Volume 57(4)
October 2022

Taxation in Australia

Tax policy development and tax administration
The Tax Institute

Carbon farming: tax issues for primary producers
Peter Slegers, CTA, Daniel Marateo and Jackson Jury

UK pension transfers: part 1
Jemma Sanderson, CTA

Contents

Cover article

202

Tax policy development and tax administration

The Tax Institute

Feature articles

211

Carbon farming: tax issues for primary producers

Peter Slegers, CTA, Director, Daniel Marateo, Senior Associate, and Jackson Jury, Associate, Tax and Revenue Group, Cowell Clarke

219

UK pension transfers: part 1

Jemma Sanderson, CTA, Director, Cooper Partners Financial Services

Insights from the Institute

184 President's Report

186 CEO's Report

187 Associate Tax Counsel's Report

Regular columns

183 Tax News – at a glance

188 Tax News – the details

191 Tax Tips

197 Mid Market Focus

200 Higher Education

225 A Matter of Trusts

228 Superannuation

231 Successful Succession

234 Events Calendar

235 Cumulative Index

Invitation to write

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

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

Tax News – at a glance

by TaxCounsel Pty Ltd

September – what happened in tax?

The following points highlight important federal tax developments that occurred during September 2022. A selection of the developments is considered in more detail in the "Tax News – the details" column on page 188 (at the item number indicated).

Skills and Training Boost

The government has released exposure draft legislation (and explanatory material) relating to the implementation of the Skills and Training Boost to support small businesses to train and upskill their employees. **See item 1.**

Technology Investment Boost

The government has also released exposure draft legislation (and explanatory material) relating to the introduction of a Technology Investment Boost to help small businesses operate digitally. **See item 2.**

Exclusions from shorter period of review

Exposure draft regulations have been released which will exclude certain small business entities from accessing a shorter two-year period of review for income tax assessments. **See item 3.**

Division 6 source concept: capital gains

The Commissioner has released a final determination to the effect that the source concept in Div 6 of Pt III of the *Income Tax Assessment Act 1936* (Cth) is not relevant when determining whether a non-resident beneficiary of a resident trust (or the trustee of that trust) is assessed on an amount of trust capital gain arising under Subdiv 115-C of the *Income Tax Assessment Act 1997* (Cth) (ITAA97) (TD 2022/12). **See item 4.**

Extra capital gain of non-fixed trust: foreign resident beneficiary

In another final determination, the Commissioner has ruled that s 855-40 ITAA97 does not disregard a capital gain that a foreign-resident (or temporary-resident) beneficiary of a non-fixed trust has because of s 115-215(3) ITAA97 (TD 2022/13). **See item 5.**

Bank deposits and assessable income

The AAT has rejected a challenge to amended assessments issued to an individual taxpayer for the five income years 2007 to 2011 and which were based on bank deposits during those income years amounting to $2,092,759 (*Chhua and FCT* [2022] AATA 2593). **See item 6.**

Termination of tax agent registrations upheld

The AAT has upheld decisions of the Tax Practitioners Board to cancel the registrations of an individual tax agent and of an associated company on the basis that they were not fit and proper persons having regard to breaches of the Code of Professional Conduct provided for in Div 30 of the *Tax Agent Services Act 2009* (Cth) and, in particular, breaches of the requirement that a registered agent comply with the taxation laws in the conduct of their personal affairs (*Alan Gough and Vision Business Group Pty Ltd and Tax Practitioners Board* [2022] AATA 2757). **See item 7.**

Crypto asset amendments

Exposure draft legislation and explanatory material have been released in relation to the government's announcement on 22 June 2022 that crypto assets such as Bitcoin would be excluded from being treated as a foreign currency for Australian income tax purposes.

The proposed legislation will maintain the current tax treatment of crypto assets and remove uncertainty following the decision of the Government of El Salvador to adopt Bitcoin as a legal tender. As a consequence of this decision, there was the potential that Bitcoin may be a "foreign currency" for the purposes of the ITAA97 due to its status as a legal tender in El Salvador.

The ITAA97 is to be also amended to include a power to make regulations to provide for further exclusions from the definition of "foreign currency" in the ITAA97.

Professional firm profit allocation arrangements

The ATO is contacting some individual professional practitioners (IPPs) to find out more about their profit allocation arrangements and assist them with using PCG 2021/4.

PCG 2021/4, which came into effect on 1 July 2022, helps IPPs to assess and manage risks associated with their profit allocation arrangements.

The ATO will be contacting IPPs who may be in a higher risk category to:

- understand their unique arrangements and structures; and
- provide them with practical assistance and guidance about how they can mitigate any risks that may present.

President's Report

by Jerome Tse, CTA

Good tax policy is key to our future

President Jerome Tse reflects on the immediate and future needs of the tax profession and the Institute.

A major part of my role as President and the role of our National Council is not only to address the issues of today, but to look ahead to the future of both our organisation and the wider tax profession. This month, the Federal Budget and ongoing improvements in our members' digital experience are top of the agenda.

Potential for change in the upcoming Federal Budget

As we learn to live alongside COVID-19 and turn our sights to budget repair, good tax policy will be crucial to reducing the record budget deficit. And good tax policy hinges on a fairer, more efficient tax system. This has been a major focus of our advocacy work for some time now and is an area where today's immediate concerns and the long-term vision for our future are aligned in increasingly inescapable ways.

Topics like affordable childcare and the stage three tax cuts have been a major part of the discussion leading up to this month's Federal Budget. These issues personally impact many of us and our clients on a daily basis. They also have broader implications for our overall economic position and the long-term economic growth of Australia that must be considered in the wider context of the tax system.

Short-term measures to address these kinds of systemic problems that likely predate many of our younger members – and some of our older ones – have been the norm for a long time. But it's increasingly clear they're no longer enough, if they ever were. There is no sustainable, fair solution to issues like these that doesn't also necessitate a conversation around system-wide reform.

The Tax Institute continues to lead the conversation on reform and bring the concerns of our members to the fore. As we approach another Federal Budget, we continue to work with thought leaders, regulators and political leaders to keep reform in the spotlight.

Investing in our Institute

Inside the Institute, there have been many changes for us this year and many investments that will see us grow over the years to come. I won't list them all here, but I would like to touch on a few key recent developments.

By now, you will be familiar with our new website experience. Last month, we also began the transition of our *Tax Knowledge Exchange* (TKE) database to the new website. With more than 25,000 resources to keep track of, this was a mammoth task. We are working to ensure that this TKE platform continues to improve and allows you increasingly easy access to the work of thousands of other tax professionals over the years. Thank you for your patience and your valued feedback throughout this process.

I am also excited that the official launch of Tax Academy, the home of our new micro-credential learning offering is closer than ever, and on track for early 2023. Education of the tax community is core to our purpose at The Tax Institute, and Tax Academy offers us a modern, flexible approach to that goal. After a significant investment of time and resources from members, staff and corporate partners, I have no doubt that this new way to learn will have long-reaching benefits for all.

Looking forward to seeing our members at The Tax Summit

Last but not least, towards the end of this month, we will be gathering at the ICC, Sydney, for The Tax Summit. This flagship event is not to be missed and our team of volunteers and staff have done an incredible job in crafting an experience unlike any other tax event.

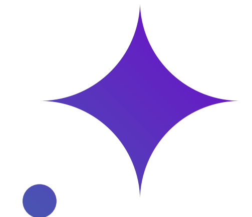
It's at events like this that the future of careers and our profession is set on its course, so I hope you will make it a priority to attend. I am looking forward to seeing you all there.

The Tax Summit

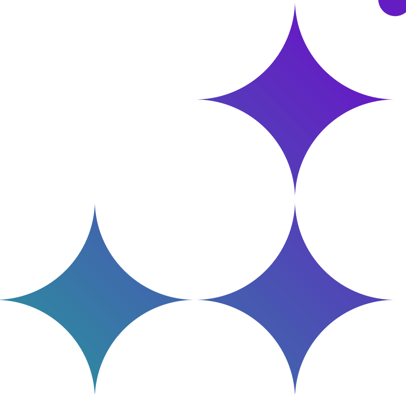
19 – 21 October 2022

ICC Sydney

Register now



Shine Together



Immersive collaboration. Shared triumphs. Irresistible joy. Nothing beats the passion and knowledge of a dedicated tax professional.

This October, join us at the must-attend tax event of the year, The Tax Summit, as we look ahead to a bright future shared – and shaped – together.

Featured Keynote Speakers

The Hon. Allegra Spender MP
Member for Wentworth

The Hon. Malcolm Turnbull AC
29th Prime Minister of Australia

Leigh Sales AM
Award winning author and journalist

Jeremy Hirschhorn
Second Commissioner, Australian Taxation Office

Karen Payne, CTA
Inspector-General of Taxation and Taxation Ombudsman

Dominic Price
Work Futurist & Team Doctor, Atlassian

Group and Employer Tickets Available

Bring your team with our flexible ticket options.
For more information, contact **Kirsty Ferguson** at **kirstyferguson@taxinstitute.com.au.**

Register today taxinstitute.com.au/tax-summit

100+ speakers · 65+ sessions · 10 streams · 3 days

22-035EVT_10/22

CEO's Report

by Giles Hurst

A busy October for the Institute and our members

CEO Giles Hurst rounds up some of the big news for this month, from the Federal Budget to the Tax Adviser of the Year Award finalists.

Supporting you through another Federal Budget

With another Federal Budget quickly approaching, the end of October will likely be a busy time for many of our members. A Budget announcement, irrespective of how prominent a role that tax policy may play, is always telling of the issues and challenges our members and their clients may face in the near future.

As always, we will be supporting you with reporting and analysis on key measures announced in the Budget. Keep an eye out for communications, social media posts and, of course, our Federal Budget report, for our Tax Policy and Advocacy team's expert analysis of relevant measures and what they mean for your clients.

Two short weeks until The Tax Summit

The Tax Summit is fast approaching and we cannot wait to welcome you to the ICC, Sydney.

The three-day program for The Tax Summit is by far the most extensive of our annual events, with streams dedicated to different sectors of the tax world, including SMEs, corporates, global taxes, emerging leaders, hot topics and, this year, digital technologies.

Recently, we added former Prime Minister of Australia, Malcolm Turnbull, to our line-up of keynote speakers. He joins the impressive class of speakers at the event, and I'm sure will provide significant insight into how our tax system works within the wider context of our political and economic spheres.

I am looking forward to the expertise brought by our speakers and to connecting with everyone again in person over some of our organised networking and social events.

If you haven't secured your ticket yet, I encourage you to do so – The Tax Summit is one event you won't want to miss.

Celebrating our Tax Adviser of the Year Award finalists

On the topic of contributions from our wonderful members, I'd like to congratulate our finalists in the Tax Adviser of the Year Awards, on behalf of the entire Institute.

In this year's awards, we were looking for individuals who displayed leadership, creativity, innovation in their thinking, and technical excellence in their chosen specialty. Given the high level of talent and dedication within the tax profession and particularly among our members, it's no small feat to be named a finalist.

I look forward to congratulating the finalists and winners at The Tax Summit gala dinner in just two short weeks and hope to see you all there.

The future of Tax Knowledge Exchange

As Jerome has said in his President's Report, last month we began the process of transitioning our *Tax Knowledge Exchange* (TKE) database to our new website. With tens of thousands of resources to account for, this is no small task.

The TKE boasts a library of more than 25,000 resources, penned largely by and for members. It is a compelling archive of tax knowledge, decades in the making, and it represents the very best of our Australian tax community – notably in technical excellence, thought leadership and generosity of spirit.

We take the role of custodian of this knowledge very seriously. In the coming weeks and months, we will be working to improve the TKE experience further, including developing new ways for you to access, browse and search TKE resources. Please stay in touch with our team about your experience and if, as we go through the difficult and complex upgrade process, you experience difficulty finding a particular resource, please reach out. This is the first step in a process that will improve your TKE experience.

Associate Tax Counsel's Report

by Amanda Donald, FTI

Getting tax ready for electric vehicles

With the proposed exemptions from fringe benefits tax for low-emission vehicles, we examine other tax provisions that may require updating for modern vehicle standards.

The government intends to achieve a 43% reduction of greenhouse gas emissions target by 2030 and a net zero target by 2050.[1] One measure intended to contribute to achieving this target is the proposal to remove fringe benefits tax on eligible zero or low-emission vehicles (ZEVs).[2]

The intent to incentivise the acquisition and use of ZEVs somewhat aligns Australia's approach with other jurisdictions. However, although the policy embraces and supports a modern approach, Australia's tax law may need something of an overhaul to allow for developments in technology.

Fuel efficiency in tax

Section 25-1(4) of the *A New Tax System (Luxury Car Tax) Act 1999* (the Act) defines a fuel-efficient vehicle as a "car" with a fuel consumption not exceeding 7L per 100km as a combined rating under the national road vehicle standards in force. The invention of ZEVs has propelled fuel economy standards to dramatically improve, and accordingly, there are a wide range of vehicles that could be classified as fuel-efficient under the current definition. For instance, the 2022 Toyota Corolla Ascent Sport petrol model has a fuel consumption of 6L per 100km compared to its hybrid equivalent of 4.2L per 100km. Under this definition, both vehicles would be considered fuel-efficient. This is not the case across all brands and models though. The Ford Escape ST Line 2.0 petrol model has a fuel consumption of 8.6L per 100km, whereas its plug-in hybrid equivalent is 1.5L per 100km. In that case, only the plug-in hybrid would be considered a fuel-efficient vehicle under the Act.

It may be expected that improvements in technology and a focus on reducing emissions globally will result in car manufacturers prioritising cleaner running vehicles and that subsequently a greater percentage of vehicles will start to fall under the fuel-efficient threshold. However, to truly work towards zero emissions, it is worth considering modifying the definition of "fuel efficiency" under the Act. Reducing the standard from 7L per 100km to 4L per 100km, as considered in the Parliamentary Budget Office costings, is expected to produce an additional $401m of revenue from 2023–24 to 2025–26.

Cents per kilometre deduction

The cents per kilometre deduction for income tax purposes is calculated based on the formula contained in a legislative instrument and published by the ATO. In 2016, when the measure was introduced, the rate was 66c and is currently set at 78c. This rate is a proxy for the average running costs of vehicles, including ZEVs, which was not incorporated into the previous rates.[3] However, this method does not integrate differences in running costs, which exist between ZEVs and internal combustion engine (ICE) vehicles. It would be reasonable to assume that, as ZEVs become more popular, the cents per kilometre deduction will become less representative of the "average" running costs for cars.

Statutory formula

The statutory formula is determined by multiplying the base value of the car by the percentage rate of 20%. This rate acts as a proxy for the average operating costs of a car and results in the calculated running costs for ZEVs being more than for ICE vehicles due to the higher initial costs of acquiring ZEVs. For instance, a Mazda MX-30 E35 Astina electric car has a base cost of $72,599 and, under the statutory formula, would result in $14,520 of estimated running costs in one year. The Mazda CX-30 G20 Astina petrol car has a base cost $46,654 and would result in $9,331 of estimated running costs in one year, which is considerably and possibly mistakenly lower than the calculated running costs for the electric car. Although the Treasury Laws Amendment (Electric Car Discount) Bill 2022 exempts FBT on these vehicles, the reportable fringe benefit amount is disclosed in the employee's tax return.

Conclusion

The above are minor examples where the tax provisions have lagged behind modern technology advancements. However, they are the tip of the iceberg of a complex and inefficient tax system in dire need of reform. As technology advances, it is crucial that our tax system progresses with changes and supports the growth of the Australian economy and the path to net zero emissions.

We welcome your thoughts in The Tax Institute's Community on the reform options that could be implemented to better encourage the uptake of electric vehicles.

References

1 Climate Change Bill 2022 (Cth), p 6.

2 For further information on this, see *TaxVine*, issue 28, 5 August 2022.

3 Explanatory memorandum to the Tax and Superannuation Laws Amendment (2015 Measures No. 5) Bill 2015, para 1.13.

Tax News – the details

by TaxCounsel Pty Ltd

September – what happened in tax?

The following points highlight important federal tax developments that occurred during September 2022.

Government initiatives

1. Skills and Training Boost

The government has released exposure draft legislation (and explanatory material) relating to the implementation of the Skills and Training Boost to support small businesses to train and upskill their employees.

The Skills and Training Boost, which was announced by the former Morrison Government in its March 2022 Budget, will provide small businesses (with an aggregated annual turnover of less than $50m) with access to a bonus 20% tax deduction for eligible expenditure incurred on external training delivered to their employees by providers registered in Australia.

The boost is to apply to eligible expenditure incurred from 7:30 pm (AEDT) on 29 March 2022 until 30 June 2024.

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

- the expenditure must be for training employees, either in person in Australia, or online;
- the expenditure must be charged, directly or indirectly, by a registered training provider and be for training within the scope (if any) of the provider's registration;
- the registered training provider must not be the small business or an associate of the small business;
- the expenditure must already be deductible under the taxation law; and
- the expenditure must be for the provision of training where the enrolment or arrangement for the provision of the training occurs at or after 7:30 pm (AEDT) on 29 March 2022.

2. Technology Investment Boost

The government has also released exposure draft legislation (and explanatory material) relating to the introduction of a Technology Investment Boost to help small businesses operate digitally.

The Technology Investment Boost, which was also announced by the former Morrison Government in its March 2022 Budget, will support digital adoption by small businesses (with an aggregated annual turnover of less than $50m) by providing a bonus 20% tax deduction for eligible expenditure incurred on expenses and depreciating assets that support digital operations.

The boost is to apply from 7:30 pm (AEDT) on 29 March 2022 until 30 June 2023. An annual cap is to apply so that expenditure up to $100,000 will be eligible for the boost, with the bonus deduction capped at $20,000 per income year. If the expenditure is on a depreciating asset, the asset must be first used or installed ready for use by 30 June 2023.

To be eligible for the bonus deduction, expenditure must be incurred wholly or substantially for the purposes of an entity's digital operations or digitising the entity's operations. That is, the eligible expenditure must have a direct link to the entity's digital operations for its business.

Expenditure on digital operations or digitising operations may include, but is not limited to, business expenditure on:

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

Ineligible expenditure

Some types of expenditure are to be ineligible for the bonus deduction even where they would otherwise meet the requirements. These are:

- salary and wage costs;
- capital works costs which can be deducted under Div 43 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97);
- financing costs;
- training and education costs; and
- expenditure that forms part of, or is included in, the cost of trading stock.

3. Exclusions from shorter period of review

Exposure draft regulations have been released which will exclude certain small business entities from accessing a shorter two-year period of review for income tax assessments.

Amendments made in 2020 increased access to several small business entity tax concessions by expanding eligibility to include medium business entities (entities with an aggregated turnover of $10m or more and less than $50m). This enabled medium business entities to access some concessions that were previously only available to small business entities, including a shortened period of review of two years instead of four years.

It was, however, announced that the shortened period of review would not apply for entities with complex affairs or

significant international tax dealings, and therefore these entities would continue to have a four-year amendment period. The draft amending regulations contain a draft of the necessary amendments to the regulations to give effect to the proposed exclusions from the shorter period of review.

The Commissioners perspective

4. Division 6 source concept: capital gains

The Commissioner has released a final determination to the effect that the source concept in Div 6 of Pt III of the *Income Tax Assessment Act 1936* (Cth) (ITAA36) is not relevant when determining whether a non-resident beneficiary of a resident trust (or the trustee of that trust) is assessed on an amount of trust capital gain arising under Subdiv 115-C ITAA97 (TD 2022/12).

In this context, the phrase "source concept" refers to the limitation in Div 6 ITAA36 on the assessment of non-residents (or trustees for them) to amounts "attributable to sources in Australia".

The same view applies in relation to a non-resident beneficiary's share of taxable Australian property (TAP) gains of a non-resident trust and a trustee's share of a capital gain to which s 115-222 ITAA97 applies.

TD 2022/12 does not deal with the application of Australia's double tax agreements.

Example 1. Non-fixed trusts (from TD 2022/12)

The OZ Trust is a resident non-fixed trust estate. The trustee of the trust holds shares in a land-rich Australian company (LandCo) and shares in an Australian company that owns no taxable Australian property (OtherCo). The trustee sells all the shares by contract executed in the United Kingdom in the 2013–14 income year and makes non-discount capital gains totalling $70,000 and $30,000, respectively.

Pursuant to the trust deed, the trustee resolves to treat the gains as income of the trust for that year. There is no other trust income. The trustee further resolves to make Edward, a non-resident beneficiary who is not under a legal disability, presently entitled to 100% of the trust income.

The trustee is assessed under s 98 ITAA36 on the $100,000 of trust capital gains attributable to Edward. The source concept in s 98(2A) ITAA36 has no application in relation to these capital gains as s 115-220 ITAA97 increases the amount assessable to the trustee under s 98 ITAA36 without regard to those conditions.

Capital gains totalling $100,000 are included in the calculation of Edward's net capital gain for the income year. However, Edward is entitled to a refundable tax offset for the tax the trustee paid on his behalf under s 98A(2) ITAA36.

The same outcome would arise if the trustee did not treat the gains as income but Edward was made specifically entitled to the amounts of capital gains.

Example 2. Fixed trusts (from TD 2022/12)

If the trust had instead been a fixed trust, Edward may have been able to access the exemption in s 855-40 ITAA97 to disregard capital gains in relation to the shares in OtherCo.

For the 2018–19 and earlier income years, the Commissioner will not devote compliance resources to identify arrangements which would give rise to adjustments solely on the basis of TD 2022/12. However, if the Commissioner is presented with the issue and asked to provide advice or otherwise becomes aware of an arrangement in the course of compliance activities, the Commissioner will apply the law consistently with the views expressed in TD 2022/12.

5. Extra capital gain of non-fixed trust: foreign resident beneficiary

In another final determination, the Commissioner has ruled that s 855-40 ITAA97 does not disregard a capital gain that a foreign-resident (or temporary-resident) beneficiary of a non-fixed trust has because of s 115-215(3) ITAA97 (TD 2022/13).

TD 2022/13 does not deal with the application of Australia's double tax agreements.

Example (from TD 2022/13)

During the 2015–16 income year, the trustee of a resident discretionary trust derived income from a business. The trustee also made non-discount capital gains from the sale of 5,000 listed shares that it had owned for less than 12 months. The shares were not "taxable Australian property" (TAP).

The trustee resolved to make a foreign-resident beneficiary presently entitled to all of the trust income (in this case, the business income).

On these facts, as there was no beneficiary specifically entitled to any of the trust gains, all of the gains will be attributable to the foreign-resident beneficiary.

Section 115-220 ITAA97 operates so that the trustee is assessed under s 98 ITAA36 on the beneficiary's attributable capital gain.

The foreign-resident beneficiary is also taken to have made capital gains under s 115-215(3) ITAA97. The beneficiary will receive a refundable tax offset under s 98A(2) ITAA36 for tax paid by the trustee.

As the trust is not a fixed trust, s 855-40 ITAA97 does not apply to disregard the foreign-resident beneficiary's capital gain attributable to the non-TAP trust assets, nor does s 855-10 ITAA97 apply to disregard the capital gain which the foreign-resident beneficiary is taken, by Subdiv 115-C ITAA97, to have.

Recent case decisions

6. Bank deposits and assessable income

The AAT has rejected a challenge to amended assessments issued to an individual taxpayer for the five income years 2007 to 2011 and which were based on bank deposits during those income years amounting to $2,092,759 (*Chhua and FCT*[1]).

The assessable income disclosed in the taxpayer's returns for the income years in question totalled $276,008. During an audit, the Commissioner identified that the taxpayer had received bank deposits totalling $2,092,759 from gaming venue operator Australian Leisure and Hospitality Group (ALHG) or other gaming venues over the relevant years.

On 24 April 2013, the Commissioner notified the taxpayer of the completion of the audit and provided reasons for issuing notices of amended assessment. The notification stated, among other things, that, during the audit, the Commissioner formed the opinion that there had been evasion in relation to the taxpayer's income tax obligations. Also on 24 April 2013, the Commissioner issued a notice of assessment of additional tax, assessing the taxpayer for additional tax by way of penalty for each of the relevant income years on the basis that the tax shortfall was caused by intentional disregard.

The taxpayer could not recall the quantum of the funds used to generate each gaming bank deposit. The taxpayer did not keep records of his gambling and there was insufficient evidence to determine the quantum of funds used to generate the gaming bank deposits or reliably determine the source and character of those funds. As the Commissioner submitted, it was implausible that the taxpayer could have consistently generated the substantial sums associated with the gaming deposits from the declared income and known financial resources available to him during the relevant income years.

It was also highly improbable that the gaming bank deposits could have been generated by the taxpayer's winnings at gambling over the relevant years. The design of ALHG's poker machines to return 90% to the player over time made that highly unlikely. Assertions by or on behalf of the taxpayer that the gaming deposits were generated by winnings were unsupported by any corroborative evidence. The AAT was far from satisfied, in all of the circumstances, as to the true source or sources of the funds used to generate the gaming deposits.

The taxpayer had not established, in respect of any of the relevant income years, the amount on which income tax ought to be levied. Accordingly, the AAT held that the taxpayer had not discharged his burden of proving that the amended assessments were excessive.

Also, in the circumstances, the taxpayer had not discharged his burden of establishing, in respect of any of the income years in question, that there was no omission of income or that, if there was, the omission was not caused by evasion.

Finally, the AAT held that the taxpayer had not demonstrated the existence of any facts or circumstances that would warrant exercise of the discretion to remit all or part of the penalties.

7. Termination of tax agent registrations upheld

The AAT has upheld decisions of the Tax Practitioners Board to cancel the registrations of an individual tax agent and of an associated company on the basis that they were not fit and proper persons having regard to breaches of the Code of Professional Conduct provided for in Div 30 of the *Tax Agent Services Act 2009* (Cth) (TASA09*)* and, in particular, breaches of the requirement that a registered agent comply with the taxation laws in the conduct of their personal affairs (*Alan Gough and Vision Business Group Pty Ltd and Tax Practitioners Board*[2]).

On the day of the AAT hearing, the individual's income tax return (ITR) for the year ended 30 June 2019, the company's ITR for the years ended 30 June 2019 and 30 June 2020, and all of the company's overdue BAS were lodged. This meant that the following lodgments remained outstanding:

- the individual's ITRs for the years ended 30 June 2016, 2017, 2020 and 2021;
- the individual's GST activity statement for the year ended 30 June 2016; and
- the company's ITR for the year ended 30 June 2021.

There was limited evidence that the individual had demonstrated significant contrition, remorse or insight into his conduct. An obvious demonstration of genuine contrition or remorse in relation to his conduct would have been to rectify all of his outstanding lodgments and those of the company and to comply with an education order that had been made by the Board. The fact that these steps had not been taken by him supported a finding that the individual lacked insight and contrition.

The tribunal found it difficult to accept that it was only days before the hearing that the individual located the box that contained the documents required to complete a number of the outstanding lodgments. The tribunal found that the manner in which he had dealt with the Board, including during the course of the review application, indicated that he did not consider his failure to meet his tax obligations to be serious.

Based on the evidence before it, the tribunal found that the individual was not a fit and proper person as required by s 20-5(1)(a) TASA09. Accordingly, it was also satisfied that the company ceased to meet the registration requirement in s 20-5(3)(a) TASA09 that each director be a fit and proper person for reason that the individual, its sole director, failed to meet this requirement.

With regard to the impact on the applicants of the termination of their registrations, the tribunal said that the extent to which the termination might inhibit or prevent their capacity to earn an income was an important consideration. However, the Board did not seek nor did the tribunal impose a period of non-application for reregistration in the applicants' circumstances. Accordingly, it would be open to them to apply to be registered as tax agents in the future at a time when they meet the registration requirements.

TaxCounsel Pty Ltd
ACN 117 651 420

References

1 [2022] AATA 2593.
2 [2022] AATA 2757.

Tax Tips

by TaxCounsel Pty Ltd

Some basic tax principles

A recent decision of the Federal Court examined a number of issues ranging from the informality of arrangements between associated parties to the operation of the penalty provisions.

Background

Although the recent decision of Logan J in *Anglo American Investments Pty Ltd (Trustee) v FCT*[1] is at first sight a little daunting on account of its length (479 paragraphs) and factual complexity, perseverance leads to the discovery that a number of important issues of general interest were considered in the judgment.

The proceedings in the Federal Court arose out of an objection decision of the Commissioner in which he disallowed in full objections of Anglo American Investments Pty Ltd (Anglo American), in its capacity as trustee of the Anglo American Charitable and Cultural Trust (AA Trust), against:

- amended assessments of income tax for the years ended 30 June 2001, 2002, 2004, 2005, 2007, 2008 and 2009; and, related to these,
- assessments of shortfall penalties for the years ended 30 June 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008 and 2009.

The AA Trust sought to prove that the income tax assessments were excessive (and thus that there were no shortfalls to attract penalties) by establishing that it was, in the income years in question, entitled to certain deductions under the general deduction provision (s 8-1 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97) in respect of deductions claimed for:

- an alleged "management fee";
- alleged bad debts written off (alternatively, the statutory bad debt deduction provided by s 25-35 ITAA97 was relied on); and
- alleged interest on what were contended to be loans borrowed in the course of the gaining or producing of assessable income or in the carrying on of a business by the AA Trust and, in particular:
    - a loan the origin of which was said to be $3,063,050 loaned to the AA Trust by its related Australian entity, Darlington McCarthur Pty Ltd, in 1992, which loan was said to have been novated four times thereafter, with the balance fluctuating such that, in June 1999, the AA Trust owed the novated loan debt (by then, $2.2m) to its related entity, CVC Investment Nominees Pty Ltd. The amount of interest on this debt from time to time was alleged to have been fixed by agreements, concluded annually; and
    - loans totalling some $4.2m, said to have been made to the AA Trust by a Samoan entity, Hua Wang Bank Berhad (HWBB). Loans were said to have been made by HWBB from July 1994 onwards and were said to have been repaid in full by the AA Trust in July 2005.

Apart from limited success in relation to certain of the interest deduction claims, Logan J upheld the Commissioner's objection decision.

Evidentiary issues

A principal witness for the AA Trust was a Mr Vanda Russell Gould (Mr Gould). Logan J said that one, but by no means the only, basis on which the Commissioner submitted that the assessments were not proved to be excessive was that, on detailed analysis, Mr Gould was a pervasive, controlling, interested presence and the alleged deductions were the product of ex post facto fiscal opportunism rather than contemporaneous legal relationships. In short, the Commissioner sought to paint Mr Gould as "a fiscal Svengali".

Logan J said that there was a good deal of merit in the Commissioner's submission on the subject of Mr Gould's credibility. The Commissioner went as far as to submit that Mr Gould had been actively dishonest, both in respect of the claimed deductions, which were said to be grounded in sham transactions, and in his evidence relating to them. Logan J then said:[2]

> "There was certainly a proper basis for the making of such a submission. It is clear that Mr Gould was a decisive presence in relation to various corporate actors. I do consider that there was a good deal of reconstructive extemporising from documents in Mr Gould's evidence, rather than truly recalled events, although less so, I thought, in relation to dealings between the AA Trust and HWBB …
>
> My mind has truly fluctuated as to whether Mr Gould's evidence about management fee, interest and other deduction claims was actively dishonest or just the result of his closing his eyes to the obvious and operating on a belief held at the time when particular deductions claimed, and still held, that he could equate deduction pretence with reality. In *Scott v Commissioner of Taxation (No. 2)* (1966) 40 ALJR 265, at 279, Windeyer J referred to a belief, 'that by doing what he did he could somehow make appearance and pretence into reality. In this he was not dishonest or fraudulent, merely mistaken'. A finding that an alleged transaction or other state of affairs is a sham may, but need not, entail a finding of fraud or dishonesty on the part of the relevant human actors.
>
> …

> As I detail below, again and again in this case I was exposed to evidence in respect of deductions claimed where it was inherently improbable that the alleged expenditure liability concerned, if it was incurred in the amount claimed or at all to the entity concerned, was incurred prior to the close of the income year in relation to which the deduction was claimed. This pattern occurred in circumstances where Mr Gould was the relevant directing mind and will. And yet in listening to his oral evidence, and reflecting upon his evidence and the evidence as a whole, I was left with the strong and distinct impression that, for all of his knowledge and experience, he had convinced himself that it was possible, in relation to entities which he controlled and by an act of will on his part, to designate, after the end of an income year, that those entities had been in a particular relationship, and incurred particular liabilities in particular amounts, during that income year. That act of will then seemed to have been carried over into entries in general ledgers. I am not persuaded that he was actively dishonest. However, given his knowledge and experience and understanding of tax consequences of particular expenditures, I am quite sure, even allowing for the strictures of s 140(2) of the *Evidence Act 1995* (Cth), that, again and again, he has closed his eyes to the obvious to the point of wilful blindness. In respect of the deduction claims concerned, it is not necessary to go further in order to hold that the AA Trust has not proved the assessments to be excessive."

His Honour also noted that the present position was that Mr Gould was a person who had been convicted of an attempt to pervert the course of justice in relation to a taxation appeal in the Federal Court. Necessarily, the conduct with which this criminal proceeding was concerned occurred after the events which were at issue in the present objection proceedings. As to Mr Gould's credibility, Logan J said that the end result, on the whole of the evidence, remained as he had indicated. Even on the basis of this conclusion, a corollary was that the accuracy of descriptive entries in various accounting records for which Mr Gould had supervisory responsibility was not to be regarded as reliable.

Management fee: informality of arrangements

The submission made on behalf of the AA Trust was that the source of the obligation to pay the management fee was contractual.

Logan J said that he readily accepted that the law of the land is that a valid contract can be formed, or its existence inferred, by conduct attended with much informality. The position is as stated by Allsop J (as his Honour then was), with the agreement of Drummond and Mansfield JJ, in *Branir Pty Ltd v Owston Nominees (No. 2) Pty Ltd*:[3]

> "… [A] number of authorities discuss the need not to constrict one's thinking in the formation of contract to mechanical notions of offer and acceptance. Contracts often, and perhaps generally do, arise in that way. They can also arise when business people speak and act and order their affairs in a way without necessarily stopping for the formalities of dotting i's and crossing t's or where they think they have done so. Here, the i's were not dotted and the t's were not crossed because of Mr Graham's conduct. Sometimes this failure occurs because, having discussed the commercial essentials and having put in place necessary structural matters, the parties go about their commercial business on the clear basis of some manifested mutual assent, without ensuring the exhaustive completeness of documentation. In such circumstances, even in the absence of clear offer and acceptance, and even without being able (as one can here) to identify precisely when a contract arose, if it can be stated with confidence that by a certain point the parties mutually assented to a sufficiently clear regime which must, in the circumstances, have been intended to be binding, the court will recognise the existence of a contract. Sometimes this is said to be a process of inference or implication. For my part, I would see it as the inferring of a real intention expressed through, or to be found in, a body of conduct, including, sometimes, communications, even if it be the case that the parties did not consciously advert to, or discuss, some aspect of the relationship and say: 'and we hereby agree to be bound' in this or that respect. The essential question in such cases is whether the parties' conduct, including what was said and not said and including the evident commercial aims and expectations of the parties, reveals an understanding or agreement or, as sometimes expressed, a manifestation of mutual assent, which bespeaks an intention to be legally bound to the essential elements of a contract."

Logan J went on to say that, in relation to small business, it is an unremarkable given (although the Commissioner's submissions in this case suggested that he was unable or unwilling to accept or even understand this) that great informality can and often does attend the formation of legal relations. His Honour then said:[4]

> "Even more this was so where the relevant corporate actors are or are represented by the same individual acting in different capacities or by individuals who are close family members or business associates. Sometimes the only documentary manifestation of that legal relationship may be a transaction recorded in a ledger or perhaps just an annually prepared profit and loss account and accompanying annotations. There may then, in a taxation appeal, be related oral evidence of the individual(s) concerned that the transaction was as so recorded, for example and relevantly, a fee for the rendering of a managerial service by or on behalf of one entity to another."

That the AA Trust incurred a management fee in the amount of $123,276 was proved prima facie by the entry in its accounts.[5] As to the operation of s 1305 of the *Corporations Act 2001* (Cth), the evidentiary effect of the tender of the general ledger with the management fee entry is as stated by Austin J in *Australian Securities and Investments Commission v Rich*:[6]

> "The statement in s 1305(1) that the company's books are prima facie evidence of a matter stated or recorded in them does more than merely to convey that they are the starting point to proof or a 'first view'. All other things being equal, the fact that a matter is stated in a book kept by a company is sufficient to prove that matter in civil proceedings. That does not reverse the onus of proof in the proceedings in any general way, but it means that the tendering of the book is evidence of the matter recorded in it, and that matter will be thereby proven unless other evidence convinces the tribunal of fact to the contrary, on the balance of probabilities."

With respect to the discharge by the AA Trust of its onus of proof, much lay behind the qualification in the passage just quoted as to the effect of s 1305 of the *Corporations Act 2001*, "all other things being equal".

Logan J said that one difficulty for the AA Trust was that there were inconsistencies between its accounts for the 2007 year and the financial accounts of the GF Trust and the Gould Share Trust (these being trusts that it was claimed had derived the management fee). These accounts, too, had a prima facie evidentiary status. These inconsistencies were not answered by a claimed "novation" of the AA Trust's management fee liability from the GF Trust to the Gould Share Trust. That was because the inconsistencies extended to an inconsistency between the 2007 income year tax return for the Gould Share Trust, which recorded management fee assessable income, and the financial accounts of the Gould Share Trust, which recorded no such income.

Assuming, however, that the 2007 tax return for the Gould Share Trust was accurate, this did not prove a novation. At most, the tax return reflected an assumption of, but it was not probative of, the occurrence of a novation. The same would be true even if the financial accounts of the Gould Share Trust recorded an entry in respect of a debt owed by the AA Trust in respect of a management fee.

Logan J said that, for there to have been a novation in the 2007 income year to the Gould Share Trust of the alleged debt constituted by the liability of the AA Trust to the GF Trust in respect of a management fee, a tripartite agreement as between each of those trustees would have been necessary. Having regard to *Branir Pty Ltd v Owston Nominees (No. 2) Pty Ltd*[7] and given that Mr Gould, in different capacities, controlled each of the trustees, it was theoretically possible that he might, before the end of the 2007 income year, have resolved informally and on behalf of each of them that the management fee liability be novated.

However, Logan J said that he was just not satisfied on the balance of probabilities that there was ever any management fee liability to novate, let alone that there was ever any novation.

Sham issues

Logan J said that he took a sham to be as described by Lockhart J (Foster J agreeing) in *Sharrment Pty Ltd v Official Trustee in Bankruptcy*,[8] being a description subsequently approved by the High Court in *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd*:[9]

> "A 'sham' is therefore, for the purposes of Australian law, something that is intended to be mistaken for something else or that is not really what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine or true, but something made in imitation of something else or made to appear to be something which it is not. It is something which is false or deceptive."

Logan J said that, as *Scott v FCT No. 2* illustrated and as Gleeson CJ, Gummow and Crennan JJ allowed in *Raftland Pty Ltd v FCT*,[10] the term "sham" has ambiguous qualities but can be employed in a less pejorative sense to describe a document brought into existence "as a mere piece of machinery" serving some purpose other than constituting the whole of an arrangement. A document brought into existence as a disguise for no transaction at all can also be described as a sham. Logan J went on to say that that need not involve fraud in the sense of a deliberate intention to deceive a third party in order for the mere piece of machinery to have no effect in law at all. At the very least, his Honour was well satisfied that the entry in the general ledger of the AA Trust was a mere piece of machinery, just the manifestation of a construct by Mr Gould. It was therefore, in this sense, a sham.

Logan J said that it was quite possible that Mr Gould's intention was fraudulent, and that his intent in causing the AA Trust to make the management fee claim was not just wilfully blind but more sinister. However, his Honour said that it was unnecessary to reach that conclusion in order to hold that the position apparently evidenced by the ledger entry was but a disguise for no transaction at all. It was not necessary to reach a more pejorative conclusion in order to hold that the deduction claimed was grounded in a sham.

In short, the evidentiary position revealed by financial accounts was contradictory and at odds with Mr Gould's oral evidence. An onus of proof is not discharged by unresolved contradictions in evidence. On the balance of probabilities, the transaction recorded in the accounts which grounded the deduction claimed was just a sham.

Logan J said that it was unlikely, in the sense of less probable than not, that any liability to the GF Trust in the claimed amount in respect of management services was incurred prior to the conclusion of the 2007 income year. In contrast, it was more likely than not that the amount specified in the general ledger of the AA Trust was nothing more than a construct, a balancing amount selected by Mr Gould for fiscal advantage at some point after 30 June 2007. The apparent supporting accounting entry in the general ledger of the AA Trust was a mere façade for no anterior agreement at all for the GF Trust to furnish a management service, much less reflective of services which were rendered on behalf of the GF Trust pursuant to any such agreement.

Logan J held that the AA Trust had not proved, on the balance of probabilities, that any management service was

provided to it by the GF Trust in the 2007 income year, let alone that it incurred a fee in the amount claimed in respect of any such service.

It may be noted that, on the issue of sham in the context of the interest deduction claims, Logan J referred, with approval, to the views expressed by Arden LJ in *Hitch v Stone (Inspector of Taxes)*[11] in relation to the determination of whether a documented transaction is a sham. The points made by Arden LJ were as follows:

- in the case of a document, the court is not restricted to examining the four corners of the document. It may examine external evidence. This will include the parties' explanations and circumstantial evidence, such as evidence of the subsequent conduct of the parties;
- the test of intention is subjective. The parties must have intended to create different rights and obligations from those appearing from (say) the relevant document, and they must have intended to give a false impression of those rights and obligations to third parties;
- the fact that the act or document is uncommercial, or even artificial, does not mean that it is a sham. A distinction is to be drawn between the situation where parties make an agreement which is unfavourable to one of them, or artificial, and a situation where they intend some other arrangement to bind them. In the former situation, the agreement is to take effect according to its tenor. In the latter situation, the agreement is not to bind their relationship; and
- the fact that parties subsequently depart from an agreement does not necessarily mean that they never intended the agreement to be effective and binding. The proper conclusion to draw may be that they agreed to vary the agreement and that they have become bound by the agreement as varied.

Bad debts

Logan J, in considering the bad debt deduction claims, set out some general principles governing eligibility to claim these particular deductions.

After pointing out that there was no mutual antipathy between the claiming of a deduction in respect of a bad debt written off under s 8-1 ITAA97 and s 25-35 ITAA97, his Honour said that for a bad debt to be deductible as a general deduction (under s 8-1(1) ITAA97) required nothing more or less than that the debt constitute expenditure incurred which satisfied either or each of the positive limbs of s 8-1(1) (and does not fall within an exclusory limb). Contrary to a submission made on behalf of the Commissioner, it was not necessary (although it would be sufficient) in relation to the second positive limb of s 8-1(1) that the bad debt constitute expenditure necessarily incurred in carrying on a money-lending business for the purpose of gaining or producing assessable income. Logan J then went on:[12]

> "Instead, as was correctly submitted on behalf of the AA Trust, for a deduction to be allowable under this limb of s 8-1, all that is necessary in this case is that the AA Trust carries on a 'business of some kind in which each of the loans was a profit-making enterprise such that any profits would have been ordinary income on the basis upheld in *Federal Commissioner of Taxation v Myer Emporium Ltd* [1987] HCA 18 …"

After setting out the terms of the statutory bad debt deduction provision (s 25-35 ITAA97), Logan J said that there could be an overlap of application between s 8-1(1) and a case falling within the alternative posited by s 25-35.

Logan J said that a debt will be a bad debt if it is reasonably regarded as irrecoverable, a question of fact. It was put on behalf of the Commissioner that, "generally, one would expect to have seen appropriate steps being taken in an attempt to recover the debt before it is determined to be bad, such as obtaining and enforcing judgment against a debtor". Logan J said that this submission was wrong. It was completely at odds with the decision of the Privy Council in *Dinshaw v Bombay Commissioner of Income Tax*.[13] The flawed assumption in the Commissioner's submission was that appropriate steps must have been taken to recover the debt, such as obtaining and seeking to enforce a judgment. Logan J said that the flaw with this approach was that it impermissibly elevated a circumstance which undoubtedly could ground a reasonable conclusion as to "irrecoverability" into a rule of general application. He then went on:[14]

> "In commercial practice, especially with small business, many a reasonable decision is taken for practical business reasons that even to initiate court proceedings in respect of a given debt, much less to prosecute them to judgement and attempted execution on a judgement is, given the costs of litigation and the amount of the debt, likely to be an exercise in throwing good money after bad. The debtor might have refused after repeated demands to pay the debt. Follow up phone calls or emails might no longer be answered or returned. This might, in turn, be a sequel to a period in which earlier debts were paid outside usual trading terms. Or it may just be that it is known that other creditors have already had such an experience. It might, objectively, against such a background, be perfectly reasonable, as a matter of practical business judgement … for the creditor to treat the extending of credit to the debtor as, in hindsight, a mistake and to write the debt off as bad. A variety of circumstances as infinite and varied as is the experience of conducting businesses in practice might reasonably yield a conclusion that a given debt is bad. Insularity of thinking on this subject is to be eschewed …The question as to whether, objectively, a debt is 'bad' is inherently case specific … In answering this question, the subjective assessment of the creditor is a relevant but not determinative circumstance."

Interest

Logan J began his consideration of the interest group of deductions by setting out his understanding of what constitutes a "loan" and "interest". Logan J said:[15]

> "A loan, stated Sackville and Lehane JJ in *Federal Commissioner of Taxation v Radilo Enterprises Pty Ltd*

(1997) 72 FCR 300, at 313, referring with approval a discussion in C L Pannam, The Law of Money Lenders in Australia and New Zealand (1965), at p 6, 'involves an obligation on the borrower to repay the sum borrowed'. That obligation may be to repay the money borrowed on demand or at a fixed date but obligation to repay there must be in order for a payment by one to another to be a loan. Conventionally, the sum borrowed is referred to as the 'principal' of a loan.

In turn, 'interest' is 'the compensation to the lender for being kept out of the use and enjoyment of the principal sum' with its essence being that it is referable to that principal sum: *Myer Emporium*, at 218."

Interest: borrowing to preserve trust corpus

There were some 21 different scenarios in which the deductibility of interest on borrowings was raised, and the deductibility of interest was upheld by Logan J in five of these scenarios.

Interestingly, one category of borrowing was to enable the AA Trust to fund the payment of trust distributions. Logan J said that an accurate, pithy summary of how the general deduction provision (s 8-1 ITAA97) was to be applied in relation to this claim was offered by Hill J (with whom Jenkinson J agreed in this regard) in *FCT v Roberts and Smith*:[16]

"The mere act of borrowing money, burdened with the obligation to pay interest, does not of itself gain or produce assessable income. The amount borrowed is not assessable income. What operates to gain or produce assessable income is the manner in which those moneys are used, so that the necessary connection between the outgoing for interest and the activities which more directly gain or produce assessable income will be found, in the ordinary case, in the use to which the borrowed funds are put. That is not to say that there may not be cases where motivation or subjective purpose will play a part in the question of characterisation."

Logan J went on to say that it was possible to envisage circumstances in which interest on funds borrowed so as to preserve the corpus of income-producing capital held on trust, in lieu of using that trust capital to make a distribution, might be deductible. Such reasoning would, his Honour said, be consistent with the deductibility reasoning of Davies J in *Yeung v FCT*,[17] and may well offer an explanation for why *Begg v DCT (SA)*[18] was not incorrectly decided. In *Roberts & Smith*, Hill J seemed to have accepted that this type of reasoning was open in relation to the allowance of a deduction under the general deduction provision (what is now s 8-1 ITAA97).

However this might be, Logan J said that it was not necessary to reach a concluded view as to matters of principle, only to assume in favour of the AA Trust that reasoning of the kind just mentioned might support a claim for the deduction of interest. That was because the AA Trust had failed to discharge its onus of proving that one or the other or each of the positive limbs of s 8-1 ITAA97 had been engaged in relation to this deduction category.

Further, his Honour said that the AA Trust had failed to discharge its onus of proving that the particular expenditures were trust distributions. As to the two relevant expenditures ($500,000 on 30 June 1998, and $14,000 on 10 January 2000), the AA Trust relied on general ledgers, handwritten notes by unidentified persons, and Mr Gould's prior attribution evidence, none of which was reliable. It also relied on a Westpac telegraphic transfer request, but this was non-specific as to the purpose of the expenditure. The deduction claim therefore wholly failed.

Public taxation ruling cited

Logan J said that, in support of his submissions concerning some categories of borrowed funds, the Commissioner cited a taxation ruling published by him.

Logan J said as to this:[19]

"Such citation, with respect, ought not to have occurred. Taxation rulings serve an important public interest in seeking to achieve consistency in public administration within the Australian Taxation Office. They also give the legal and accountancy professions, and the wider public, the benefit of the Commissioner's view of the meaning and effect of legislation under his administration. Yet further, such rulings, and the extent to which they have been consulted, can have relevance in determining the level of penalty in relation to any tax shortfall. However, in relation to substantive taxation liability issues in a taxation appeal in this Court, they are no more than an expression of opinion by a party to such an appeal, as irrelevant as is an opinion furnished by counsel, solicitor or accountant to a taxpayer."

Penalties

In relation to the imposition of penalties, Logan J said that the conclusion which he had reached concerning an absence of active dishonesty by Mr Gould precluded a finding of intentional disregard for penalty purposes. In some circumstances in relation to criminal liability, wilful blindness can supply the requisite element of knowledge. However, the text of item 1 of the table in s 284-90(1) of Sch 1 to the *Taxation Administration Act 1953* (Cth) (TAA53) was against a like conclusion in relation to penalty and suggested that there must be an actual intention, not an equivalent of one. A taxpayer or an agent who was wilfully blind would at least be reckless.

In his Honour's view, Mr Gould was at least grossly indifferent as to whether expenditures claimed by the AA Trust as deductions were truly incurred or incurred in the amounts claimed. A reasonable person in his position would have seen there was a real risk that the deductions claimed were not allowable to the AA Trust under an income tax law. Fiscally, Mr Gould's conduct was, objectively, outrageous, much more than just a failure to take reasonable care. In these circumstances, the appropriate characterisation was that it was reckless, so attracting

penalty at a rate of 50%, pursuant to item 2 of the table in s 284-90(1), Sch 1 TAA53.

Other issues

Among the other issues considered by Logan J were issues arising under:

- the general anti-avoidance provisions of Pt IVA of the *Income Tax Assessment Act 1936* (Cth); and
- the amendment of assessment provisions, including whether there had been fraud or evasion.

Observations

It will be appreciated that the decision of Logan J in the *Anglo American Investments* case is of considerable importance in relation to a range of issues.

On the views of Logan J relating to the informality of arrangements in some circumstances, practitioners should nevertheless make a practice of adequately documenting transactions to avoid the Commissioner raising issues.

It may be noted in relation to the deductibility of bad debts that the specific bad debt deduction provision (s 25-35 ITAA97) permits a more flexible approach than the general deduction provision. Under the general deduction provision (s 8-1 ITAA97), the deduction would be allowable in the income year in which the loss was incurred, whereas under the specific provision, the deduction would be allowable if the debt was bad and was written off in the income year in which the debt became bad or in a later income year.

In relation to the observations of Logan J in relation to binding rulings, it needs to be noted that public rulings and private rulings are legally binding on the Commissioner where they apply to a taxpayer and the taxpayer relies on the ruling by acting (or omitting to act) in accordance with the ruling (s 357-60, Sch 1 TAA53).

It is not known whether the AA Trust intends to appeal to the Full Federal Court from the decision of Logan J.

TaxCounsel Pty Ltd

References

1 [2022] FCA 971.

2 [2022] FCA 971 at [22], [23] and [26].

3 [2001] FCA 1833 at [369].

4 [2022] FCA 971 at [54].

5 S 1305 of the *Corporations Act 1995*; *FCT v Clark* [2011] FCAFC 5 at [65]; and see also, in any event, s 69 of the *Evidence Act 1995* (Cth).

6 [2009] NSWSC 1229.

7 [2001] FCA 1833.

8 (1988) 18 FCR 449 at 454.

9 [2004] HCA 55 at [46].

10 [2008] HCA 21 at [34]–[36].

11 [2001] STC 214.

12 [2022] FCA 971 at [97].

13 (1934) 50 TLR 527.

14 [2022] FCA 971 at [100].

15 [2022] FCA 971 at [171] and [172].

16 [1992] FCA 363 at [36].

17 88 ATC 4193 at 4204.

18 [1937] SASR 97.

19 [2022] FCA 971 at [340].

Mid Market Focus

by Andrew Burns, CTA, HLB Mann Judd

Fuel tax credits: a reminder

Following the recent temporary reduction in fuel excise duty, now is a good time for a refresher on claiming fuel tax credits to offset cost of living increases.

The basics

Excise duty is charged on sales made by producers and importers of fuel and petroleum products. The responsibility for reporting and payment of this excise duty rests with the producer or importer.

Eligible businesses are entitled to fuel tax credits which offset the excise duty included in the purchase price of the fuel that they use. A road user charge applies to reduce the amount of fuel tax credits that can be claimed on fuel used for on-road purposes.

Both the excise duty and fuel tax credits are calculated based on the volume of fuel.

Eligibility for fuel tax credits

All entity types are entitled to claim fuel tax credits for eligible fuel, which is used for an eligible activity, provided they are registered for GST at the time they purchased the fuel, and registered for fuel tax credits at the time they make the claim.

Eligible fuels

Most types of fuel are eligible for fuel tax credits. These include both the obvious fuels, such as petrol, diesel and liquid petroleum gas (LPG) sold at service stations, and the less obvious fuels, such as kerosene, mineral turpentine, white spirit, toluene, heating oil, and some solvents. However, aircraft fuels are excluded. Essentially, any fuel which is subject to excise duty is also eligible for fuel tax credits.

While gaseous fuels, such as LPG, liquid natural gas (LNG) and compressed natural gas (CNG), are all eligible for fuel tax credits, only those fuels that are intended for use for road transport are subject to excise duty, and therefore eligible for fuel tax credits. This will include gaseous fuels for mixed use and where the intended end use is unknown. Gas for use in forklifts is not considered to be transport related.

All other gaseous fuels are subject to an automatic remission of excise duty and, as a result, do not have any fuel tax credits which can be claimed. For example, if a restaurant uses portable gas heaters in its outdoor dining area, there would be no excise duty paid on the gas contained in the bottles used and therefore no entitlement to fuel tax credits.

Eligible activities

There is no definitive list of activities which are eligible for fuel tax credits. Rather, a business will be entitled to claim fuel tax credits for all fuel used in the course of its business unless one of the following exclusions applies:

- fuel used in a vehicle of 4.5 tonnes or less, for travelling on public roads;
- gaseous fuels used in a vehicle of more than 4.5 tonnes, for travelling on public roads;
- fuel used for private purposes; and
- fuel that is lost, stolen or otherwise disposed of.

It is not necessary for the fuel to be used in an internal combustion engine in order to be eligible. Other eligible uses include use as burner fuel, use as an ingredient in the manufacture of products, or fuel that is applied onto a surface (for example, as a solvent).

Travelling on public roads

Determining whether fuel is used when travelling on public roads is vital as it affects both the types of vehicle that are eligible for fuel tax credits, and the rate of credit that applies.

The ATO has issued FTR 2008/1. While this ruling's main focus is on when travelling on a public road is incidental to the vehicle's main use and therefore not subject to the road user charge (which reduces the fuel tax credits available or the minimum weight limit), FTR 2008/1 provides an explanation of a number of key terms, including "vehicle", "travel", "for travelling", "public road", "main use" and "incidental to".

To simplify these definitions, a "vehicle" is anything that is capable of locomotion, and may be authorised to travel on a public road by a relevant authority (where "travel" is the movement from one place to another). However, a vehicle which is travelling along a public road in the course of constructing, repairing or maintaining that road will not be considered to be travelling for the purposes of the *Fuel Tax Act 2006* (Cth).

FTR 2008/1 includes a number of examples of when a vehicle will be considered to be travelling for fuel tax credit purposes, with examples 5 and 6 highlighting the exclusion of travelling on a public road during the course of constructing, repairing or maintaining that road. These two examples involve a street sweeper which is used by the local council to clean the roads within its area. The street sweeper will be considered to be travelling on public roads from when it leaves the depot until it reaches the point where it commences cleaning, and then from when it

ceases cleaning until it reaches the depot again (this travel includes the disposal of collected rubbish at the local waste collection site). However, it will not be considered to be travelling as it moves along the road as part of the cleaning process.

Paragraph 23B of FTR 2008/1 confirms that fuel used "for travelling" includes all fuel used in the normal aspects of a vehicle's function, not just that used in the actual propulsion of the vehicle. This will include powering air-conditioning in the cabin of the vehicle, or while the vehicle is temporarily stationary in the course of its journey. This is further confirmed in FTD 2016/1.

However, para 23E of FTR 2008/1 states that fuel used for travelling does not include fuel which is used for a purpose unrelated to the vehicle's movement on a public road. This is highlighted in example 4, which states that fuel used to operate a garbage truck's bin lift and compacting mechanism is not used for travelling on a public road. Similarly, example 9A confirms that fuel used to power the refrigeration unit used to cool goods in a refrigerated vehicle is not used for travelling.

FTR 2008/1 confirms that a "public road" will take its ordinary meaning, and gives examples of roads which are considered to be public roads, and roads which will not be considered to be public roads. While most of these are self-explanatory, para 45 clarifies that a public road will include any shoulder to the road and auxiliary lanes, such as emergency lanes.

Section 43-10(4) of the *Fuel Tax Act 2006* excludes an exemption from the road user charge where a vehicle's travel on a public road is incidental to its main use. FTR 2008/1 sets out how to determine a vehicle's "main use", as well as whether its travel on a public road is "incidental to" that main purpose.

Paragraph 48 states that a vehicle's main use is a question of fact, based on the circumstances of each case, including the following factors:

- the purpose for which the vehicle is designed;
- any specific alterations or modifications which makes the vehicle's use different from the use for which it was originally designed;
- the ordinary pattern of the vehicle's use;
- time spent or distance travelled by the vehicle in carrying out different operations; and
- the nature of the owner of the vehicle's enterprise

Even when the vehicle's main use is other than travelling on public roads, the exclusion in s 43-10(4) will only apply where any travel on public roads is incidental to the vehicle's main purpose. To assist in making the determination of whether a vehicle's on-road travel is incidental to its main use, FTR 2008/1 includes a number of examples, highlighting the need to assess each situation individually.

Examples 15 and 19 both involve a harvester. Clearly, a harvester has the main use of harvesting crops, and not travelling on public roads. However, the use of the harvesters in each of these examples leads to a different conclusion on whether its on-road use is incidental to that main use.

In example 15, the harvester, owned by a primary producer, travels short distances along public roads to get from one part of the agricultural property to another in order to harvest crops. In this example, the travel on public roads is considered to be incidental to the harvester's main use.

On the other hand, the harvester in example 19 is owned by a contract harvesting enterprise. In this example, the harvester travels on public roads from one client's property to another client's property in the same district. The on-road use of the harvester is not considered to be incidental to its main use.

Auxiliary equipment

As stated above, fuel used to power equipment which is not related to the propulsion of a vehicle or its normal operation while travelling on public roads is not subject to the road user charge. Therefore, where a vehicle that is used to travel on public roads also includes auxiliary equipment, it is important to be able to determine the volumes of fuel used to power this equipment rather than for travel on public roads.

This determination is relatively easy where the auxiliary equipment has a separate tank, but it is more difficult to determine where the vehicle only has a single fuel tank that is used for all of the vehicle's operations, including the auxiliary equipment.

While the ATO will accept any method to apportion the fuel used, it has provided a simplified method which can be used. Under this simplified method, the fuel used by the vehicle is multiplied by a relevant percentage published by the ATO, depending on the nature of the auxiliary equipment (these percentages can be found in PCG 2016/11). For example, 30% of the fuel used by a concrete truck will be considered to be used to power the mixing barrel and other mechanisms related to loading and unloading the concrete.

Where a vehicle is used for both on-road and off-road use, it is only necessary to apportion the fuel used for on-road use, as any off-road use will not be subject to the road user charge.

Practical tips

In order to maximise the fuel tax credits which can be claimed for fuel used in the course of carrying on an enterprise, the following practical tips should be kept in mind:

- keep records of all fuel used in the enterprise (based on the number of litres used, not the amount spent);
- where fuel is used for both on-road and off-road purposes, keep a record of the fuel used for each purpose;

- if a vehicle includes auxiliary equipment, either apportion the fuel based on the ATO's simplified method, or some other reasonable basis;
- if the fuel is received in bulk and it is used for multiple vehicles with different eligibilities, keep records of how much fuel is used by each vehicle;
- if the fuel is received in bulk, keep records of the amount of fuel on hand at the end of each BAS period, as the fuel tax credits claim should be based on the amount of fuel actually used, not just the amount of fuel purchased; and
- do not forget the fuel that is not used in an internal combustion engine.

Andrew Burns, CTA
Manager
HLB Mann Judd

Higher Education

Offering value-add solutions to clients

One of the duxes of CTA2B Advanced for Study Period 3 2021 discusses how the skills learned from the subject have been applied to her job roles.

Vicky Tang
Tax Learning Designer, Tax Nuggets Academy, Victoria

Please provide a brief background of your career in tax.

Prior to my current role, I worked for more than five years in business advisory services, looking after diverse portfolios of family groups and private enterprises. I started my career at Deloitte before joining Slomoi Immerman Partners in 2019, and have just switched gears to join Tax Nuggets Academy. I hold Bachelor of Arts and Bachelor of Commerce degrees from the University of Auckland and I am a chartered accountant with Chartered Accountants Australia and New Zealand.

What skills and knowledge have you taken away from the CTA2B Advanced subject?

I took the subject as part of the Graduate Diploma of Applied Taw Law program. As this subject covered GST, FBT, corporate tax and international tax, it was a great continuation from CTA2A Advanced in deepening my knowledge on these specific topics. I was particularly impressed that recent developments were included in the subject, such as the loss carry-back tax offset in the corporate tax section, which was timely and relevant to my clients.

Have you applied this new knowledge to your role?

Yes, definitely! Studying this subject has solidified my knowledge more holistically, which I have applied to developing accurate and useful tax learning content for Tax Nuggets Academy's subscribers. In my previous role, the program also gave me greater confidence when engaging with clients' tax problems, as I knew I had a good technical toolkit to offer value-add solutions.

How did you juggle study, work and other commitments?

It wasn't easy! But I had a wonderfully supportive team at Slomoi Immerman Partners, and when the exam rolled around, they helped hold down the work front so I could focus on my studies. I've also gone through the CA Program with CA ANZ as well, so I have several years of helpful experience in juggling work and study.

My best tip would be to plan in advance. On the one hand, I knew the subject's deadlines, and on the other hand, I knew when work would get busy, so I was able to plan accordingly and avoid burning the candle at both ends.

Where to now for you when it comes to continuing tax education?

I will be continuing my Graduate Diploma of Applied Tax Law journey, of course. After CTA2B Advanced, I studied CommLaw 2 and I'm currently enrolled in Corporate Tax.

What advice do you have for other tax professionals considering the Graduate Diploma of Applied Tax Law program?

So far, the Graduate Diploma of Applied Tax Law program has been incredibly useful, both in my previous roles advising clients and in my current role as a content developer. It's very practical and I would highly recommend it for those looking to increase the depth and breadth of their tax knowledge.

"Learn from practising tax experts who apply concepts they're teaching to their real-life situations."

We offer a range of highly flexible online education programs that can help you achieve your full potential in your tax career. Learn directly from industry experts working in your field and gain practical knowledge that can be immediately applied to real-life work situations.

Study Period 3 2022 key dates

	Subjects	CTA3 Advisory* Intensive
Early bird closes	14 Oct 2022	12 Oct 2022
Enrolments close	2 Nov 2022	4 Nov 2022
Commencement	7 Nov 2022	7 Nov 2022
Exam week	30 Jan 2023	6 Feb 2023

*This subject satisfies the educational requirements for a Chartered Tax Adviser designation

To find out more
taxinstitute.com.au/education

Higher Education

Stephen Chen
Convenor, CommLaw Subjects

22-029EDU_08/22

HEPCO Pty Ltd trading as The Tax Institute Higher Education PRV14349.

Tax policy development and tax administration

by The Tax Institute

This chapter of the *Case for Change* explores the issues of tax administration, funding of government agencies, and the development of tax policy. The way in which tax policy is developed, implemented and ultimately administered significantly influences whether or not we have a tax system which is fair, efficient and effective. A failure to consult deeply on tax results in laws being difficult to comply with and difficult to administer, and insufficient funding for government agencies results in a less than desirable implementation of legislative change, leading to users of the system having increased challenges in engaging with the system and meeting their obligations. Improvements in policy development and tax administration will improve trust in the overall system and result in improved support of, and compliance with, the tax system. Note: The data contained within this chapter has not been updated since original publication of the *Case for Change*.

Overview

While the principles and details of tax reform have been covered across previous chapters of the *Case for Change* paper, key to ensuring that the tax system is and remains fit for purpose is the way in which tax policy is developed, implemented and ultimately administered.

There are great opportunities to improve the policy development, implementation and administration of our tax laws. Fundamentally, improvements in policy development and tax administration will improve trust in the overall system and result in improved support of, and compliance with, the tax system.

It is noteworthy that responsibility for the tax system is not only confined to the various Treasury departments and revenue agencies, but also to those who are charged with monitoring the operation of the system; at the federal level, this not only includes the Auditor-General, but also the Commonwealth Ombudsman, the Inspector-General of Taxation and Taxation Ombudsman (IGTO), and the Australian Small Business and Family Enterprise Ombudsman (ASBFEO). It would be desirable to improve the clarity of the roles of various agencies that have been established to monitor revenue agencies or advocate on behalf of users of the system, improve coordination between such agencies, and potentially rationalise their various remits.

The failure to engage and consult deeply on tax, to seek and obtain the best advice from experienced experts, and the failure to maintain our tax laws has meant that we are saddled with some of the most difficult tax laws to comply with and to administer. Highly detailed provisions seeking to nail down every possible permutation or set of circumstances has resulted in often impenetrable laws.

The administration at both the state/territory and federal levels are often not resourced sufficiently to ensure that users of the system are able to engage with the system and meet their obligations as easily as they otherwise might. For example, while great strides have been made to enhance online interactions, there is still enormous room for improvement. Agencies are sometimes saddled with additional expectations and initiatives from government without the resources necessary to properly execute those initiatives.

Similarly, agencies need to be able to contribute to the policy of administration so that the relevant laws governing the operation of those agencies are suitable to allow for efficiency improvements that respond to community needs and expectations.

Tax policy development

Traditionally, governments have jealously guarded the development of tax policy as their domain. While it is true that policy is ultimately the responsibility of government for which they will be accountable, this does not preclude seeking and taking good advice. That advice has, until recently, been the role of the public sector, in particular, Treasury. This has not prevented the government seeking and relying on the advice of experts – in particular, in determining the health responses to the COVID-19 pandemic. That is appropriate and to be applauded. In fact, it should represent the model for all areas of government, but especially tax. It is experts who can unfold the details and consequences of particular policies. A better way of capturing that specialised knowledge and engaging with it must be found or else Australia will continue to be hampered by excessively complex law and unnecessary red tape.

The Tax Institute has observed that one state government set a new model for engagement in the development of new laws. After suggesting that a new policy should be looked at, and before committing to any particular outcome, the government set up a public process to engage as many views as possible, as well as establishing a public education campaign. Professionals were engaged in the design of the policy, both through invitations for submissions as well as individual and group discussion forums. Having listened to

the various stakeholders, there was a process of settling the principles of the policy. Further consultation was suggested before finalising the form of legislation and drafting instructions. Such an approach would be most welcome and avoid the unintended consequences that often arise from hastily prepared drafting instructions.

This level of consultation at all of the important stages of law development should represent the new benchmark.

Tax administration

In 2004, the Organisation for Economic Co-operation and Development (OECD) published a guidance note for its member countries to manage and improve tax compliance in their respective jurisdictions.[1] A taxpayer's compliance is measured on the basis that they meet the OECD's four pillars of compliance, namely: registration, lodgment, correct reporting and on-time payments. The ATO oversees these compliance requirements and reports on them annually in the *Commissioner of Taxation annual report*.[2] This section analyses the methods used by the ATO to measure these compliance requirements and suggest improvements wherever possible.

It is worth noting that the Federal Commissioner of Taxation has additional roles. The Commissioner is also the Australian Business Registrar. This role will become even more important with the transfer of certain operational functions from the Australian Securities and Investments Commission (ASIC) to the ATO and the introduction of director identification numbers.

Further, the Commissioner is also the accountable authority for both the Tax Practitioners Board (TPB) and the Australian Charities and Not-for-profits Commission (ACNC). While each of these bodies is run independently of the ATO, parliament has determined that the funding for those two organisations should be part of the budget of the ATO. One suspects that, as each of these agencies grew out of the ATO, it was perceived to be simpler to leave existing arrangements in place. Theoretically, it may have been seen as alleviating the agencies from certain administrative detail, but it has resulted in levels of duplication and potential perceptions of a lack of independence. The former government accepted a proposal that the TPB should become a separate agency and receive its own specific appropriation from the government.[3]

Registration

Registration for individuals

Registration refers to ensuring that all individuals who are required to participate in the tax and superannuation system are registered in the system. The ATO reported that, for the 2019–20 financial year, there were 106% of individuals registered on the ATO client register.[4]

The ATO compares active individual clients (aged 15–64) in their client register to the Australian Bureau of Statistics (ABS) estimated resident population of the same age group, as this is the assumed working age population. The proportion is above 100% as the ATO's definition of 'resident' for tax purposes captures a greater number of people than the ABS estimated 'resident' population'. In saying this, there are still individuals who should not be in the system but are still registered, and those who should be registered but are not. There are also those individuals who are determined to remain outside the system and never register for a tax file number (TFN). Therefore, the question is whether the system of registration that we have in Australia is still an adequate measure of ensuring that individuals are registered in the system.

As to the inactive individuals, the ATO states on its website that clients who no longer need a TFN can be identified as inactive and have their record secured. This is usually done if the client is deceased, has departed the country or their visa has expired.[5] According to the ATO annual report,[6] the ATO has difficulties identifying and deactivating TFNs for expatriates as they do not currently receive information relating to expatriates leaving the country. Therefore, there are unused TFNs within the system.

Registration for companies and other entities

The ATO states on its website that it is confident that large corporate groups which should be registered in the system are registered.[7] The ATO measures the proportion of companies registered in the system by comparing the number of companies registered by the ATO to the number of companies registered by ASIC.[8] For the 2019–20 financial year, 66.1% of the companies are registered in the ATO client register.[9] Currently, not all companies are active such that they require a TFN, even though they will automatically be issued with an Australian company number (ACN) on registration.

Currently, while tax entities such as trusts and partnerships can apply for a TFN and otherwise register with the ATO, there is no register of such 'entities' that provides a basis for comparison that would give confidence in the right number of entities being registered. While there are other incentives in the system (e.g. penal withholding tax (WHT) rates) for registration with the ATO, there is no way of knowing whether all such entities are appropriately registered. Separately, it is noted that the OECD expects that countries that are part of the Global Forum on Transparency and Exchange of Information for Tax Purposes meet the "standards on ensuring that law enforcement officials have access to reliable information on who the ultimate beneficial owners are behind a company or other legal entity so that criminals can no longer hide their illicit activities behind opaque legal structures".[10]

Such actions would give greater assurance that all non-individual entities that should be in the system are registered, and those that have not been active are deactivated.

Lodgment

Lodgment refers to the proportion of activity statements and income tax returns lodged on time. Only 74.6% of activity statements were lodged on time in the 2019–20

financial year compared to the ATO's 78% end-of-year target.[11] The ATO suggests that the bushfires in early 2020 and the effects of COVID-19 affected the lodgment of small businesses. Small businesses make up the largest volume of activity statements, and so any change in lodgment behaviour impacts the overall performance of lodgment compliance.

In regard to income tax returns, the lodgment performance for the 2018–19 financial year finished at 83.9%, which is 0.9% more than the ATO's target of 83%. The increased on-time lodgment of tax returns was due to improvements in the ATO's end-to-end strategies, such as an increase in the timeliness and quantity of pre-filled data and sending tax time messages.

There are short- and long-term issues in this context. Firstly, in an increasingly connected and online world, is 'lodgment' an antiquated notion that might be superseded over time? For example, could the automatic exchange of data get to a level where the ATO has sufficient confidence in the information available to allow the ATO to present back for verification to a taxpayer the relevant information on a periodic basis, obviating the need for a business activity statement and income tax returns? Could the artificial construct of a tax year be abolished such that tax is in real time, both in reporting/verification and payment (see below)? Indeed, if it were possible to get the right level of data, the ATO could assess in a highly automated way. This then calls into question the current settings of self-assessment which were designed in a low-data era with the object of pushing responsibility for 'getting it right' onto taxpayers and their advisers. With higher levels of confidence in the data, the responsibility could shift back to sophisticated ATO systems that could allow a reversion to a full assessment environment. This would mean a lower risk of penalty for taxpayers and a greater confidence in the finality of tax affairs.

It should be noted that Single Touch Payroll (STP) already represents the mechanism to provide updates to the ATO of data available in employers' payroll systems — salary and wages, allowances, superannuation contributions etc. The same principles for data sharing could be implemented to get real time data about the business' income and expenses, either directly from the business itself or from reliable third party sources such as banks, business customers and suppliers. Other countries, such as Brazil and Russia, have adopted models of invoices requiring government identification or verification. This should be investigated as to how far it would assist, both in reducing the compliance burden of lodgment, as well as in supporting correct reporting (see below).

Accordingly, it should be a longer-term aim to remove the lodgment requirement from the Australian tax system. This should not be taken to equate to removing interaction with the system. Rather, an integrated and online system should interact with taxpayers electronically and in real time, with verification built into processes. While the ATO believes it has made great strides on pre-fill, there is still considerable opportunity to improve both the quality and range of information that is made available. It has been observed that not all pre-fill information is accepted by taxpayers.

Secondly, in the shorter term, there should be steps taken to simplify and integrate the sharing of data that reduces the compliance cost on taxpayers in preparing statements for the ATO where the data could be collected and presented to taxpayers for verification and finalisation. For example, there could be automatic upload of business accounting data through the use of application programming interfaces built into accounting software.

If that is so, then it may raise the concern that the quality of the data needs to be improved. Further, the range of data available can be extended through cooperation with taxpayers and the development of data protocols. However, this must be coupled with the ATO building levels of trust with the community that give confidence that the data provided will be used appropriately and not as a tool to penalise taxpayers.

Correct reporting

The term 'correct reporting' refers to ensuring that the correct income and expenditure have been reported and that there is no under-declaring of income nor over-claiming of expenses. The ATO seeks to 'assure' itself that correct reporting has occurred through verification and assurance reviews. Some of that work relies on third party data being reported that allows the ATO to pre-populate returns, and some data is used to verify or test reported income and expenses after a taxpayer lodges a return.

The ATO reports on its understanding of the level of correct reporting by taxpayers through the use of measures such as 'tax assured' and 'tax gaps'. According to the ATO, the estimated overall net tax gap for the 2017–18 financial year was 6.9% or $31.2b.[12] This means that the ATO collected 93% of the tax revenue it expected to collect, which is mostly from voluntary compliance. That there was such a high level of voluntary compliance is an asset that should be valued by the Australian community.

Nonetheless, as referred to above, there are options to improve correct reporting in conjunction with improvements in lodgment. One significant opportunity for improvement is increasing the amount of information available as pre-filled data. For example, there is no automated reporting for rental property investments. Working with the real estate industry, standard reporting could be established such that automated and even regular reporting could be made directly by agents to the ATO. This would engage extended use of TFNs to streamline reporting and matching. Given the high levels of investment property ownership, this is the next logical extension of investment income reporting to complement the existing dividend, interest and managed fund reporting that is currently available. While certain expenses may not be captured in the real estate agent's report, such as interest on loans, it might be possible to work with financial institutions to receive that data set.

The point of such initiatives is to apply resources to helping people report correctly up front rather than chase omissions

after lodgment. This is a better application of resources and is likely to improve attitudes towards compliance with the tax system.

Additionally, it is already the case that certain data received by the ATO is shared in real time with other agencies. It would appear that problems of the past of incorrect use of data by other agencies is being overcome by the proper use of STP data. Similarly, data reported by other new means, as suggested above, could be shared with other agencies to reduce the burden on businesses of reporting the same information multiple times (sometimes referred to by government as a 'tell us once' principle).

Self-assessment and rulings

Correct reporting is reliant, in part (and ironically), on self-assessment. That Australia enjoys high quality self-reporting is reflective of a culture of adhering to positive societal norms and expectations.[13] That self-assessment is backed up by automated checks and audits.

An important feature of the introduction of self-assessment was the ability of taxpayers to gain certainty in their tax affairs by asking the Commissioner to provide a ruling that he could be bound by. This gave rise to a regime that governs both private rulings (applying to a particular taxpayer in connection with a particular arrangement) and public rulings (applying to all taxpayers in particular circumstances).

The private rulings system is often criticised as being slow and resource-intensive. Rather than making reasonable and obvious assumptions, taxpayers are often asked for very detailed information. There seems to be a lack of appreciation that the private ruling issued can only be relied on based on its terms and the description of the arrangement. Any departure from the described arrangement makes the ruling otiose.

Should a taxpayer be dissatisfied with a private ruling, they have a right to object and appeal against that ruling. However, if circumstances change in any material way, that ruling is no longer binding. Nonetheless, the objections officer, the AAT and the courts are limited to reviewing the Commissioner's ruling on the original arrangement; there is no flexibility to update the facts of the arrangement to reflect any changed circumstances.

Similarly, the development of public rulings often takes in excess of a year. Sometimes the ruling has been prepared on the basis of a need for clarity in the law on an industry practice and it has been initiated by representatives of the industry. When a draft ruling is issued for comment, it has often been the subject of a significant internal process. These delays mean that taxpayers are left uncertain as to the position the ATO is to adopt and what approach they should take in lodging returns.

One suspects that the delays in the development of public rulings and the response to requests for private rulings can partly be found in inadequate resources being applied to those areas of the ATO that need to deal with these.

Further, the rulings system has been designed in a way that the Commissioner can only 'rule' on his interpretation of the law. This precludes ruling on the way in which the Commissioner may apply his resources to enforcing the law. This is a distinct difference to the position prior to the introduction of a formal rulings regime wherein the Commissioner would issue 'rulings' on both his view of the law and how taxpayers and his officers should approach the practical application of the law.[14] To overcome this, the ATO issues other 'products', such as practical compliance guidelines. These, of course, are non-binding, leaving taxpayers hoping that the Commissioner will be administratively bound by guidance.

The ATO also issues other guidance material that does not constitute a binding ruling – fact sheets, practice statements, taxpayer alerts, and other material published on the website are examples. A taxpayer following such guidance gets no comfort that their tax position is certain. There are a number of possible solutions to some of these conundrums:

- abolish the current rulings regime and revert to a broader regime that existed pre-1992 (there is no guarantee, however, that this will result in more frequent or better rulings);
- make all advice (including all other 'products') issued by the Commissioner binding on the ATO; or
- if the current system is to be retained, provide for objections and appeals to be able to consider revised arrangements that are substantially the same as the original arrangement that was ruled on.

However, each of these solutions needs to be considered in the context of the self-assessment system itself. As noted above, serious consideration should be given to a full assessment system, once adequate data is available to provide taxpayers with a substantially complete return and other recommended changes in the *Case for Change* paper are made (including the treatment of work-related expenses).

Education

Educating the community about the tax and superannuation systems will increase its understanding of meeting its tax commitments, which eventually leads to correct reporting. The ATO has a number of programs which aim to educate students in Australian schools. For example, the ATO offers free school webinar presentations for students about how the Australian tax and superannuation systems work, such as 'Paying it Forward' for primary school students and 'Tax, Super + You' for secondary school students. The ATO also arranges an annual Tax, Super + You competition (although, due to COVID-19, it was cancelled in 2020).[15] However, the support that the ATO makes available to teachers is only effective if it is used. Currently, state education authorities do not mandate tax education as a component of the curriculum. It is up to teachers to pick up the material and incorporate it in relevant subjects. It would be beneficial to the tax system if this education was mandatory such that

students left school with an understanding of the tax system as a public good.

Similarly, courses can be developed at TAFE and universities to provide both business ethics education (and the responsibility to make a contribution to the community through taxes), as well as direct education about how to interact with the tax system.

On-time payments

'On-time payments' is the proportion of tax liability paid on time by value, which was 88.7 % in the 2019–20 financial year. This was a 1.2% decrease from the previous financial year.

While it is clear that the majority of taxpayers who had the capacity to pay continued to meet their obligations, there is a large stock of debt on the ATO's books. In excess of 60%[16] of that debt relates to small business. When small businesses get into cash flow trouble such that they become indebted to the ATO, it is likely that they are not making a profit and they have an income tax liability. That is, much of that debt is not the tax on the business itself, but rather the tax that the small businesses were paying on behalf of others, namely, GST and WHT. This is the money of customers and of employees that the business is holding and is obliged to forward to the government on behalf of those customers and employees.

Currently, a significant proportion of new businesses fail in the first five years.[17] Anecdotally, it is suggested that cash flow is one of the major issues facing small business and a significant factor in failure rates. The current settings in the tax system are not best suited to managing cash flow. Most tax obligations are periodic, not real time. Even when real time or more regular reporting of their tax-related activity is required of businesses, it is not always matched by associated payment obligations. It is axiomatic that, where payment occurs at the same time as receipt or payment of the balance of the money, there is real time cash flow management and less likelihood of default. This is the principle on which tax withholding occurs — whether in relation to the payment of interest or wages, or other obligations. However, by not requiring the withholding agent (employer/ business) to immediately pass that withholding on to the ATO, the risk of cash flow management is shifted to the business/employer. This is an area that should be examined to improve on-time payments across the system.

Additionally, e-invoicing can be utilised in the coming years. In the 2020–21 Budget, the Australian Government announced its intention to accelerate e-invoicing. The government provided funding to the ATO until June 2022 in its role as the Pan-European Public Procurement On-Line (Peppol) Authority, with the aim of encouraging the adoption of, and assisting with the implementation of, Peppol e-invoicing.[18]

E-invoicing allows the digital exchange of invoices between a supplier and a buyer's software systems, similar to being able to make a phone call to another phone regardless of the phone's model, brand or carrier. E-invoicing reduces the occurrence of human errors associated with traditional invoicing, such as lost invoices and incorrect invoices, which cause delays in payment. E-invoicing will provide a good opportunity for small to large businesses to manage their GST credits and GST payable in real time. This information could be collected by the ATO to automate GST reporting.

The Australian Taxation Office

The ATO has proven to be an efficient, and often relied on, administrator. This has been most evident in the design and administration of the government's response to COVID-19. In particular, the ATO has been able to show its ability to deal with a crisis and to respond to the needs of the community or the government of the day. It has been able to marshal and redirect its resources to such ends. Importantly, it has a connection with most adult Australians directly and with all Australians indirectly (think collection and payment of GST, for example). That relationship is often intermediated by an army of tax professionals much larger than the resources of the ATO itself.

Nonetheless, the ATO has been the subject of criticism in certain areas of its administration. While some of this criticism may be unjustified or poorly researched, all criticism should be welcomed as an opportunity to reflect and determine how things can be done better. Similarly, where performance data shows significant gaps or issues, it should be readily published together with remediation plans to improve performance in those areas. It would appear that not all areas of performance are consistently reported on and the impression may be left that the reason for such omissions is that there is underperformance in those areas.

This chapter of the *Case for Change*, in the light of such criticism, seeks to consider improvements to tax administration.

State revenue authorities

It has been the observation of members of The Tax Institute who interact with the state revenue authorities that, for whatever reason, they tend to trail the ATO in technological advances and taxpayer-focused administration. While there is evidence of changes in this area (for example, the NSW Government's citizen-centric 'Services' initiative), it has been slow and sporadic (cf. the requests made to the Queensland Government for the establishment of a discrete website for the Queensland State Revenue Authority).

On the other hand, some of the state revenue authorities often have a much more open and engaging approach when designing tax changes than their federal counterparts, genuinely seeking to explore the circumstances surrounding businesses or arrangements that are to be taxed and looking for efficient, lower compliance cost approaches. Unfortunately, this is not consistent, even across the state authorities.

Funding

Anecdotally, it is understood that the state revenue authorities are poorly funded in comparison to the ATO.

This is not to suggest that the ATO is overfunded (in fact, quite the contrary when international comparisons are made[19]), but rather that the state revenue authorities should have their funding reviewed with the objective of ensuring that the 'service' side of the organisation is adequately funded. Those services include support for the administrator objectives of registration, lodgment, correct reporting (and the right support for that) and payment.

The funding model for the ATO has been the subject of meeting political objectives of the relevant government at the time (this applies to both sides of politics), as well as a 'one-size-fits-all' approach to so-called efficiency dividends.

In the latter case, the logical end position of efficiency dividends is that funding of an agency continues to be reduced until it must be so efficient that it ceases to exist. That the concept continues to be applied is an indictment on those that seek to pursue it. True efficiency will come from investing the right kind of resources to achieve the types of services and deliver the results that the community expects. While there should never be an open cheque book for an agency, stable funding and clear objectives based on commercial concepts of zero-based budgeting should ultimately result in the right funding to achieve the right outcomes.

In relation to political objectives, this is best illustrated by the funding of a significant part of the ATO being on four-year cycles. That is, while part of the ATO's funding is stable on an ongoing basis (subject to the aforementioned efficiency dividends), a significant portion of funding is based on 'programs', such as the Tax Avoidance Taskforce. This allows governments to 'announce' new funding for the ATO, whereas what is happening in truth is that previous similar short-term programs are replaced by new short-term programs. Whether this is the best use of that funding is seldom questioned. Further, significant parts of the bureaucracy must spend time reporting on the specially funded programs, as well as applying for a new program lest the thousands of auditors employed for those programs be made redundant. That a better way of collecting tax might exist is overlooked in this process. Such improvements to tax collection must seek to scrounge some funding out of what is left of the regular part of the allocation to the agency.

Certainty and consistency of funding would allow for investment by the ATO in appropriate responses to emerging approaches to tax administration, investment in the right technologies, and the true efficiencies relevant to a modern economy to be focused on. For example, rather than just funding audit programs that increase the burden on taxpayers in order to generate revenue, a better approach might be to invest in technology and data collection and curation that allows greater support of taxpayers in getting their affairs correct up front and meeting their obligations in a timely manner. This would be much more valuable to the system and the government, having the added benefit of building trust in the system.

Organisation of the Australian Taxation Office

The ATO is organised into five major groups, each headed by a member of the ATO executive.[20] Two of those groups represent the 'support' functions of the ATO – technology, human resources, finance etc – and cover approximately 5,300 people (employees and contractors) in total. The more 'front line' areas of the ATO are contained in the remaining three groups – Client Engagement (approximately 8,000 people), Service Delivery (approximately 6,700 people), and Law, Design & Practice (just over 1,000 people).[21]

Audit focus

Within these groups, ATO officers are devoted to different activities. However, because of the ATO funding method mentioned above, a significant proportion of the Client Engagement staff is devoted to audit activities. Given the relatively high levels of compliance in the Australian taxpaying population, as often noted by the ATO itself, one might think that the emphasis of the ATO should be less about 'catching' those who make mistakes and more about putting in place the infrastructure to support better education and participation, more accurate reporting (through improved collection and presentation of data to taxpayers), and more efficient collection mechanisms. Supported by a better funding model, this should be the direction that the ATO takes.

Objections and appeals

There have been reports by the IGTO over several years that have called for a separation of the appeals and objection function from other parts of the ATO, and even the creation of a further Second Commissioner role to head that. It is noted that there have been changes to make the appeals and objection function independent of the rest of the ATO, and it is not clear if further separation is warranted or would be of value. Further, as is apparent from the problems arising from the current funding model, hard coding the organisation of the ATO into legislation is likely to create an inflexible structure that will focus on trying to solve such objections and appeals after something has gone wrong, rather than reducing them through better management of cases up front.

Disputes are costly for all involved. Not only is there the monetary and opportunity cost, there is also the emotional cost. While the ATO, in particular, has instituted alternative dispute resolution practices, this overlooks the need to prevent disputes from occurring in the first place. Often processes can be designed to meet measures of timeliness or revenue targets to the detriment of getting the right result, with the attendant outcome of often protracted disputes.

Trust

As has been noted earlier in this *Case for Change* chapter, Australians have a relatively high level of voluntary compliance with the tax system. This is a valuable

commodity in our system. However, it is a mistake to automatically equate that compliance with trust.

A fundamental asset of any tax system is the trust that the community has in its tax administrator. However, despite the relatively high levels of voluntary compliance, there is, anecdotally, a lack of trust between the administrator and taxpayers which is reflected in audit and debt collection approaches and efforts, and which adds to the compliance costs imposed on taxpayers. Those anecdotes are borne out in the media reports of particular cases and in reports by the IGTO and the ASBFEO. Additionally, that lack of trust is in stark contrast to what is expected of ATO officers under the Taxpayer Charter, in particular, the expectation that ATO officers will treat taxpayers "with courtesy and respect and … as being honest".[22] Excessive requirements for detailed information, requests for written responses to questions answered in interview and increased levels of reporting impose heavy burdens on taxpayers. There have even been instances of auditors requesting that a taxpayer provide evidence that something did not occur. Disproportionate expectations on small business to have systems and processes in excess of what is normal commercial practice, and auditors approaching taxpayers on the basis that the business is hiding something, similarly impose high compliance costs. Unsurprisingly, behaviours from auditors that indicate a lack of trust in taxpayers tend to elicit an equivalent lack of trust in auditors and the audit process.

Lack of trust, desire for certainty and fairness or a fair go are also arguably the greatest underlying reasons for the current state of the law. In recent decades, there has been a demand from users of all kinds that the law be clear in what it covers so there is no danger of 'unintended consequences'. The truth that is now apparent is that such detail simply leaves new gaps or areas of uncertainty. Moreover, it often meant that the law operated in a way that is contrary to normal business and commercial practices, thus adding to the compliance burden. At its core, the two sides of this approach reflected a complete lack of trust: a lack of trust in taxpayers and their advisers, a lack of trust in the administrators, and a lack of trust in the judiciary. In Australia, that era, we would like to think, has come to its necessary end. While trust has not yet been fully restored, we would venture to say that it is re-emerging. Where there is trust, there can be a new and principled approach to the way law is drafted. This should mean simpler law. It should mean law that is adaptable to changing circumstances and new and emerging ways of doing business.

Second Commissioners

As will be evident from the above, the members of the executive consist of group heads who are both Second Commissioners and Deputy Secretary equivalent roles. This gives rise to some level of confusion, as does the naming convention of Second Commissioners. Further, Second Commissioners are statutory appointments which attracts a process that includes ministerial, cabinet and Governor-General approval. This adds considerably to the process of appointing people to that role as is evidenced by the fact that, until recently, there was a Second Commissioner vacancy for some 18 months. This creates instability both for the ATO and for those who deal with the ATO. Consideration should be given to alternative arrangements and naming conventions of the roles reporting to the Commissioner.

Tax policy development

When viewed as a whole, parts of the Australian tax system are highly principled, whereas other parts are highly detailed. That said, there are no current structures in place to allow for efficient, regular system maintenance in either case. This, coupled with an increasing lack of confidence in existing political processes to drive effective tax reform, lends itself to an unsustainable tax system.

There have been countless reviews of various aspects of the Australian tax system. However, recommendations are disproportionately implemented. This is inefficient in itself. The Tax Institute is of the view that it is time to reconsider who should be managing tax reform and who should be tasked with maintaining the tax system on an ongoing basis. An independent, bipartisan commission, whether existing or newly formed, could be charged with this task to alleviate the pressure on government and to reduce opportunities for political influence in the establishment of good tax policy and law. Not only could such an organisation consider and deliver genuine tax reform, it would also have the scope to consider the kinds of reviews that should be pursued and to determine the regularity and extent of system maintenance that should be undertaken.

A starting point could be the implementation of a new tax policy development structure similar to the UK, which has adopted a five-year corporate plan. Any review or plan should include well-defined objectives and terms of reference which align with those objectives. This would ensure that it is approached with a clear understanding of the input to be sought from relevant stakeholders and the priorities to be set. Agreed time frames would ensure that a review remains on track and that outcomes or objectives are delivered as expected. The development of supporting guidance in relation to any newly developed policy or law should be taken into account in terms of a broader plan and should follow a similar framework, including agreed time frames for the delivery of outcomes, an assessment of prioritisation, and a clear framework for consultation, including the level of involvement to be provided by stakeholders.

Other important factors include transparency and a broad understanding of the structure and purpose of the tax system. Any of the options considered above must be coupled with initiatives to build trust between taxpayers and the ATO, and reductions in red tape to reduce administrative costs and compliance burdens. Importantly, improved communication between government data collectors to ensure that the role of tax practitioners and advisers is efficient and simplified is fundamental. This is particularly relevant, for example, in the context of STP and the modernisation of business registers.

Other bodies: the Inspector-General of Taxation and Taxation Ombudsman, the Board of Taxation, and the Australian Small Business and Family Enterprise Ombudsman

Each of the IGTO and the ASBFEO plays a role as both scrutineers of the ATO and as advocates on behalf of specific taxpayers or taxpayer groups. While those roles are valuable to the community, there is sometimes confusion as to where each of these bodies should operate and how they interact with more general scrutineers, such as the Auditor-General and the Commonwealth Ombudsman.

Additionally, those bodies are not sufficiently resourced to undertake strongly evidenced-based reports of performance. Reports are often, by their nature, hampered by detailed data and rely on anecdotes and trends arising from smaller samples of cases. Consideration could be given to these bodies working with the Auditor-General to guide this valuable work and to improve the review of broader data that would enhance the efficacy of these reports.

The Board of Taxation plays a unique role in reviewing the operation of legislation to determine if it is meeting its policy objective and to recommend improvements to the law. This is valuable work, but is often undertaken on the basis of referrals from ministers or through the representations of particular groups or bodies representing sections of the taxpayer population. Consideration should be given to a more structured role for the Board of Taxation to review all new legislation within five years of its introduction.

Options for reform

- Improve consultation on policy development, drafting of law (including instruction to the Office of the Parliamentary Counsel) and interpretational issues before legislation is drafted.
- Clarify and honestly state the objective of legislation.
- Increase the use of well thought out principles-based legislation.
- Provide better and more flexible funding of revenue agencies.
- Ensure that there is ‘warts and all’ reporting of revenue authority performance.
- Redesign processes to prevent disputes arising in the first place.
- To address shortcomings in the registration of individuals, issue TFNs to individuals from birth, or as they arrived as a resident or on a working visa.[23]
- Through cooperation with state and federal agencies, it would be possible for the ATO to identify those cases where it would be appropriate to deactivate TFNs. For example, consideration may need to be given to those cases of permanently departing individuals (whether or not citizens or tax residents) and whether they may continue to derive Australian-sourced income or whether it is likely that they may return in the future (eg citizens).

In relation to the rulings system and, either concurrently or separately, in the context of the adoption of a full assessment system:

- make all advice and other ‘products’ issued by the Commissioner binding on the ATO (with appropriate requirements to ensure that the ATO continues to issue guidance at its current rate or higher);
- where the current rulings system is to be retained, provide for objections and appeals to be able to consider revised arrangements that are substantially the same as the original arrangement that was ruled on; or
- increase ATO resource allocation to private and public rulings.

Among the options to increase confidence in the system:

- work with state government agencies to establish an appropriate register of all partnerships and trusts; and
- all companies, trusts and partnerships could be simultaneously issued with an ACN/ABN and TFN on incorporation/creation.
- Clarify the roles of scrutineers. Support the work of the IGTO and the ASBFEO through the expertise of the Auditor-General.

Conclusion

As noted at the outset, improvements in policy development and tax administration will improve trust in the overall system and result in improved support of, and compliance with, the tax system. While there may be numerous options for reform, two core principles stand out. Government agencies need the appropriate level of base funding to implement and effectively administer the laws, and deeper, more holistic consultation will result in less complex laws which are easier to administer and comply with.

The Tax Institute

References

1 OECD, *Compliance risk management: managing and improving tax compliance*, OECD Publishing, 2004. Available at www.oecd.org/tax/administration/33818656.pdf.

2 ATO, *Commissioner of Taxation annual report 2019–20*. Available at www.ato.gov.au/uploadedFiles/Content/CR/Downloads/Annual_Report_2019-20/annual_report_2019-20.pdf.

3 Australian Government, *Government response to the Review of the Tax Practitioners Board*, November 2020, recommendation 3.1. Available at https://treasury.gov.au/sites/default/files/2020-11/20201117-governmentresponse.pdf.

4 ATO, *Commissioner of Taxation annual report 2019–20*, p. 36. Available at www.ato.gov.au/uploadedFiles/Content/CR/Downloads/Annual_Report_2019-20/annual_report_2019-20.pdf.

5 ATO, *Reactivating inactive client records*. Available at www.ato.gov.au/Tax-professionals/Prepare-and-lodge/In-detail/Reactivating-inactive-client-records/.

6 ATO, *Commissioner of Taxation annual report 2019–2020*, p. 39. Available at www.ato.gov.au/uploadedFiles/Content/CR/Downloads/Annual_Report_2019-20/annual_report_2019-20.pdf.

7 ATO, *The OECD four pillars of compliance*. Available at www.ato.gov.au/General/Tax-and-Corporate-Australia/In-detail/The-OECD-four-pillars-of-compliance/.

8 Ibid, p. 39.

9 ATO, *Commissioner of Taxation annual report 2019–20*, p. 36. Available at www.ato.gov.au/uploadedFiles/Content/CR/Downloads/Annual_Report_2019-20/annual_report_2019-20.pdf.

10 OECD press release, "New Beneficial Ownership Toolkit will help tax administrations tackle tax evasion more effectively", 20 March 2019. Available at www.oecd.org/tax/new-beneficial-ownership-toolkit-will-help-tax-administrations-tackle-tax-evasion-more-effectively.htm.

11 ATO, *Commissioner of Taxation annual report 2019–20*, p. 39. Available at www.ato.gov.au/uploadedFiles/Content/CR/Downloads/Annual_Report_2019-20/annual_report_2019-20.pdf.

12 ATO, *Commissioner of Taxation annual report 2019–20*, p. 62. Available at www.ato.gov.au/uploadedFiles/Content/CR/Downloads/Annual_Report_2019-20/annual_report_2019-20.pdf.

13 This can be seen, for example, in the way in which Australians generally followed restrictions imposed in connection with controlling the COVID-19 pandemic.

14 See the "TR series" of rulings issued prior to 1992.

15 ATO, *Tax, super + you*. Available at www.taxsuperandyou.gov.au/competition.

16 ATO, *Commissioner of Taxation annual report 2019–20*, p. 194. Available at www.ato.gov.au/uploadedFiles/Content/CR/Downloads/Annual_Report_2019-20/annual_report_2019-20.pdf.

17 Estimates vary from as high as 80% to as low as 40%. In its December 2020 report, *Small business counts – December 2020*, the Australian Small Business and Family Enterprise Ombudsman, using ABS data, estimated that the survival rate over four years for non-employee businesses is around 60% (or a failure rate of 40%). This is one of the more conservative estimates. Available at www.asbfeo.gov.au/sites/default/files/2021-11/ASBFEO%20Small%20Business%20Counts%20Dec%202020%20v2_0.pdf.

18 Treasury, *Options for mandatory adoption of electronic invoicing by businesses – November 2020*, p. 9. Available at https://treasury.gov.au/sites/default/files/2020-11/c2020122716.pdf.

19 Determined through calculations by The Tax Institute based on the proportion of revenue officers at national levels compared to population size.

20 See the ATO organisational chart at www.ato.gov.au/uploadedFiles/Content/CR/downloads/n75148_ATO_organisational_structure.pdf.

21 ATO, *Annual report 2019–20*, table 4.13. Available at www.ato.gov.au/uploadedFiles/Content/CR/Downloads/Annual_Report_2019-20/annual_report_2019-20.pdf.

22 ATO, *Taxpayers' charter*. Available at www.ato.gov.au/about-ato/commitments-and-reporting/taxpayers--charter.

23 This would require cooperation with the various states and territories which maintain the registers of births, deaths and marriages. In New Zealand, Inland Revenue Department numbers can be issued as part of the online process of registering a child's birth with the Department of Internal Affairs. As for the other taxpayers, New Zealand's Inland Revenue requires the specific identification information and confirmation of tax residence to prevent identity theft, double-ups and fraudulent behaviours.

The Tax Institute

Noosa Tax Convention

Australia's leading tax getaway is back! 8 technical sessions, 3 workshops, 2 networking functions, 1 perfect location for a working holiday.

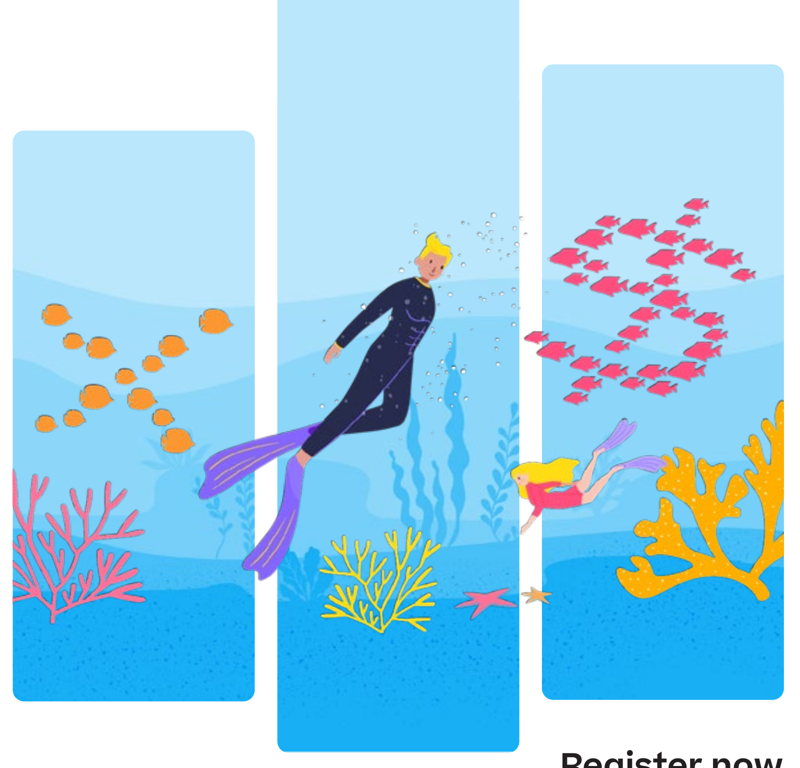
16–18 November 2022

Sofitel Noosa Pacific Resort

12 CPD hours

MEMBERS ONLY

22-030EVT_09/22



Register now
taxinstitute.com.au

Carbon farming: tax issues for primary producers

by Peter Slegers, CTA, Director, Daniel Marateo, Senior Associate, and Jackson Jury, Associate, Tax and Revenue Group, Cowell Clarke

Owners of primary production land are increasingly being approached by carbon credit service companies to participate in carbon abatement projects. For many primary producers, this development represents an opportunity to generate additional cash flow by venturing surplus or marginal parts of their land into projects and/or changing to "greener" agricultural practices in order to qualify for eligible offsets projects. This article highlights some of the significant tax issues for primary producers participating in eligible offsets projects. The article not only addresses the carbon credit tax regime itself, but also some of the ancillary commercial, structuring and planning issues that primary producers are likely to encounter when participating in eligible offsets projects. It can be seen that there are a multitude of issues to be considered by primary producers, and therefore their advisers, when contemplating participating in carbon farming projects.

Background

Owners of primary production land are increasingly being approached by carbon credit service companies to participate in carbon abatement projects. Credits generated from such projects have a ready market in that the Commonwealth will purchase the credits under the existing regulatory regime.

For many primary producers, this development represents an opportunity to generate additional cash flow by venturing surplus or marginal parts of their land into projects and/or changing to "greener" agricultural practices in order to qualify for eligible offsets projects. In addition, on the expectation that the price for carbon credits will increase on a reliable basis over time, increases in the capital value of any primary production land generating such credits might also be anticipated.

This article highlights some of the significant tax issues for primary producers participating in eligible offsets projects in accordance with the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) (CFI Act). The article not only addresses the carbon credit tax regime itself, but also some of the ancillary commercial, structuring and planning issues that primary producers are likely to encounter when participating in eligible offsets projects.

The authors expect these issues to become of increasing significance to primary producers as the market for carbon credits develops and matures over time.

The carbon farming regime

Legal framework

Before reviewing the tax issues, it is first necessary to understand the broad principles of the financial model and regulatory framework. The legislation itself has been around for more than a decade but only in recent years has there been a widespread proliferation of activity in the Australian agribusiness sector.

The regime is primarily governed under the extensive provisions of the CFI Act and the accompanying rules in the *Carbon Credits (Carbon Farming Initiative) Rule 2015* (Cth) (CFI Rules). Its broad hallmarks may be summarised as follows:

- applicants must submit projects to the Clean Energy Regulator (the Regulator) for assessment. The project proposal must provide detailed information to meet the specific requirements of the CFI Act and provide methodology as to precisely how the project will reduce greenhouse gas emissions;
- the entity responsible for, and with the legal right to carry out, an offsets project is known as the project proponent.[1] It is the project proponent's responsibility to submit the application;[2]
- the CFI Act allows the landowner to be a project proponent, but this can also be a third party. It is also possible to have multiple project proponents;[3]
- the project must take the form of an eligible project.[4] However, broadly speaking, all projects have an overarching objective of reducing greenhouse gas emissions by mechanisms of either avoidance or removal of carbon emissions;
- the CFI Act delineates between different types of projects that broadly fall within one of two categories. These are emissions avoidance offsets projects and sequestration offsets projects (the latter commonly referred to as carbon sequestration projects);[5]
- common examples of emissions avoidance projects include the reduction of greenhouse gases by way of livestock management (eg the reduction of cattle emissions by feeding nitrates to beef cattle or the introduction of dietary additives to dairy cows) and

savanna and grassland fire management (eg strategic planned burnings);[6]

- by way of comparison, carbon sequestration projects typically involve reforestation, revegetation, restoring rangelands and protecting or maintaining native forest or vegetation.[7] In essence, these are projects which trap or remove carbon from the atmosphere and store it in plants or in soil;
- if the Regulator approves the offsets project, a declaration is made by the Regulator resulting in the project being deemed as an eligible offsets project.[8] This ultimately results in the project and project proponent qualifying for the generation of carbon credits that may be sold by the registry account holder (see below) to the Commonwealth or third parties;
- the entity that qualifies for credits (ie the project proponent), or wishes to hold credits, must establish an account via the Australian National Registry of Emissions Units (known as a registry account).[9] A registry account allows for the ownership of credits to be tracked and recorded in the public register;
- the main form of credit relevant to Australian farmers is the ACCU or Australian Carbon Credit Unit. In broad terms, one ACCU is able to be earned for each tonne of CO_2 equivalent net abatement that is avoided or stored by an eligible offsets project;[10]
- each project has a set period of time under which it is able to generate ACCUs over its lifespan. This period is referred to as the crediting period of the project.[11] Typically, the crediting period begins from the date the project is registered, but it may also be another nominated start date, being no later than 18 months after a project is declared eligible;[12]
- the crediting period for a carbon sequestration project is typically 25 years, but can be 15 years for certain projects.[13] The crediting period for an emissions avoidance project is seven years but can be 25 years for certain projects;[14]
- ACCUs are generated each time the project proponent applies for and is issued with a non-transferrable certificate of entitlement by the Regulator.[15] A certificate of entitlement is granted to the project proponent by submitting an offsets report to the Regulator in relation to the carbon sequestration or emissions avoidance achieved by the project.[16] The offsets report is submitted at the end of each reporting period, of which there will be multiple over the entirety of the project's crediting period.[17] The ACCUs are thereafter credited to the nominated registry account for the project;
- the applicable reporting period will depend on the type of eligible project and the activities conducted. For sequestration projects, a reporting period can be between six months and five years,[18] and for an emissions avoidance project between six months and two years.[19] Each subsequent reporting period commences immediately after the end of the prior reporting period;
- for carbon sequestration projects, it is worth noting that such projects must be carried on for a set period of time (known as the permanence period), being either 25 or 100 years.[20] The period chosen will impact on the amount of ACCUs generated under the project. For example, a 25-year project will result in a negative discount factor of 20% being applied against any ACCUs generated, whereas a 100-year project will have no discount factor.[21] By comparison, emissions avoidance projects do not have a permanence period;
- ACCUs qualify as personal property[22] and, subject to the CFI Act, can be assigned. This facilitates the ability to buy, sell and deal in ACCUs on the open market or sell ACCUs back to the Commonwealth under a carbon abatement contract;[23] and
- a security interest may also be granted over an ACCU and it can be held on behalf of others under a trust or similar type of arrangement regarding beneficial ownership.[24]

It can be seen from the above summary that the CFI Act provides a framework for primary production landowners to derive extra income from their land by participating in an eligible offsets project and from the generation and sale of ACCUs.

Carbon farming contracts

Due to the technical expertise required in submitting and managing an offsets project, the projects are often undertaken by specialist companies, generally referred to as carbon service providers (service providers).

A service provider may also be an aggregator, being an entity that brings multiple sources of carbon abatement together either by way of aggregating projects (ie into a single registered project) or aggregating contracts.

Service providers will often approach landowners with a view to entering into a written contract, here referred to as a carbon farming contract.

The carbon farming contract will set out the basis for the landowner and the service provider to work together in initiating, developing and eventually submitting an offsets project for it to become registered as an eligible offsets project and generate ACCUs.

Typically, a carbon farming contract will include details such as:

- delineating the precise area of the land to be the subject of the offsets project;
- identifying and appointing the project proponent(s);
- placing obligations on the landowner to do all things reasonably necessary and execute all such agreements as are required so that the project can be carried out and maintained as an eligible offsets project;
- allowing the service provider access to the project area of the land for the purposes of all feasibility studies and later carrying out the project, including internal audits by the staff or agents of the service provider;

- agreeing on who is to open the registry account and who is to be the holder of ACCUs generated from the project;
- placing obligations on the service provider to develop budgets, projections and all financial reporting data associated with the project;
- granting ownership of any carbon rights by the landowner to the service provider either exclusively or on some shared basis;
- external audit obligations; and
- agreeing on the basis of the sharing of ACCUs generated or proceeds from their sale.

It should be appreciated that there is a high degree of flexibility in how these issues may be negotiated and agreed. A key issue for advisers will be to ensure that they are on the "front foot" when their clients are approached to enter into such contracts so that the issues and terms of the contract are carefully considered before execution.

Commercial and legal issues for landowners

Aside from the tax law issues (explored below), there are a number of commercial and risk management issues that landowners will need to consider when entering into a carbon farming contract.

These issues might include all or any of the following:

- Does the landowner have sufficient land (normally areas that are not otherwise used productively in its main primary production activities) that could be used in an offsets project so as to ensure that the project is viable?
- What precise obligations will be placed on the landowner and, if agreeable, are there any practical impediments to carrying them out?
- What are the likely costs to the landowner or its associated entities in carrying out the project and to what extent can they be tax-effective (see further below)?
- What is the term of the project and what termination rights exist during the term?
- What are the payment terms for the landowner (ie form, frequency and quantum of expected payments)?
- Has disclosure been made to the landowner's financier? Agreeing to an offsets project will normally require mortgagee consent and so, assuming the land is subject to bank security, approval will need to be sought;
- ACCUs are a financial product and therefore any dealing in them may require certain parties to hold an Australian financial services licence (AFSL) or will otherwise require compliance with the financial licensing provisions of the *Corporations Act 2001* (Cth). Are these requirements met?
- Will an existing offsets project increase the value of the land on its sale? Alternatively, could the ongoing obligations to the service provider and the Commonwealth act to potentially decrease the sale price?
- What precise structuring issues does the primary producer need to address?

As to the last issue, it is worth emphasising that, as carbon farming agreements are normally a contract between the service provider and the landowning entity, it is necessary to consider the structuring implications. It is commonplace with many agribusiness structures for the landowning entity to be separate from the operating entity.[25] Particular strategies need to be developed to ensure that the right entity bears the expenditure and derives the income from the project.

It should be appreciated that the above issues are merely a summary of the typical issues that arise in practice. Specialist advice relevant to the particular circumstances should be sought on any given project.

Taxation issues

Tax regime for ACCUs

Division 420 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97) contains a specific taxation regime that applies to the acquisition, holding and disposal of registered emissions units, including ACCUs. "Registered emissions units" are defined as ACCUs and Kyoto units for which there is an entry in a registry account.[26] For convenience, only ACCUs are referred to here.

Before addressing the operation of Div 420, it is important to bear in mind that not all landowners participating in an offsets project will be subject to the taxation regime under Div 420. In particular, Div 420 only applies to taxpayers that "hold" registered emissions units. A taxpayer will only "hold" an ACCU if it is the entity in whose registry account there is an entry for the ACCU (subject to the nomination provisions discussed below).[27]

Many carbon farming agreements will restrict this role to the service provider, who will hold the registry account and will acquire, hold and sell ACCUs in its own right – while agreeing to share the proceeds with the landowner. Such income would, in the authors' view, simply be treated as ordinary income rather than income generated from the disposal of ACCUs that is taxed under Div 420.

The overarching policy intent of Div 420 is to produce the same income tax treatment for ACCUs irrespective of the purpose of acquiring or holding the ACCUs.[28] In other words, the notion of holding ACCUs as trading stock or otherwise on revenue or capital account is not directly relevant to the taxation treatment of dealing in ACCUs held by a taxpayer.

The principal features of Div 420 may be summarised as follows:

- a taxpayer can deduct expenditure that it incurs in becoming the holder of an ACCU (but see below as to a significant limitation on this specific deduction insofar as issues of ACCUs are concerned), as well as for expenditure incurred in ceasing to hold an ACCU;[29]
- a taxpayer's assessable income in the income year in which it ceases to hold an ACCU includes any amount the taxpayer is entitled to receive because it ceases to hold the ACCU;[30]

- at year-end, the taxpayer must compare the value of all ACCUs held at the start of the income year against the value of all ACCUs held at the end of the income year. To the extent that there is a difference in such values, any excess at the end of the year over the start of the year will be assessable to the taxpayer, while any deficiency will be deductible.[31] This effectively reverses the deduction for ACCUs until the year of sale;
- subject to the comments further below, the taxpayer can undertake the abovementioned valuation at the end of an income year by applying one of three available methods, namely, the first in, first out (FIFO) cost method, the actual cost method or the market value method;[32]
- the value attributed to an ACCU held at the start of an income year must be the same amount adopted at the end of the previous income year (or nil if the ACCU was not taken into account under Div 420 at the end of the previous income year);[33] and
- Div 420 provides an exclusive code in that a taxpayer is precluded from deducting costs associated in becoming the holder of an ACCU (except for issue costs – see below) under any provision outside of Div 420 and is also not assessed on income derived from ceasing to hold an ACCU under any provision outside of Div 420.[34] Further, registered emissions units are specifically carved out from the definition of "trading stock" and hence a Div 70 ITAA97 analysis will not apply in relation to ACCUs.[35]

> "… the tax treatment of dealing in ACCUs is analogous to the tax treatment of trading stock, with some important differences."

It may be seen from the above outline that the overall taxation treatment of dealing in ACCUs is somewhat analogous to the taxation treatment of trading stock. There are, however, some important differences. For instance:

- the methods for choosing how to value ACCUs (ie FIFO cost, actual cost or market value) and the ability to choose those methods differ considerably from a trading stock analysis under Div 70. By way of example, taxpayers that commence to hold ACCUs for the first time in an income year may choose any of the above methods to value the ACCUs at the end of the income year. However, if no choice is made, the FIFO cost method applies by default;[36]
- the taxpayer may subsequently choose one of the above methods in later income years subject to the proviso that, if no choice is made, the value of the ACCU held at the end of the current income year is worked out using the same method that applied to the most recent income year at the end of which the taxpayer owned ACCUs;[37]
- this choice of method is also subject to the proviso that the taxpayer is precluded from making a choice for a current income year unless the same method applied for each of the four most recent income years at the end of which the taxpayer held ACCUs and this method as previously applied is different from the method to which the taxpayer's choice for the current income year relates.[38] Taxpayers are also precluded from choosing to apply the actual cost method for an income year if the FIFO cost method applied in the most recent income year at the end of which the taxpayer held ACCUs.[39] Similar restrictions on the choice of method do not arise under Div 70;
- normally, the costs associated with acquiring trading stock are deductible, whether on revenue or capital account.[40] While Div 420 provides a specific (and exclusive) deduction for costs incurred by taxpayers in becoming a holder of an ACCU (ie regardless of whether the expenditure is properly seen as being on revenue or capital account), the specific deduction for *issue* costs is expressly limited to expenditure incurred in preparing or lodging an application for a certificate of entitlement or an offsets report.[41] This is a significant issue for primary producers as it means that all such other costs associated with being issued with an ACCU (as opposed to acquiring an existing ACCU) must fall within the general deduction provision in s 8-1 ITAA97 if a deduction is to be claimed. It might be expected that much of the taxpayer's issue costs in this regard would be capital in nature and therefore requires consideration of potential deductions available under the capital allowance regime (including primary production write-offs referred to below or the blackhole expenditure provisions);[42]
- the choice of valuation methods must be made before the taxpayer lodges its income tax return for the income year for which the choice is made.[43] The choice is irrevocable.[44] It is therefore critical that careful consideration is given to the choice of method before lodging the taxpayer's income tax return as it will not be permissible to choose to adopt a different method for the year at a later time;
- there are a range of provisions in Div 420 addressing circumstances in which registered emissions units are transferred between foreign accounts and Australian registry accounts. A discussion of the operation of these provisions is outside the scope of this article. However, these provisions will need to be considered in the event that the transaction involves foreign registry accounts or non-resident holders of ACCUs; and
- while there are various forms of roll-over relief aimed at preventing assessable income arising on notional disposals when transferring trading stock to associates, no such roll-over relief is available under Div 420.

Finally, it should be emphasised that, consistent with the object of Div 420, there is no requirement that the taxpayer is carrying on a business in order to fall within the taxing regime under Div 420. Trading stock, on the other hand, by definition requires that stock is produced, manufactured or acquired and held for purposes of manufacture, sale or exchange "in the ordinary course of a business".[45]

Primary production income

At present, income from the sale of ACCUs is unlikely to qualify as primary production income on the basis that it would not constitute income derived from, or resulting from, the taxpayer carrying on a primary production business.[46] In particular, the activities associated with an eligible offsets project would not usually fall within the definition of "primary production business" within the specific meaning ascribed to that phrase under s 995-1 ITAA97.

A question arises as to whether the derivation of income by way of a share in the proceeds from a carbon farming project (as distinct from income from the sale of ACCUs held by the taxpayer itself) could constitute primary production income. Such an argument would necessarily proceed on the basis that the carbon farming income is merely an incident of carrying on the primary production business rather than being derived from a separate activity of substance (or a "virtually separate business" to adopt the words of the Commissioner in IT 210).[47]

That said, the Commissioner has traditionally adopted a strict interpretation of when income is derived "from" a given primary production business, as distinct from income derived from a separate project conducted by the same taxpayer on the same land.[48]

The implications of carbon farming income not constituting primary production income include, among other things, that:

- income from ACCUs cannot typically be subject to the primary production averaging provisions.[49] Moreover, if as a result of the eligible offsets project, the taxpayer's primary production income is expected to decrease on a continual or permanent basis, the taxpayer may wish to consider opting out of the averaging system given that it is likely that future assessments will be subject to increasing tax adjustments under the averaging regime; and
- income from ACCUs may potentially limit or deny primary producers access to farm management deposits where the non-primary production income exceeds certain thresholds (usually $100,000 of taxable non-primary production income).[50] The timing of the derivation of assessable non-primary production income and the incurrence of non-primary production deductions may become important in this regard.

For the above reasons alone, thought should be given to acquiring ACCUs in separate entities from the main primary production operating entity.

On 21 March 2022, a joint media release was issued by the then Minister for Agriculture and Northern Australia (the Hon. David Littleproud MP) and the then Assistant Treasurer (the Hon. Michael Sukkar MP). The release announced that the former Coalition Government would implement measures to allow the sale of ACCUs by primary producers to be treated as primary production income. This announcement was then supplemented in the 2022–23 federal Budget papers.[51] At the time of writing, the Albanese Labor Government has made no announcement on whether it proposes to adopt this measure.

Even if adopted, there are some real issues as to how far such legislation will go in addressing these issues. The Budget announcement only deals with treating income from the sale of ACCUs generated from "on-farm" activities as primary production income for the purposes of the farm management deposit and income averaging schemes. For instance, the following questions remain unanswered:

- Would the new measure treat primary producers' share of income derived from the sale of ACCUs by a service provider as primary production income?
- Would the treatment of income derived by primary producers from eligible offsets projects overcome the issues that will potentially arise under the non-commercial loss rules where income from such projects exceeds $250,000 per individual (see further below)?
- Would any capital expenditure on primary production depreciating assets that relate to the eligible offsets project become subject to the accelerated deductions under Subdivs 40-F and 40-G ITAA97 (see further below)?

Based on the announcements to date referring only to the farm management deposit and primary production income averaging schemes, the answer to each of the above questions appears to be "no". Interestingly, the Budget announcement does suggest that the taxing point of ACCUs for "eligible" primary producers would also be amended such that primary producers would not need to undertake the annual tax accounting for ACCUs at year-end.

The breadth of any new legislation — assuming that the Albanese Government sees fit to introduce the measures announced by the Coalition — will certainly require close scrutiny.

Project expenditure and primary production write-offs

Significant capital expenditure may often be required to ensure that a project qualifies as an eligible offsets project and can be registered with the Regulator as such.

Primary producers have long had access to a range of capital write-offs that allow for accelerated deductions associated with effecting improvements to land used in carrying on a primary production business. These are generally found in Subdivs 40-F and 40-G ITAA97 and include:

- water facilities;
- fodder storage assets;
- horticultural plants;
- fencing assets; and
- landcare operations.

All of these deductions require that the capital expenditure incurred in relation to the facility or asset must have been incurred primarily and principally for use in carrying on a

primary production business on land in Australia.[52] In the authors' view, and in light of the matters raised above, this is potentially an issue in making such claims in furtherance of an eligible offsets project. The Commissioner adopts a similar view in (now withdrawn) ATO ID 2004/634 that mallee trees that were planted and cultivated for the purposes of selling the carbon credits generated under a state government scheme in New South Wales did not qualify for a deduction under Subdiv 40-F as horticultural plants. Care is therefore urged in this area.

Capital allowance deductions for depreciating assets based on the effective life of the asset under Div 40 ITAA97 may be the safer course for the time being. Of course, to qualify under Div 40, the asset must meet the definition of a depreciating asset by being an asset that has a limited effective life and can be reasonably expected to decline in value over the time it is used.[53] It should be noted in this regard that "land" cannot be a depreciating asset. However, improvements to land can qualify.[54] This is of course subject to the same expenditure being eligible for capital works deductions for buildings or structures under Div 43 ITAA97 and therefore potential capital works deductions should also be considered.

Structuring issues: entities and project

As noted already, a carbon farming contract will normally be entered into between a service provider's entity or entities and the landowning entity.

Some contracts of sufficient scale may also involve the establishment of a special purpose vehicle for the purposes of acquiring, marketing and selling ACCUs in which the service provider and the landowning entities take up equity.

As already noted, where the primary producer's landowning entity is separate from its operating entity, it may be necessary for the operating entity to also be party to the contract. Alternatively, there should at least be a mechanism in place for the operating entity to act as the landowning entity's agent in carrying out its various obligations under the contract. This is because, in a primary production context, many landowning entities will not necessarily derive any income from the farm operations and will simply make their land available to an operating entity for no rent or licence fee. The landowning entity may not even have a bank account. Moreover, even if rent or some fee is paid to the landowning entity by the operating entity, it may not be the optimal entity in which to accrue income from eligible offsets projects.

A further issue arises where the service provider and landowner have agreed for the landowner to hold a registry account and acquire, hold and sell ACCUs. In these cases, it may be worthwhile for the operating entity to appoint the landowning entity as a nominee under s 420-12 ITAA97 for the purposes of determining the income tax implications of dealing in the ACCUs for Div 420 purposes. In particular, this provision allows the taxation treatment under Div 420 to take place at the operating entity level.

Active asset test

An issue arises as to whether land that contains an eligible offsets project and is also used for primary production activities fails the active asset test. This could be an issue where the land is to be sold, crystallising a capital gain for which small business CGT concessions[55] might otherwise be available. It is also potentially an issue where land might be transferred as part of a restructure under the small business restructure roll-over.[56]

Broadly, s 152-40 ITAA97 provides that an asset will be an active asset of a taxpayer where it is used or held ready for use in the course of carrying on a business that is carried on by the taxpayer, an entity connected with the taxpayer or an affiliate of the taxpayer (positive limb). An asset will not, however, be an active asset where it is mainly used to derive interest, an annuity, rent, royalties or foreign exchange gains (negative limb).[57]

In the authors' view, the mere existence of an eligible offsets project on part of the land that is otherwise used for primary production activities should not necessarily compromise the active asset test.

Arguably, the positive limb should be satisfied on the basis that there is no need for the land to be used wholly or exclusively in the primary production business or even mainly or predominantly in that business. Instead, it need only be used in the course of conducting a business, which is a lesser threshold.[58]

Moreover, the negative limb may raise issues where the ACCU income represents a passive income stream for the primary producer. To this end, a question arises as to whether income generated from ACCUs falls within the general description of the types of passive income under the negative limb in s 152-40(4)(e). If so, will this mean that land that is mainly used to derive income from ACCUs will fail the active asset test?

Arguably, income generated from ACCUs does not meet the description of any of the specific items in s 152-40(4)(e). However, caution is urged in this regard if the income from ACCUs is passive in nature.

Non-commercial losses

Another issue that should not be overlooked is whether losses generated from primary production activities are able to be applied against income generated by the primary producer from eligible offsets projects.

It can be expected that the non-commercial loss measures in Div 35 ITAA97 will have a role to play here. These measures prevent individuals (including individual partners in partnerships) from applying losses from business activities (including primary production) against other income unless various thresholds or tests are satisfied.

Notably, the non-commercial loss rules will not apply to deny the deduction of the primary production losses if the taxpayer's assessable income from other sources (eg income from ACCUs) was less than $40,000 (excluding net capital gains) for an income year.[59] If the other income

meets or exceeds this $40,000 threshold, it would be necessary to satisfy one of the various tests applicable under the non-commercial loss rules in order for the taxpayer to validly deduct the loss.

If, however, the income from ACCUs (or other non-primary production sources) was $250,000 or more, such tests would not be applicable and a deduction for the primary production loss would be denied (and must be quarantined) unless the taxpayer obtains the favourable exercise of the Commissioner's discretion not to apply the non-commercial loss rules.

It should be emphasised that the non-commercial loss measures only apply to individuals. Therefore, if the entity generating the primary production income is a trust or company, it will have its own carry-forward loss rules and will not be subject to the non-commercial loss measures. This may be of particular concern in circumstances where the business continuity test is sought to be relied on for corporate structures and the ACCU generating activities were not previously carried on by the company in the loss years.

Goods and services tax

The supply of an eligible emissions unit (which includes an ACCU) is GST-free.[60]

This GST-free treatment, however, only applies in relation to the supply of an ACCU itself. This is to be distinguished from the supply of land on which there is an eligible offsets project or any supplies that might be made by the primary producer under the carbon farming contract.

Care should be taken in this regard as there may be taxable supplies in the nature of licences or rights granted to the service provider under the carbon farming contract. Appropriate GST clauses should be included in the carbon farming contract to protect the landowner's interests.

When land being sold contains an eligible offsets project, a question arises as to whether this impacts on the GST treatment. Depending on the scale of the eligible offsets project, there may be issues as to whether the GST-free farm land exemption still applies to the land in question.[61]

Alternatively, land sold that is subject to an eligible offsets project may be regarded as the GST-free supply of a going concern[62] given that an eligible offsets project generating ACCUs is likely to be viewed as an enterprise (bearing in mind that the definition of an "enterprise" for GST purposes is wider than the definition of a "business").

Credit where credit's due?

It may be seen that there are a multitude of issues to be considered when primary producers are contemplating participating in carbon farming projects.

For landowners that have land that is appropriate for eligible offsets projects, the good news is that the potential exists to generate supplementary income. Extra liquidity in the group generated from such income may also assist primary producers with greater flexibility in determining and implementing their precise succession plans.

In the authors' view, these opportunities will only be enhanced if the Albanese Government sees fit to progress the proposal announced by the former Coalition Government to treat income generated by primary producers from eligible offsets projects as primary production income. The breadth of any such relief will be of critical significance to primary producers and their tax advisers.

Peter Slegers, CTA
Director
Tax and Revenue Group, Cowell Clarke

Daniel Marateo
Senior Associate
Tax and Revenue Group, Cowell Clarke

Jackson Jury
Associate
Tax and Revenue Group, Cowell Clarke

References

1 See definition of "project proponent" in s 5 CFI Act.
2 S 27(4)(e) CFI Act.
3 S 135 CFI Act.
4 Ss 22 and 27 CFI Act.
5 See definition of "offsets project" in s 5 CFI Act. See also ss 22, 53, 53A and 54 CFI Act.
6 See definition of "agricultural emissions avoidance project" in s 5 CFI Act.
7 S 54 CFI Act.
8 S 27 CFI Act.
9 For the purposes of the *Australian National Registry of Emissions Units Act 2011* (Cth).
10 Ss 16(2) and 18(2) CFI Act.
11 Pt 5 CFI Act.
12 S 69(4) and (5) CFI Act.
13 S 69(2) CFI Act.
14 S 69(3) CFI Act.
15 Ss 11 and 20 CFI Act.
16 Ss 12, 13 and 15 CFI Act.
17 S 12 CFI Act.
18 S 76(1)(c) and (d) CFI Act.
19 S 76(1)(c) and (e) CFI Act.
20 Ss 23(1)(g) and 27(3)(e) and (f) CFI Act.
21 S 16(2) CFI Act.
22 S 150 CFI Act.
23 Ss 150 to 153 CFI Act; Pt 2A CFI Rules.
24 Ss 157A and 158 CFI Act.
25 See P Slegers, J Pascale and D Marateo, *Australian agribusiness advisers' guide*, Cowell Clarke, February 2022, ch 2.
26 S 420-10 ITAA97.
27 S 420-12(1) ITAA97.
28 S 420-5 ITAA97.
29 Ss 420-15 and 420-42 ITAA97.
30 S 420-25 ITAA97.
31 S 420-45 ITAA97.

32 S 420-51 ITAA97.

33 S 420-50 ITAA97.

34 Ss 420-65 and 420-70 ITAA97. This includes any capital gains (or capital losses) that a taxpayer makes from an ACCU, which are disregarded under s 118-15 ITAA97.

35 S 70-12 ITAA97.

36 S 420-55 ITAA97.

37 S 420-57(1) to (3) ITAA97.

38 S 420-57(5) ITAA97.

39 S 420-57(6) ITAA97.

40 Under s 8-1 ITAA97, noting that s 70-25 ITAA97 provides that an outgoing incurred in connection with acquiring an item of trading stock is expressly precluded from being an outgoing of capital or of a capital nature under s 70-25 (and hence will not fall within the negative limb under s 8-1(2)(a)).

41 S 420-15(4) ITAA97.

42 Div 40 ITAA97.

43 Ss 420-55(4) and 420-57(7) ITAA97.

44 Ss 420-55(5) and 420-57(8) ITAA97.

45 S 70-10 ITAA97.

46 The Commissioner of Taxation has adopted this view in a number of private binding rulings. See, for instance, PBR 1051237204348, PBR 1013032138063 and PBR 1012927800595.

47 See also the Commissioner's views as expressed in IT 225.

48 See, in particular, PBR 1051237204348 and TD 2013/2.

49 Under Div 392 ITAA97.

50 Under Div 393 ITAA97.

51 Australian Government, Budget 2022–23, "Primary producers – increasing concessional tax treatment for carbon abatement and biodiversity stewardship income", *Budget paper no. 2*, p 26.

52 S 40-525 ITAA97.

53 S 40-30(1) ITAA97.

54 S 40-30(1)(a) and (3) ITAA97.

55 Div 152 ITAA97.

56 Subdiv 328-G ITAA97.

57 S 152-40(4)(e) ITAA97

58 *Eichmann v FCT* [2020] FCAFC 155.

59 S 35-10(4) ITAA97.

60 S 38-590 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

61 Under Subdiv 38-O of the *A New Tax System (Goods and Services Tax) Act 1999*.

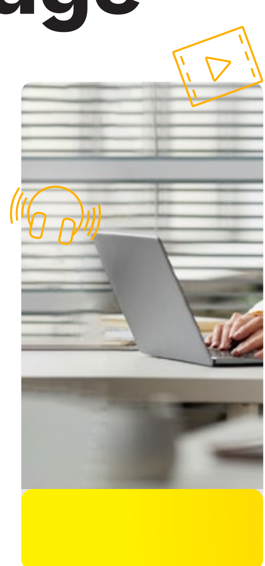
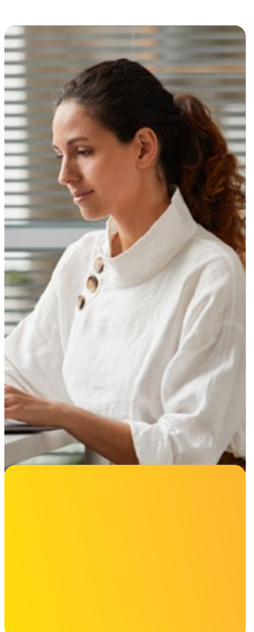
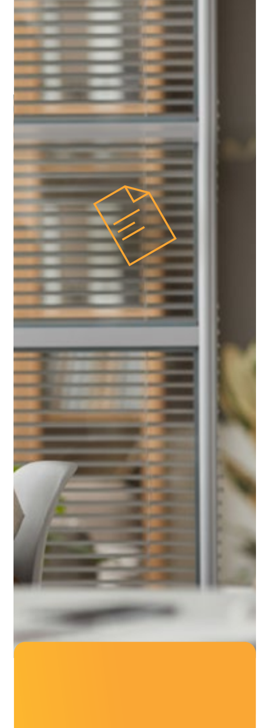
62 Under Subdiv 38-J of the *A New Tax System (Goods and Services Tax) Act 1999*.

The Tax Institute

Tax Knowledge Exchange

Your comprehensive online source of knowledge, updates and insights from the best minds in tax

Find out more
taxinstitute.com.au/tke

22-007RES_03/22

UK pension transfers: part 1

by Jemma Sanderson, CTA, Director, Cooper Partners Financial Services

Many Australians have substantial pension benefits in overseas jurisdictions as a result of the ease with which people, who may have been born overseas, were (and once again are) able to travel and obtain work in Australia. This is particularly the case with respect to United Kingdom expatriates. The value of some of these pension accounts has been quite high when compared to an ongoing pension entitlement (for defined benefit schemes), or where the money has been invested over a period of time. With the attractiveness of now retiring in Australia, it is desirable to transfer these funds to Australia. However, there are some complex interactions between the two jurisdictions to be aware of to ensure that taxpayers do not inadvertently pay tax at prohibitive rates in one or both of the jurisdictions.

Introduction

For our global workforce, and particularly those people who have been trapped in Australia or overseas due to COVID-19, their superannuation position across multiple jurisdictions has become an area of increased focus.

International pension/superannuation systems are not all created equal and may have different tax considerations. This article will provide some insight and guidance regarding transfers of UK pension benefits to Australia, particularly for those individuals who desire to transfer their benefits to Australia (once they have settled here for good) for the following reasons:

- to have control/flexibility over their investments;
- to mitigate the foreign exchange risks;
- to have an asset that can be left to their beneficiaries when they die; and
- to obtain a more efficient tax position.

Australian taxation of foreign pensions

It is important to understand the tax position in Australia for the following types of benefits received from a UK pension where the foreign superannuation fund provisions as outlined in the *Income Tax Assessment Act 1997* (Cth) (ITAA97) are applicable:

- pension payments; and
- lump sum payments.

Pension payments

Pension payments from a UK pension account for an Australian resident are included as assessable income in the individual's personal tax return in Australia and are taxed at their marginal tax rate. This is pursuant to ss 6(5), 6(10) and 10(5) ITAA97.[1]

An individual may be eligible for an annual deductible amount with regard to a pension interest, based on the level of personal contributions made to the account. The individual can apply to the ATO for the calculation of this "undeducted purchase price" by using form NAT 16543.

Where the individual had a defined benefit pension in the foreign jurisdiction, it is unlikely that they will be eligible for the undeducted purchase price.

Lump sum payments

Within six months of residency

Where an individual receives a lump sum payment from a foreign superannuation fund within six months of becoming an Australian resident, it is not assessable income and is not exempt income. Section 305-60 ITAA97 states:

> "A superannuation lump sum you receive from a foreign superannuation fund is not assessable income and is not exempt income if:
>
> (a) you receive it within 6 months after you become an Australian resident; and
>
> (b) it relates only to a period:
>
> (i) when you were not an Australian resident; or
>
> (ii) starting after you became an Australian resident and ending before you receive the payment; and
>
> (c) it does not exceed the amount in the fund that was vested in you when you received the payment."

In the author's experience, it is almost impossible for the individual to receive the benefits in their own name from the UK scheme without being subject to UK withholding tax and other considerations from the foreign scheme itself.

After six months of residency

Section 305-70 ITAA97 outlines how a lump sum benefit from a foreign superannuation fund is taxed when it is received after six months of residency:

> "(1) This section applies to a superannuation lump sum you receive from a foreign superannuation fund if:
>
> (a) you are an Australian resident when you receive the lump sum; and
>
> (b) sections 305-60 and 305-65 *do not apply to the lump sum.*
>
> …

(2) Include in your assessable income so much of the lump sum (excluding any amount mentioned in subsection (4)) as equals:

(a) your applicable fund earnings (worked out under section 305-75); or

(b) if you have made a choice under section 305-80 – your applicable fund earnings, less the amount covered by the choice.

…

(3) The remainder of the lump sum is not assessable income and is not exempt income.

…

(4) Any part of the lump sum that is paid into another foreign superannuation fund is not assessable income and is not exempt income."

Where the payment is classified as a lump sum for Australian tax purposes under s 305-70 ITAA97, the applicable fund earnings (AFE) component (s 305-75 ITAA97) will be included in the individual's assessable income and taxed at their marginal tax rate.

Where certain conditions are met, and the lump sum is paid directly to an Australian superannuation fund, the AFE can be taxed at the fund's tax rate of 15%.

Applicable fund earnings

The AFE is a function of:

- the growth on the benefit between the date of Australian residency (or the date of the last foreign fund transfer) and the date of payment;
- any contributions that were made over the period from the date of residency (or the date of the last foreign transfer) to the date of payment; and
- the number of days that the individual has been an Australian resident as a proportion of the total days since first becoming an Australian resident/date of last payment.

Section 305-75 ITAA97 provides the definition of "applicable fund earnings", which also includes the concept of "previously exempt fund earnings", whereby the AFE that may have been crystallised within a scheme but is carried forward as the scheme was rolled over from one foreign fund to another fund is also recognised.

"(1) This section applies if you need to work out an amount (your ***applicable fund earnings***) in relation to a superannuation lump sum to which section 305-70 applies that you receive from a foreign superannuation fund.

If you were an Australian resident at all times

(2) If you were an Australian resident at all times during the period to which the lump sum relates, the amount of your ***applicable fund earnings*** is the amount (not less than zero) worked out as follows:

(a) work out the total of the following amounts:

(i) the part of the lump sum that is attributable to contributions made by or in respect of you on or after the day when you became a member of the fund (the ***start day***);

(ii) the part of the lump sum (if any) that is attributable to amounts transferred into the fund from any other foreign superannuation fund during the period;

(b) subtract that total amount from the amount in the fund that was vested in you when the lump sum was paid (before any deduction for foreign income tax);

(c) add the total of all your previously exempt fund earnings (if any) covered by subsections (5) and (6).

If you were not an Australian resident at all times

(3) If you become an Australian resident after the start of the period to which the lump sum relates (but before you received it) the amount of your ***applicable fund earnings*** is the amount (not less than zero) worked out as follows:

(a) work out the total of the following amounts:

(i) the amount in the fund that was vested in you just before the day (the ***start day***) you first became an Australian resident during the period;

(ii) the part of the payment that is attributable to contributions to the fund made by or in respect of you during the remainder of the period;

(iii) the part of the payment (if any) that is attributable to amounts transferred into the fund from any other foreign superannuation fund during the remainder of the period;

(b) subtract that total amount from the amount in the fund that was vested in you when the lump sum was paid (before any deduction for foreign income tax);

(c) multiply the resulting amount by the proportion of the total days during the period when you were an Australian resident;

(d) add the total of all previously exempt fund earnings (if any) covered by subsections (5) and (6).

Previous lump sums from the fund

(4) If the lump sum is not the first lump sum from the fund you have received to which this section applies, for subsections (2) and (3) the ***start day*** is the day after you received the most recent such lump sum.

Previously exempt fund earnings

(5) You have an amount of ***previously exempt fund earnings*** in respect of the lump sum if:

(a) part or all of the amount in the fund that was vested in you when the lump sum was paid (before any deduction for foreign income tax) is attributable to the amount; and

(b) the amount is attributable to a payment received from a foreign superannuation fund; and

(c) the amount would have been included in your assessable income under subsection 305-70(2) by the application of this section, but for the payment having been received by another foreign superannuation fund.

(6) The amount of your ***previously exempt fund earnings*** is the amount mentioned in paragraph (5)(c) (disregarding the addition of previously exempt fund earnings under subsection (2) or (3) of this section)."

AFE of a partial payment

A common misconception experienced is that the calculation of the AFE that may apply to a partial transfer/payment from a foreign superannuation fund is proportionate.

For example, 20% of a £400,000 UK benefit represents the AFE, and therefore, if £100,000 is transferred, the AFE on that transfer will be 20%, or £20,000.

However, the calculation of the AFE is uncontentious in this regard, ie the value of the lump sum less the amount vested at the date of residency, less any contributions made to the foreign fund. There is no consideration in this calculation for a proportionate attribution of AFE — it attaches to a lump sum paid such that the first part of any lump sum paid would comprise the AFE.

Therefore, in the above example, the AFE on a payment of £100,000 of a £400,000 benefit would not be £20,000; rather, it would be £80,000, being the whole AFE on the £400,000 benefit.

This can be a bit of a shock to some clients who may be comfortable paying tax in Australia on the £20,000, but certainly not the £80,000.

This was queried with the Commissioner in ATO ID 2012/48, where the question was asked whether a proportionate approach is taken with respect to the calculation of AFE. As stated in ATO ID 2012/48:

"It is the Commissioner's view that where an individual is paid a superannuation lump sum that represents only a part of the amount vested in them at the time of payment, there is no basis for applying a proportionate approach in working out the 'applicable fund earnings'.

Having regard to the facts, the method requires the following amounts to be determined:

- the amount in the fund vested in the person just before the day they first became an Australian resident (the start day) (subparagraph 305-75(3)(a)(i) of the ITAA 1997)
- the part of the payment attributable to contributions to the fund made by or in respect of the person from the start day (subparagraph 305-75(3)(a)(ii) of the ITAA 1997)
- the amount in the fund vested in the person when the lump sum was paid (before any deduction for foreign income tax) (paragraph 305-75(3)(b) of the ITAA 1997).

Paragraph 305-75(3)(b) of the ITAA 1997 clearly requires the total amount that was vested in the individual when the lump sum was paid to be used in the calculation of the applicable fund earnings.

The sum of the amounts specified in subparagraphs 305-75(3)(a)(i) and 305-75(3)(a)(ii) of the ITAA 1997 are then subtracted from the amount referred to in paragraph 305-75(3)(b) of the ITAA 1997 as part of the calculation. This amount is multiplied by the proportion of the total number of days the person was an Australian resident during the period from the start day to the day the lump sum is paid (see ATO Interpretative Decision ATO ID 2009/124 *Lump sums received from superannuation funds by Australian residents: relevant periods under subsection 305-75(3) of the ITAA 1997*). In this case, that proportion will be 1. The result is the individual's 'applicable fund earnings'.

However, the amount included in assessable income cannot exceed the amount of the lump sum as a result of subsection 305-70(2) of the ITAA 1997. Subsection 305-70(2) of the ITAA 1997 states that only so much of the lump sum as equals the 'applicable fund earnings' is included in the assessable income. Therefore, the assessable income will be limited to the amount of the lump sum in any case where the lump sum is less than the applicable fund earnings."

Exceptions: where AFE is proportionate

In ATO ID 2012/49, notwithstanding the above conclusion in ATO ID 2012/48, there are circumstances where the proportionate approach is applicable, and that is where a superannuation lump sum is paid from a foreign superannuation fund at the same time as an annuity is commenced.

"It is the Commissioner's view that where an individual commences an annuity from the foreign superannuation fund at the same time as the superannuation lump sum is paid from the fund, subsection 305-75(3) of the ITAA 1997 is applied having regard only to the individual's lump sum entitlement. That is, regard is had only to so much of each of the relevant vested amounts that was, at the relevant times, payable as a lump sum. The part of the vested amount that relates to the annuity must be disregarded.

For example, if the rules of the foreign superannuation fund require the individual to be paid an annuity from the fund but allow the individual to choose, as in this case, to receive a superannuation lump sum of one-third of the vested amount, subsection 305-75(3) of the ITAA 1997 is applied on a proportionate basis, that is, to only one-third of the individual's total vested interest in the fund.

This approach ensures that the individual is not assessed on earnings that have, in effect, accrued in relation to the annuity that will be paid from the foreign superannuation fund."

Such an arrangement has not often been encountered by the author, as individuals are generally seeking to transfer their benefits as lump sums, rather than commencing annuity or pension arrangements. However, the above is included for completeness.

AFE taxed at 15%, not marginal tax rate

For an Australian superannuation fund to tax the AFE at 15% rather than the marginal tax rate, the following conditions must be satisfied (s 305-80 ITAA97):

- the benefit must be paid directly from the foreign superannuation fund to the Australian fund (s 306-10 ITAA97);
- there must be a *nil balance* in the foreign superannuation fund that is the source of the payment, as stipulated in s 305-80(1)(d) ITAA97; and
- the ATO form *Choice to have your Australian fund pay tax on a foreign super transfer* (NAT 11724) must be completed to elect for the Australian fund to pay the tax.

With regard to the nil balance condition above, s 305-80(1)(d) ITAA97 does not require that all of the foreign pension benefits are transferred to Australia at once, just that there is a nil balance in the source pension interest with respect to that particular transfer. This is important as it could be considered that the condition is satisfied if benefits within a sub-account within a scheme are transferred. However, this may be insufficient for the requirement that there are no further benefits in "the foreign superannuation fund".

Where the entire balance of a particular foreign superannuation fund account is transferred to Australia, the above conditions will be satisfied.

Where only a portion the account is transferred, the above conditions will not be satisfied, and the AFE on the transfer will be taxed at the individual's marginal tax rate, with the entire value of the transfer being treated as a non-concessional contribution.

Where it is preferred that some benefits are retained in the source fund, other options may be available whereby an amount from the current pension account is transferred to a new pension account in the UK, which is then subsequently transferred to Australia, thereby resulting in a nil balance in the source account. This approach is subject to the UK scheme being able and agreeing to the above strategy.

Not all schemes allow a direct transfer to superannuation in Australia, given their plan rules. As s 306-10 ITAA97 requires that the benefits are transferred directly, the member is unable to receive the benefits personally and then subsequently transfer them to the superannuation account in Australia to avail themselves of this provision. Usually benefits can be transferred to another UK scheme that will be able to make such a transfer.

Section 295-200 ITAA97 includes the AFE in the fund's assessable income:

"(1) The assessable income of a fund that is an Australian superannuation fund for the income year includes an amount transferred to the fund from a fund that was a foreign superannuation fund for the income year in relation to a member of the foreign fund to the extent that the amount transferred exceeds amounts vested in the member at the time of the transfer.

(2) The assessable income of a fund that is a complying superannuation fund for the income year includes so much of an amount transferred to the fund from a fund that was a foreign superannuation fund for the income year as is specified in a choice made by a former member of the foreign fund under section 305-80.

(3) The amount is included in the income year in which the transfer happens."

Foreign currency conversion

When benefits are transferred from the UK to Australia, they will invariably be in a non-Australian dollar (AUD) currency. It is therefore important to be aware of the calculation of the components of any transfer from a foreign currency perspective.

There could be two alternative means to undertake such a calculation:

1. Consider the AUD value at the date of residency (ie converting the foreign currency to AUD at the prevailing exchange rate at that time), and the AUD value at the date of transfer. For example:

   Homer has £500,000 worth of benefits in a UK scheme. The current exchange rate is 1.9:1. He became a resident of Australia for tax purposes in 2001 when the exchange rate was 3:1 and his account was worth £200,000.

   If we were to use this approach, the AUD values of the accounts and the AFE could be as follows:

At residency:	$600,000	(3 × £200,000)
Now:	$950,000	(1.9 × £500,000)
AFE:	$350,000	

2. Consider the increase in value of the benefits in the source currency, and then convert this raw difference at the prevailing rate on the day.

   Using Homer's example, that would be:

At residency:	£200,000	
Now:	£500,000	
AFE:	£300,000	
In AUD:	$570,000	(1.9 × £300,000)

It is clear that option 1 provides the better outcome in terms of limiting the AFE and therefore what might be taxable. However, do we have a choice?

In ATO ID 2015/7, the Commissioner considered the foreign currency translation rules in relation to lump sum transfers from foreign superannuation funds:

> "For the purposes of working out your 'applicable fund earnings' in relation to a superannuation lump sum under section 305-75 of the ITAA 1997, the correct rule for translating foreign currency into AUD is the rule described in Item 11A of the table in subsection 960-50(6) of the ITAA 1997. In the circumstances of this case, each amount in a foreign currency that is an element in the calculation of your 'applicable fund earnings' is to be translated to AUD at the exchange rate applicable at the time of receipt of the relevant superannuation lump sum.
>
> …
>
> Item 11A requires that an amount to which it applies is to be translated into Australian currency at an exchange rate that is reasonable having regard to the circumstances. The Commissioner considers that, in the circumstances of this case, the exchange rate at which it is reasonable to translate amounts used in the method statements set out in subsections 305-75(2) and (3) of the ITAA 1997 into Australian currency is the exchange rate applicable at the time of receipt of the relevant superannuation lump sum given that, as mentioned above:
>
> - in essence, the amount of applicable fund earnings in relation to a superannuation lump sum to which section 305-70 of the ITAA 1997 applies is the part of the lump sum that is attributable to earnings that have accrued to the individual in the foreign superannuation fund during the period the individual is an Australian resident;
> - a comparison must be made between the amount of a superannuation lump sum to which section 305-70 applies and the amount of the individual's applicable fund earnings in relation to that lump sum to determine the amount included in the assessable income of the individual under subsection 305-70(2) of the ITAA 1997; and
> - the amount of a superannuation lump sum to which section 305-70 applies is to be translated to Australian currency at the exchange rate applicable at the time of its receipt."

Accordingly, the Commissioner determined that the conversion is to occur at the time of receipt of the lump sum to work out the AUD equivalent of the amount in a foreign superannuation fund vested in a taxpayer on a certain date (see the option 2 calculation above). All exchange rates are published on the ATO's website on a daily basis.

Tips and traps

Given the complexity of the rules, even though all good intentions are there to transfer the UK scheme to Australia, this does not necessarily get accomplished in some of the following scenarios:

1. where only a partial transfer is made to the Australian superannuation fund from the source fund:
   a. the AFE cannot be included in the assessable income of the fund;
   b. as such, the AFE is included in the assessable income of the individual, and they need to pay tax on the amount. As the transfer has occurred to superannuation in Australia, the individual may not have the cashflow available to pay the tax personally, particularly where they are not able to access their superannuation until age 60 under a condition of release; and
   c. the entire transfer amount is treated as a non-concessional contribution as there is no AFE component in the fund on the transfer, which could give rise to an excess non-concessional contribution; and
2. the individual receives a payment in the UK that, under UK tax laws, is tax-free. However, the following Australian tax implications may not have been considered:
   a. this is more often than not where a pension commencement lump sum has been paid out of the pension scheme in the UK;
   b. a pension commencement lump sum in the UK allows a payment from a pension scheme of up to 25% of the member's pension account value (up to their UK lifetime allowance) tax-free;
   c. this tax-free status is under the UK income tax rules, but not under the Australian income tax provisions;
   d. under the Australian provisions, that would be a lump sum payment from a foreign superannuation fund whereby the AFE would be taxable in the individual's own name; and
   e. even if the individual is able to receive the 25% payment tax-free under the Australian provisions (as they were a non-resident of Australia when they received the payment, or within six months of residency), extracting the remaining 75% into Australia is a challenge due to the subsequent nature of the remaining balances (being a crystallised account).

It is therefore recommended to obtain specialist advice in this regard.

Part 2 of this article will be published in the next issue of this journal. It will outline some of the issues and strategies that should be considered in order to transfer benefits from the UK to Australia in a tax-effective and timely manner.

Jemma Sanderson, CTA
Director
Cooper Partners Financial Services

Reference

1 ATO ID 2004/809 confirms this position.

National Resources Tax Conference

Don't miss Australia's leading tax conference focused entirely on the energy and resources industries

- Top-class program focusing on the issues that are front of mind for industry
- Access to Australia-wide subject matter experts
- A chance to reconnect with the energy and resources community

10–11 November 2022

The Westin Perth

10 CPD hours

Early bird closes 14 October – SAVE $200!

Register now
taxinstitute.com.au

22-029EVT_09/22

A Matter of Trusts

by Phil Broderick, CTA, Sladen Legal

Owies – end of trustees' discretion?

The *Owies* decision has significant ramifications for trustees making their end of financial year distributions. Is this the beginning of the end for trustees' discretion?

The Victorian Court of Appeal's decision in *Owies v JJE Nominees Pty Ltd*[1] (*Owies*) will surprise many trustees of discretionary trusts and their advisers. Effectively, the court found that the decision of the corporate trustee (controlled by the parents of the family) of a discretionary trust not to properly consider two of the children (who were estranged from their parents), when making annual distributions from the trust, was voidable (and potentially void).

While this decision could be said to be somewhat confined to its facts, it is likely to have significant ramifications, going forward, for how the determination of annual distributions from discretionary trusts are made (and challenged).

Background

This case involved distributions from the trustee of a discretionary trust known as the Owies Family Trust (the trust). The trust was established by a couple (John and Eva) in 1970. The trust was a generally typical discretionary trust (from the 70s), although it did have a narrow class of beneficiaries — its primary beneficiaries were the couple's three children (Michael, Deborah and Paul), while the general class of beneficiaries were certain relatives of the primary beneficiaries. As a result, the beneficiary class in the years in question was less than 10 people. John and Eva were the controllers of the trust during their lifetimes, including as directors of the corporate trustee and as appointors and guardians of the trust.

John and Eva were estranged from two of their children (Deborah and Paul) for significant periods of time, including for most of the years in question (2015 to 2019). During that time, the trustee of the trust distributed income to John (40%), Michael (40%) and Eva (20%), except for the 2019 year when 100% of the income was distributed to John and a distribution of capital, in the form of a residential unit, was distributed to Deborah.

Issues for the court

Deborah and Paul successfully argued that the income distributions for the 2015 to 2019 years were voidable on the basis that the distribution decisions of the trustee of the trust were made on the basis of no real and genuine consideration of Deborah and Paul as potential recipients of distributions. This issue will be considered in this article. Other issues decided by the court included that the trustee was not required to give reasons for its decision, the resolutions were voidable rather than void, but as no application was made to set them aside, they couldn't be set aside, and the trustee of the trust was removed by the court.

No real and genuine consideration

While the court acknowledged that it could not overturn a trustee decision that is unreasonable (unless it is grossly unreasonable) and the trustee is not required to distribute on a needs basis (although it is required to adopt a needs-based analysis of beneficiaries), the court effectively reached the decision ("by the back door") by finding that there was no real and genuine consideration of Deborah and Paul.

The court based its decisions on longstanding legal principles. Some of the notable quotes from the decision include:

- "… the exercise of a discretion in these terms will not be examined or reviewed by the courts so long as the essential component parts of the exercise of the particular discretion are present. Those essential component parts are present if the discretion is exercised by the trustees in good faith, upon real and genuine consideration and in accordance with the purposes for which the discretion was conferred" (from *Karger v Paul*[2]);
- "Where a trustee exercises a discretion, it may be impugned on a number of different bases such as that it was exercised in bad faith, arbitrarily, capriciously, wantonly, irresponsibly, mischievously or irrelevantly to any sensible expectation of the settlor, or without giving a real or genuine consideration to the exercise of the discretion. The exercise of a discretion by trustees cannot of course be impugned upon the basis that their decision was unfair or unreasonable or unwise. Where a discretion is expressed to be absolute it may be that bad faith needs to be shown" (from *Attorney-General (Cth) v Breckler*[3]);
- "… the decision of a trustee may be reviewable for want of 'properly informed consideration'. If the consideration is not properly informed, it is not genuine. The duty of trustees properly to inform themselves is more intense in superannuation trusts in the form of the Deed than in trusts of the *Karger v Paul* type" (from *Finch v Telstra Super Pty Ltd*[4]);
- "In the case of some trusts, the number of potential objects might be very large and a requirement to undertake a detailed analysis of the identity and needs of each would be unworkable";[5]
- "The trustee must not simply proceed to exercise the power in favour of such of the objects as happen to be at hand or claim his attention. He must first consider what persons or classes of persons are objects of the power

within the definition in the settlement or will. In doing this, there is no need to compile a complete list of the objects, or even to make an accurate assessment of the number of them: what is needed is an appreciation of the width of the field, and thus whether a selection is to be made merely from a dozen or, instead, from thousands or millions … Only when the trustee has applied his mind to the 'size of the problem' should he then consider in individual cases whether, in relation to other possible claimants, a particular grant is appropriate. In doing this, no doubt he should not prefer the undeserving to the deserving; but he is not required to make an exact calculation whether, as between deserving claimants, A is more deserving than B" (from *Re Hay's Settlement Trusts*[6]);

- "… one cannot ordinarily decide a question of fact in good faith and give it real and genuine consideration without conducting some investigation and in some cases that will entail making an inquiry of a person who is willing to provide information and is in the best position to do so. It is not a matter of natural justice but bona fide inquiry and genuine decision making" (from *Telstra Super Pty Ltd v Flegeltaub*[7]); and
- "An obvious, but unstated, premise on which the trustee would be expected to discharge its duties is that it would generally be informed about the differing circumstances, needs and desires of each beneficiary as an incident of the familial bonds that underpin the trust and explain its purpose. It is not to be supposed that, when those familial bonds become strained or broken, the purpose of the trust to provide for the family as a whole would change or that the trustee would be relieved of the obligation to properly inform itself."[8]

Why did the court find there was no real and genuine consideration?

The court found that there was no real and genuine consideration (and the trustee income distributions were voidable) for the following reasons:

- the trustee (ie the parents) made no enquires of Paul and Deborah. This was because in some years there was no contact with them and in others there was minimal contact and no evidence of enquires;
- the distributions went in the same proportions each year (exempt 2019) to John (40%), Michael (40%) and Eva (20%), with the court noting that "there was no obvious reason why the trustee would favour Michael, John and Eva in this way" and "Deborah's health and financial situation were parlous. Although need was not a qualifying factor for a distribution, the purpose of the trust was to make provision for the beneficiaries in the context of a family settlement. Deborah had strong claims to a favourable exercise of the discretion. That does not mean that a distribution had to be made to her; but the failure to do so, and the repetition of the same formula in each year up to and including 2018, strongly points to a lack of due consideration of her position";[9]
- although the trustee was required to consider the wishes of the guardian (John and, in the event of his death, Eva) when making a decision to distribute income, "the trustee was required to exercise an independent mind, and the interests of John and Eva did not correspond to the best interests of the beneficiaries";[10]
- "[t]here was a history of antipathy between Eva and Paul, and Eva and Deborah, that found reflection in the dealings with the trust";[11] and
- it could be inferred "from the outcome of the 2018 distributions that the trustee had, by that time, reached a policy of distributions with a settled ratio that was inconsistent with a continuing obligation to consider the distribution of income for each accounting period", "[t]he failure to give real and genuine consideration to Paul and Deborah is made more obvious by the extreme nature of the distribution that was made in 2019", and "the distribution in 2019 is so extreme and without any evident justification that it provides an additional factor that demonstrates that the trustee exercised its discretion under cl 3 without real and genuine consideration of the position of Paul and Deborah".[12]

What does this case mean for distributions going forward?

As noted above, many parents (and their advisers), who set up discretionary trusts primarily and ultimately for themselves, would be surprised to learn that making income distributions to themselves and a child they have contact with (and not to those they don't have contact with) would be making determinations without real and genuine consideration. To the contrary, they would most likely say that they did consider their estranged children and definitively decided not to make distributions to the estranged children.

However, this case makes it clear that this is not enough; the trustee must actively inform itself of the beneficiaries of the trust – if not all of them, then at least the key beneficiaries. This could include writing to such beneficiaries each year to enquire about their situation and needs. Although it does beg the question: if the trustee did make such enquiries and still did not make distributions to the beneficiaries "in need", would the court still overturn the decision on the basis that the decision was "grotesquely unreasonable" (the term used in *Owies*)?

While in a "happy families" situation, this issue may not arise (as no beneficiaries will challenge the decision), in cases where there is a potential disaffected beneficiary, the controllers of trusts could consider:

- excluding/removing the disaffected beneficiary as a beneficiary of the trust (although that decision could be found to be void on the basis of no real and genuine consideration);
- having a wider/broader class of beneficiaries (although there still appears to be an obligation to consider the "core beneficiaries");

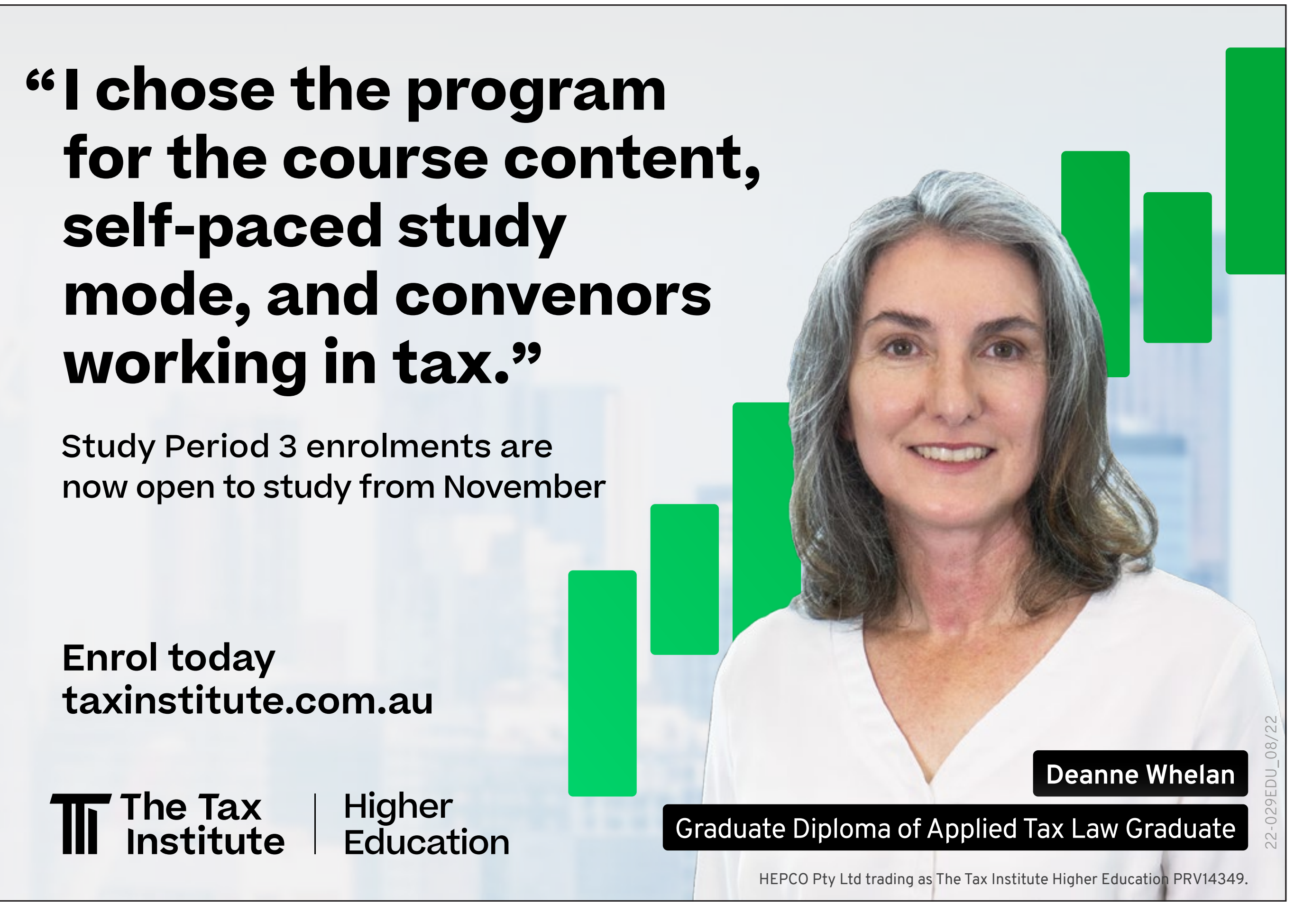
- not having the disaffected beneficiary as a primary/default beneficiary – here, the court appeared to put some weight on the fact that the children were the primary beneficiaries (as compared to the parents);
- going through a formal claim-staking process each year – enquiring about the beneficiaries' situations and needs (although if distributions were not made to beneficiaries in need would the court still overturn the decision on the basis that the decision was "grotesquely unreasonable"); and
- taking the assets of the trust to the individuals (although that decision could be void on the basis of no real and genuine consideration or that there was a conflict of interest).

In summary, distributions by trustees of discretionary trusts are not a "tick-the-box" exercise, even for annual income distributions. Careful thought, and processes, should be put in place to ensure that the trustee exercises real and genuine consideration for each distribution.

Phil Broderick, CTA
Principal
Sladen Legal

References

1 [2022] VSCA 142.
2 [1984] VR 161.
3 (1999) 197 CLR 87.
4 [2010] HCA 36.
5 [2022] VSCA 142 at [95].
6 [1981] 3 All ER 786.
7 [2000] VSCA 180.
8 [2022] VSCA 142 at [111].
9 [2022] VSCA 142 at [121].
10 [2022] VSCA 142 at [122].
11 [2022] VSCA 142 at [124].
12 [2022] VSCA 142 at [125]–[126], [129].



Superannuation

by Shaun Backhaus and Daniel Butler, CTA, DBA Lawyers

Varying unit trust deeds to minimise risk

A great number of unit trust deeds were prepared many years ago and do not reflect the range of trust, tax and other legal developments that have occurred since they were originally prepared.

Introduction

Unit trusts are a common investment structure and can provide a simple way for parties to co-invest in property or do business together. In particular, investing via a unit trust is a popular way for SMSFs to invest in real estate, including to develop property.

While the terms of a unit trust deed typically cover a number of important provisions, there are a number of critical provisions that may have been overlooked. Where a unit trust is lacking some of the key provisions, the deed should generally be varied to minimise risk moving forward.

Unless carefully managed, a variation can give rise to significant tax and duty implications. Thus, a variation should be prepared by an experienced lawyer.

Why many unit trust deeds should be varied

A great number of unit trust deeds were prepared many years ago and do not reflect the range of trust, tax and other legal developments that have occurred since they were originally prepared. Moreover, many deeds supplied in recent times are also not of an acceptable quality, especially as many are no longer supplied by law firms.

Note that the High Court in *CPT Custodian Pty Ltd v Commissioner of State Revenue*[1] stated that:

> "… [the term] 'unit trust', like 'discretionary trust', in the absence of an applicable statutory definition, does not have a constant, fixed normative meaning …"

Thus, each unit trust depends on how the trust deed is drafted and what provisions are included or omitted. Before investing in a unit trust, the parties should ensure that the terms of a trust are suitable for the proposed venture, and timely action should be taken to vary the terms (or obtain a new trust) if required. Given the cost of a variation, it may be more cost-effective to establish a new trust where circumstances allow.

Does the unit trust qualify as a fixed trust?

Basically, unless a unit trust qualifies as a fixed trust, the trust will be treated as non-fixed. A non-fixed trust includes a discretionary trust under Sch 2F of the *Income Tax Assessment Act 1936* (Cth) (ITAA36).

The ordinary and statutory income of a non-fixed trust distributed to an SMSF can be taxed at 45% instead of the concessional tax rate of 15% – and 0% if the SMSF is in pension mode. However, the ATO's current administrative practice generally accepts that many unit trusts should not be subject to non-arm's length income at 45% provided distributions of distributable income are made in proportion to each unitholders equity ownership and there is no exercise of discretion regarding distributions. However, this current ATO administrative practice could change without notice and, accordingly, should not be relied on.

The Federal Court in *Colonial First State Investments Ltd v FCT*[2] confirmed that a unit trust that operated as a managed investment trust that allowed a 75% vote to amend the trust's governing rules did not qualify as a fixed trust as there was the possibility, although it was unlikely to be exercised, for the majority to dilute the 25% minority's interests in the trust.

Checking the voting threshold to vary a unit trust deed is a quick test of determining whether a unit trust satisfies a fixed trust definition, ie unless 100% of unitholders must consent to a variation, the unit trust may not qualify as a fixed trust for the purposes of Sch 2F ITAA36. Schedule 2F deals with trust losses and franking credits (discussed in more detail below).

It is important to note that, as there is no fixed or normative definition of "unit trust", there is also no normative definition of "fixed trust". In particular, the type of fixed trust that is needed depends on the purpose and intended use of the trust, eg NSW land tax has its unique definition of "fixed trust", being a trust that satisfies s 3A(3B) of the *Land Tax Management Act 1956* (NSW). The NSW definition of fixed trust differs to the definition of fixed trust for Sch 2F purposes, and these two definitions differ from the meaning of fixed trust for trust law purposes. Thus, when referring to a fixed trust, you need to be specific in relation to what type of fixed trust you need.

Despite the complexity of the law in this area, we come across suppliers that market their unit trusts as fixed trusts but include discretionary classes of units with flexible distribution entitlements, which would make them non-fixed.

What other tax implications arise if a unit trust is not fixed?

There are a range of other federal tax reasons why a fixed trust is preferred to a non-fixed trust. For instance, unless

a family trust election or an interposed entity election has been made in relation to a trust in accordance with Sch 2F ITAA36, there are stricter rules applying to non-fixed trusts (as compared to fixed trusts) for such matters as:

- whether a tax loss can be carried forward to a subsequent financial year; or
- the ability to distribute franking credits from the trust to a unitholder.

Broadly, an SMSF is treated as a non-fixed trust for the purpose of determining whether a unit trust can carry forward a tax loss. In certain circumstances, an SMSF trustee may be required to make a family trust election or an interposed entity election so that the unit trust can carry forward a loss.

Does the type of unit trust deed impact the land tax liability?

Higher land tax is payable in a number of Australian states and territories if the trust does not qualify as a fixed trust under the legislation in the relevant jurisdiction.

For example, NSW has a very strict definition of fixed trust in order to obtain the land tax threshold (the threshold is $822,000 for the 2022 calendar year). A discretionary or non-fixed trust (referred to as a "special trust" in NSW) is not entitled to any land tax threshold and therefore pays an extra $13,152 per annum in land tax for 2022 compared to a fixed trust (based on a 1.6% land tax rate on the unimproved value of land). NSW also has a premium land tax threshold where the land tax rate increases to 2% if the unimproved value of land exceeds $5,026,000.

Naturally, you should check the land tax legislation in each jurisdiction to determine what extra land tax is payable if the trust does not satisfy the relevant test. Expert advice should be obtained if in any doubt.

Can unitholders be liable for trust liabilities?

Unitholders are, prima facie, personally liable to indemnify a trustee for liabilities that the trustee incurs when carrying out its duties. As a principle of law, the trustee's right of indemnity against liabilities properly incurred in the execution of its duties is not limited to the trust property but extends, where the trust assets are insufficient to satisfy the indemnity, to a right of indemnity against the beneficiaries. The Full Federal Court in *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)*[3] referenced this principle and cited McGarvie J in *JW Broomhead (Vic) Pty Ltd (in liq) v JW Broomhead Pty Ltd*:[4]

> "The basis of the principle is that the beneficiary who gets the benefit of the trust should bear its burdens unless he can show some good reason why his trustee should bear the burdens himself."

Given this principle, to afford unitholders with protection against personal liability, appropriate wording must be included in the deed to limit the liability of unitholders to the assets of the trust. Otherwise, unitholders' personal assets may be exposed to risk.

Thus, it is prudent to carefully examine each unit trust deed to make sure it is appropriate and does not expose unitholders to unwanted liabilities.

Are there tax risks in varying a unit trust deed?

Care and caution need to be exercised before varying a trust deed as a resettlement can give rise to significant tax and duty liabilities.

FCT v Clark[5] provided support for the ability to vary a unit trust deed without giving rise to a CGT event where the deed contained an appropriate variation power. The ATO issued TD 2012/21 shortly after the *Clark* decision confirming this CGT position.

However, the position under the duty legislation of each state and territory is not so clear and, in certain jurisdictions, a resettlement risk needs to be carefully managed. Expert duty advice from a practitioner with experience in the relevant jurisdiction is recommended to make sure variations do not attract unwanted duty liabilities.

Conclusion

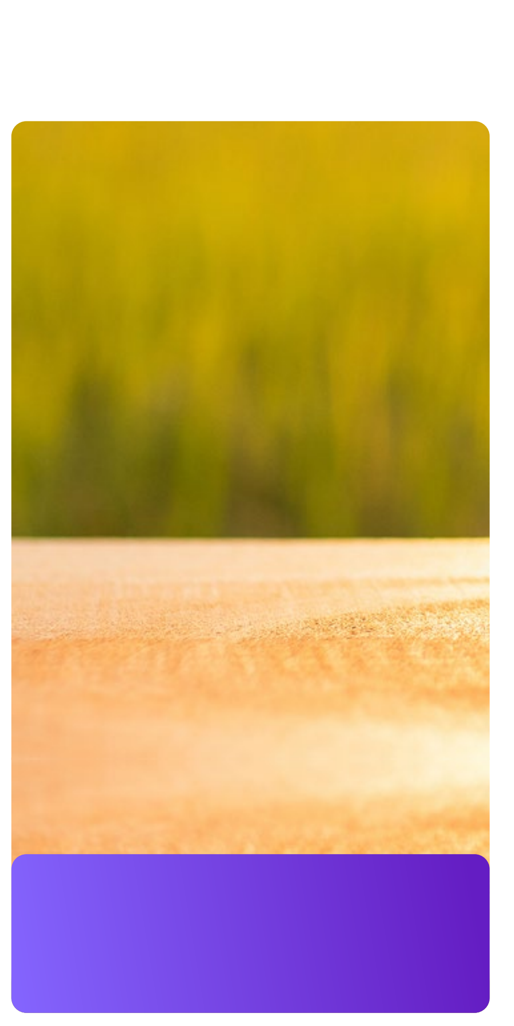
An important first step when considering whether a unit trust is an appropriate structure is to carefully examine the trust deed to ensure that it is not lacking one or more key factors (as outlined above).

Shaun Backhaus
Lawyer
DBA Lawyers

Daniel Butler, CTA
Director
DBA Lawyers

References

1 [2005] HCA 53 at [15].
2 [2011] FCA 16.
3 [2002] FCAFC 285.
4 (1985) 9 ACLR 593 at 635.
5 [2011] FCAFC 5.



Property Intensive

Australia's leading property event

Gain invaluable technical content delivered by expert presenters:

- Nicki Hutley, Nicki Hutley Economics
- Louise Clarke, Australian Taxation Office
- Scott McGill, CTA, Pitcher Partners
- Rachel O'Donnell, CTA
- Matthew McKee, FTI, Brown Wright Stein

3–4 November 2022

Online

8 CPD hours

22-033EVT_06/22

Successful Succession

by Tim Donlan, ATI, Donlan Lawyers

Public policy and provision avoidance

When taking steps to reduce the potential impact of a family provision claim on one's estate the effectiveness of any transaction may be stifled by public policy considerations.

Most practitioners will be familiar with the family provision legislation existing in all Australian jurisdictions.[1] In short, the relevant laws provide that an eligible claimant may apply to the court to seek further provision from the estate of a deceased will-maker[2] in circumstances where they consider that the provision made for them in the will is inadequate.

The factors taken into account by the courts when considering the claims of an applicant for further provision are varied, including the size of the estate, the financial and personal circumstances of the claimant, the financial and personal circumstances of those beneficiaries named in the will, and the relationship between the claimant and the deceased will-maker. The courts will give consideration to both the financial needs of a claimant and what might be considered to be the moral obligations of the will-maker.[3] If the courts determine that the provision made for a claimant was, in all of the circumstances, inadequate, the courts can effectively amend the terms of a will and make such provision in favour of a claimant that they deem adequate.

It is important to recognise that it is only the personal beneficially owned estate of the deceased will-maker or intestate that can be the subject of a claim for further provision. Assets not beneficially owned by the deceased at their death, such as assets held on trust or as a joint tenant, will fall outside of the family provision legislation.

Over time, motivated testators have sought to "manage" the potential for family provision claims against their estate (or at least to manage the likelihood of any claim being successful if brought by an eligible claimant) by limiting the size of their personal estate.

In order to limit one's personal estate that might be available to satisfy any claim for further provision, it is generally open to a person to enter into an inter vivos (while alive) transaction to dispose of part or all of their estate or to otherwise reduce its value. Such transactions might include an outright transfer of property to intended beneficiaries during one's lifetime, transactions to create joint tenancies (so that the surviving tenant will take full ownership by right of survivorship on the death of the first of them), forgiving loans owed to the will-maker prior to death, and the entering into of contracts to make mutual wills. In NSW, the notional estate provisions will effectively look behind certain inter vivos transactions prior to death to ensure that, as a matter of law (and policy), certain such transactions will not have the effect of putting the subject assets outside of the scope of the estate from which to satisfy a claim for further provision.[4]

A constraint on the effectiveness of inter vivos transactions putting assets beyond the reach of family provision legislation is the general public policy consideration regarding the purpose of family provision legislation and whether the law should curtail certain attempts to defeat the provision regime.[5]

In *Calvert v Badenach*,[6] the Tasmanian Supreme Court was not prepared to find any public policy reasons why a solicitor, taking instructions for the preparation of a will, should not be required to provide advice to a will-maker of the possible steps that could be taken by them to circumvent the provisions of the *Testator's Family Maintenance Act 1912* (Tas).

In rejecting public policy arguments raised by the solicitor, the court in *Calvert v Badenach* cited the South Australian Supreme Court in *Barns v Barns*,[7] a case involving a deed for mutual wills between a husband and wife and their son. The deed was intended to contractually bind the estate of the deceased and remove the assets from the scope of the estate of the survivor of them available to satisfy a potential claim for provision that might be brought by their daughter.

In *Barns v Barns*, Lander J stated:[8]

> "There is no doubt that the Act provides a safeguard to those persons who might be overlooked by a deceased person in the disposition of his estate by his will. The Act, however, is not designed to require a person to accumulate assets or indeed to die with an estate. A person is quite entitled to dispose of his or her estate by waste, gift or any other way before that person's death. The Act, at least in this State, does not provide any protection to the person otherwise entitled if the deceased dies without an estate in those circumstances."

The Permewan decision

In the recent case *Re Permewan No. 2*,[9] the Supreme Court of Queensland adopted a seemingly different view with respect to public policy considerations and the consequences of inter vivos transactions carried out by a deceased on her daughters' ability to make a claim for further provision from her estate pursuant to the relevant provision legislation.

Facts

The deceased, Prudence Veronica Permewan (the deceased), was a widow who died on 21 September 2019. She was survived by three children, Scott, Donna and Marla.

She left a last will which favoured Scott to the exclusion of Donna and Marla. She also took steps to defeat any claim by

Donna and Marla for family provision under the *Succession Act 1981* (Qld).

The will

By her will:

- Scott was appointed executor and trustee;
- shares in a company, Zalerina Pty Ltd (Zalerina), were bequeathed to Scott; and
- the rest of the estate was bequeathed to the Lotus Trust.

At the time of death, Zalerina was the trustee of the Lotus Trust. The bequest of the shares in Zalerina to Scott put him in sole control of the company and, by reason of its position as trustee, in sole control of the assets of the Lotus Trust.

The deceased's principal assets at the time of her death were:

- her residence;
- shares in a company, Orion Investments Pty Ltd (Orion), which owned commercial premises at Morayfield; and
- a loan to Orion.

These assets had an estimated value of $3m.

The effect of the deceased's will was to transfer her entire estate either to Scott or to the trustee of the Lotus Trust in circumstances where, on her death, Scott controlled the trustee of the Lotus Trust.

Not surprisingly, a dispute arose between Scott and the deceased's daughters in relation to the enforceability of the inter vivos transactions by the deceased which were admittedly made with intent to defeat any family provision claim.

On or about 18 April 2018, the deceased entered into certain inter vivos transactions after advice from her then lawyers. The transactions were contrived in what was described by the lawyers as the "secured debt documents". The purpose of the subject transactions, being to create a personal liability of the deceased (her estate) to deplete the entire estate and defeat potential claims by the daughters, was not denied by Scott.

Cooper J summed up their purported effect as follows:

- the deceased gifted, through the provision of the promissory note, $3m to the Lotus Trust;
- the Lotus Trust then loaned $3m to the deceased;
- to secure the loan, the deceased mortgaged or otherwise charged all of her assets; and
- the consequence would be that the deceased's financial position changed from having had assets worth approximately $3m before the transactions to subsequently having a debt of $3m to the Lotus Trust secured over her assets.

The proceedings were initially commenced for the purpose of seeking a declaration that the subject transactions were void for a variety of reasons, including that they were a "sham" and contrary to public policy. Their validity on those grounds did not ultimately need to be determined by the court as Scott made concessions on a technical point regarding the delivery of the relevant promissory notes that would render the transactions as being void.

Nevertheless, when considering orders as to the payment of legal costs, the court addressed the issues of sham and public policy and indicated that it would have found against the validity of the transactions on all counts.

Cooper J found that the transactions were invalid and unenforceable because:

- they were contrary to public policy; and
- they were sham transactions.

Public policy

Cooper J said:[10]

> "... I am confident that the Administrator was almost certain to have succeeded on his application on the basis that enforcement of the transactions would be contrary to public policy."

Citing the High Court in *Barns* v *Barns*[7] (and referring to the policy of the Queensland *Succession Act 1981*, his Honour stated:[11]

> "The public policy upon which s 41 of the *Succession Act* is based is 'the making of provision for the maintenance of members of a family who are found to be in need of such maintenance when the family tie has been broken by death. That policy is of public, as well as private importance'."

In relation to what constitutes a breach of public policy, his Honour referred to the dicta of Jordan CJ in *Re Jacob Morris*,[12] and this passage of the majority of the High Court in *Westfield Management Ltd v AMP Capital Property Nominees Ltd*:[13]

> "Windeyer J observed in *Brooks v Burns Philp Trustee Co Ltd*[14] that a person upon whom a statute confers a right may waive or renounce his or her rights unless it would be contrary to the statute to do so. It will be contrary to the statute where the statute contains an express prohibition against 'contracting out' of rights. In addition, the provisions of a statute, read as a whole, might be inconsistent with a power, on the part of a person, to forego statutory rights. It is the policy of the law that contractual arrangements will not be enforced where they operate to defeat or circumvent a statutory purpose or policy according to which statutory rights are conferred in the public interest, rather than for the benefit of an individual alone. The courts will treat such arrangements as ineffective or void, even in the absence of a breach of a norm of conduct or other requirement expressed or necessarily implicit in the statutory text."

His Honour addressed obiter remarks of Gleeson CJ in *Barns v Barns*[7] that a person, in good faith, could dispose of assets during their lifetime, stating that:[15]

> "The present case does not fall within the circumstances described by Gleeson CJ in those paragraphs. This was not a case of Prudence having divested herself

of all her assets before she died. Having regard to the evidence given by Mr Hart (see [60] above), *I would not accept that the Transactions involved a bona fide inter vivos gift of Prudence's assets. Prudence had no intention of disposing of her property during her lifetime.* The documents which recorded the Transactions were executed contemporaneously with Prudence's will and *the Transactions were only ever intended by her to take effect upon her death.* Prudence never intended that the Lotus Trust, which she controlled, would call on the promissory note or attempt to enforce the loan while she was alive. If that occurred, she would have been placed in the position of having to sell her assets to meet her obligations and she never intended to do so. Evidence given by Mr Kong was also consistent with the conclusion that the Transactions were not intended to take effect during Prudence's lifetime." (emphasis added)

This is a crucial part of his Honour's reasons. It enabled his Honour to distinguish the comments made in *Barns v Barns*[7] which expressed the view that a competent testator could effectively dispose of their assets during their lifetime to defeat a potential claim for further provision. In the subject case, the court simply found that the assets had not been effectively disposed of.

His Honour also referred to a statement by Barwick CJ in *Palmer v Bank of New South Wales*[16] about a transaction that is illusory because, while the person divests himself of the property by a transaction inter vivos during his lifetime, it is in reality a dealing with property in a testamentary fashion. He said this of those dicta:[17]

"Although the context of this proceeding is different, Barwick CJ's statement is apt to describe Prudence's conduct. She entered into an illusory transaction whereby she appeared, contrary to the reality, to have parted with her property. That conduct amounted to dealing with her property in a testamentary fashion. The sole purpose of that conduct was to ensure that there was so little, if anything, left in the estate upon Prudence's death that any family provision application under section 41 of the *Succession Act* by Donna and Marla would have no prospect of success. In those circumstances, the effect of enforcing the Transactions would be to 'defeat or circumvent' the public policy upon which s 41 of the *Succession Act* is based and would thereby 'be generally regarded as injurious to the public interest'."

Sham

Cooper J also concluded that the transactions were invalid on the basis that they constituted a sham.[18]

Considerations for practitioners

One cannot help but think that the tension between the freedom of testation, the freedom to dispose of one's assets during one's lifetime, and the public policy considerations regarding family maintenance laws need to be further addressed – hopefully by the courts or legislature.

As will-makers and their advisers look to become more innovative, with inter vivos arrangements intending to defeat potential claims such as in *Permewan* and with some emerging strategies such as the granting of option agreements exercisable on death, it is difficult to be certain of the judiciary tolerating anything other than the most definitive, immediate and unconditional disposal by a will-maker during their lifetime as being effective to remove assets from the family maintenance regime.

To complicate the uncertainty surrounding public policy considerations, the High Court has previously shown a willingness to set aside certain inter vivos transactions post-death based on equitable principles of unconscionable dealing. In a case where the relevant transactions (transfer and forgiveness of a loan) would otherwise have removed assets from the reach of family provision claims, and in circumstances where they appeared, on their face, to be neither unconscionable nor anything other than freely entered into, the determination of the court seemed to be more focused on public policy considerations and the outcome of the transactions on potential claimants, rather than the legal validity of transactions themselves.[19]

Advisers should be on guard. Where steps are instructed to be taken to defeat the family provision legislation, advisers should ensure that such steps are found to be effective, otherwise they may be faced with an additional layer of liability to a disappointed intended donee.

Tim Donlan, ATI
Principal
Donlan Lawyers

References

1. *Inheritance (Family Provision) Act 1972* (SA); *Succession Act 2006* (NSW); *Testator's Family Maintenance* Act *1912* (Tas); *Family Provision Act 1970* (NT); *Family Provision Act 1972* (WA); *Succession Act 1981* (Qld); *Administration and Probate Act 1958* (Vic); *Family Provision Act 1969* (ACT).
2. Or for a person dying intestate. In the absence of a valid will, the laws in each jurisdiction provide a statutory division of a deceased estate.
3. For cases referring to will-makers' moral obligations, see, for example, *Vigolo v Bostin* [2005] HCA 11.
4. For the notional estate relevant property transactions provisions, see Div 1 of Pt 3.3 of the *Succession Act 2006* (NSW).
5. The purpose of family provision legislation is considered to ensure that deceased persons make appropriate provision for those to whom society deems they have an obligation to provide.
6. [2015] TASFC 8.
7. [2001] SASC 303.
8. [2001] SASC 303 at [72].
9. [2022] QSC 114.
10. *Re Permewan No. 2* at [66] per Cooper J.
11. *Succession Act 1981* (Qld).
12. (1943) 43 SR (NSW) 352 at 355–356.
13. [2012] HCA 54 at [46].
14. [1969] HCA 4.
15. [2022] QSC 114 at [74].
16. [1975] HCA 51.
17. [2022] QSC 114 at [76].
18. The concept of a "sham" is beyond the scope of this article. See *Raftland Pty Ltd (as Trustee of the Raftland Trust) v FCT* (2006) 227 ALR 598.
19. *Bridgwater v Leahy* (1998) 194 CLR 457. This decision has been heavily criticised see for example CEF Rickett, *University of Queensland Law Journal*, 2012, at 233.

Events Calendar

Upcoming months

OCTOBER
19–21
Wed–Fri

NSW

The Tax Summit

20 CPD hours

NOVEMBER
10–11
Thu–Fri

WA | Online

National Resources Tax Conference

10 CPD hours

NOVEMBER
16–18
Wed–Fri

QLD

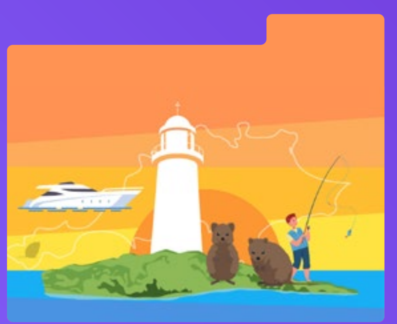
Noosa Tax Convention

12 CPD hours

NOVEMBER
24–25
Thu–Fri

WA

Rottnest Tax Retreat



10 CPD hours

For more information on upcoming events, visit taxinstitute.com.au/events.

Cumulative Index

The following cumulative index is for volume 57, issues (1) to (4). Listed below are the pages for each issue:

Vol 57(1): pages 1 to 56
Vol 57(2): pages 57 to 126
Vol 57(3): pages 127 to 182
Vol 57(4): pages 183 to 242

2021 Intergenerational Report 61

A

Absentee owner surcharge 78
Accounting periods
substituted, petroleum resource rent tax 83
Acknowledgment of trust
dutiable property (NSW) 50
Active asset test
carbon farming 216
Adjacent land
main residence exemption 138
Administration
ATO 206–208
correct reporting 204–206
funding 206, 207
lodgment 203, 204
on-time payments 206
property tax 80, 81
registration 203
state revenue authorities 206, 207
Administrative penalties
unexplained bank deposits 133–135
Adult children
superannuation death benefits 155
Advance pricing arrangements 43
Affordable housing
stamp duty liability 79
Age limits
superannuation contributions..... 25, 28
Age pension
women 29
Agreements
carbon farming 213
Intergovernmental Agreement on Federal Financial Relations...... 147, 148
reimbursement agreements 36
settlement agreements 43
Agribusinesses — see **Primary production**
Alcohol duties 88
Amalgamated land
GST margin scheme 117–119
Amended assessments
bank deposits
– gaming 190
– unexplained 133–135
onus of proof 162–165
Amnesty
superannuation guarantee system 26, 27
Anti-discrimination laws 29
Appeals
ATO 207
Applicable fund earnings
pension transfers (UK) 220–222
Arrangement 39
Assessable income
bank deposits, gaming 190
loans for producing 191, 194, 195
Assessments
excessive 191, 192
small business entities, shorter period of review 188, 189
Asset protection
superannuation death benefits 157
Assets — see also **CGT assets**
depreciation, effective life of assets 63, 64
Audits
ATO focus 207
Australia
Australia–India DTA 132
Australian Capital Territory
foreign purchaser surcharge duty..... 78
land tax rates 78
Australian Carbon Credit Units
active asset test 216
generation 212
GST 217
income from sale 215
non-commercial loss rules 216, 217
sale 216
tax regime 213, 214, 216
Australian financial services licence
carbon farming 213
Australian Government contracts
tendering, residency disclosure 132
Australian Small Business and Family Enterprise Ombudsman 209
Australian tax system
administration 203–208
education 205, 206
federalism 72, 73
GST 144–153
policy development 202, 203, 208, 209
transparency 208
trust 207, 208
vertical fiscal imbalance 72, 73
Australian Taxation Office
administration 206–208
appeals and objections 207
client register 203
COVID-19 responsiveness 206
debt recovery, small businesses 5
education 205, 206
focus on audits 207
funding 207
legal professional privilege 62
organisation 207
record-keeping course 131
reimbursement agreements 62, 63
Second Commissioners 208
state revenue authorities 207
Taxpayer Charter 208
Australian Treasury
forgone revenue 146
tax integrity package, multinational enterprises 131, 132
Auxiliary equipment
fuel tax credits 198
Award entitlements
underpayment 8

B

Bad debts
deductions for expenditure 194
Bank account deposits
amended assessments 190
unexplained, onus of proof 133–135
Bankruptcy protection
superannuation 170
Base erosion and profit shifting
OECD action plan 173
Pillar Two Global Anti-Base Erosion Rules 174
Behavioural change
alcohol duties 88, 89
motor vehicle use 87
Benchmark interest rate
Div 7A 63
Beneficial ownership
change of (NSW) 49, 50
Binding death benefit nominations 22, 157, 158, 170–172
Bitcoin 58, 62
Board of Taxation
review, digital asset taxation 58
role 209
Budget deficit 184
Buildings
sale of land after demolition 137
Burden of proof
excessive assessments 134
omission of income 190
reform, tax disputes 162–165
Bushfire
effects on tax return lodgment 204
non-commercial business losses 6
Business activity statement 77
Business losses
non-commercial 6
– carbon farming 216, 217
Business turnover tax
payroll tax alternative 76, 77

C

Callaghan review 82, 85
Capital account or revenue account 94
Capital allowance deductions
primary production write-offs 215, 216
Capital gains
Div 6 source concept 189
Capital gains tax — see also **CGT events**
main residence
– building concession 137–139
– knockdown rebuild 136–139
Car limits
GST and luxury car tax 7
Carbon farming
active asset test 216
Australian Carbon Credit Units 212, 213, 216
commercial and legal issues 213
contracts 212, 213, 216
deductions for expenditure 213–217
eligible offsets projects 211, 212, 215–217
income derived from 215
non-commercial losses 216, 217
primary production income 215
structuring issues 216
taxation issues 213, 214
Cars — see **Electric vehicles; Motor vehicles**
Cash flow boost 27, 64
Cash flow management
small business 206
Casual employees 47, 48
Centrelink
non-reversionary versus reversionary pension 159
CGT assets
building dwellings on pre/post-CGT land 138
definition 136
land and buildings 136
loss or destruction 136
CGT events
event C1 .... 136, 137
Change of beneficial ownership (NSW) 49, 50
Charities
exemptions 80
Childcare 184
Children
superannuation death benefits 132, 156, 170, 171
Clean energy
carbon farming 211
Client register
ATO 203
Commercial and legal issues
carbon farming 213
Commissioner of Taxation
additional roles 203
advance pricing arrangements 43
declaratory relief 43
discretion, non-commercial losses 6
disputes, burden of proof 162–165
Div 7A determination 132, 133
excessive assessments 134, 162, 191, 192
legal professional privilege 62
litigation under Pt IVC 43
oral rulings 43
private rulings 38–44
– self-assessment and 205
public rulings 42, 43
settlement agreements 43
Compliance
GST 146
legal professional privilege 62
payroll tax 73–77
Computer-assisted technology
legal professional privilege 62
Concessional contributions
current caps and thresholds 21
current concessionary measures 22
inadequacy 23, 24
indexation 23
women, catch-up contributions 29
Concessions
property tax 80
Congestion charges 81, 87, 88
Consolidated groups
payroll tax 77
Consumption tax — see **Goods and services tax**
Contractor/employee distinction
casual employees 47, 48
multi-factorial test 113–115
PAYG withholding rules 46, 47
superannuation guarantee 47
Contracts
carbon farming 212, 213, 216, 217
Core R&D activities 105–108
Correct reporting 204–206
Cost of living increases
fuel excise duty 197
Country-by-country tax reporting
multinational enterprises 132, 175
COVID-19 impacts
economic downturn 23
GST revenue 144, 145, 148
non-commercial business losses 6
superannuation balance erosion 23
superannuation guarantee amnesty 25, 27
tax return lodgment 204
COVID-19 measures
ATO responsiveness 206
cash flow boost 64
economic response package 23
JobKeeper 27
Crime victims
early access to superannuation 5
Cryptocurrencies 58, 62
Customs duties 88

D

Data sharing 204
De minimis threshold 174
Death benefits — see **Superannuation death benefits**
Debt recovery
small business 5
Deceased estates
BDBNs 170
family provision claims 231–233
Declaratory relief 43
Deductions for expenditure
bad debts 194
carbon farming 213–217
difficulties for individuals 130
interest 194, 195
management fees 192–194
overtime meal expenses 63
primary production write-offs 215, 216
self-education expenses 5, 131, 133
travel expenses 63
work-related expenses 130
Default assessments
onus of proof 162–165

Defence forces
death benefits ... 132
Depreciation
car limits ... 7
effective life of assets ... 63, 64
primary production write-offs ... 215, 216
Deregistration
tax agents ... 190
Derivation of income
carbon farming project ... 215
Digital currencies ... 58, 62
Digital economies
multinational enterprise profits ... 132
on-time payments ... 206
work recognition ... 129
Digital technologies
investment boost ... 5, 188
legal professional privilege ... 62
Disclaimers
beneficiaries of discretionary trusts ... 33–36, 66
Disclosure of information
high-risk arrangements ... 175
notice to produce documents ... 7
Discretionary trusts
beneficiaries
– adding ... 66, 67
– disclaimers by ... 33–36, 66
– private companies, Div 7A ... 63, 132, 133
– real and genuine consideration ... 225–227
challenging distributions ... 225–227
litigation ... 66–69
trust deeds
– construction ... 66
– lost ... 68, 69
– rectification ... 67, 68
trust income, present entitlements ... 33, 34
Dispute resolution
objections and appeals ... 207
R&D eligibility ... 105–111
Distributable income
calculation ... 35
present entitlements ... 33, 34
Diversity and inclusion ... 2
Dividends
treaty shopping ... 133
Division 7A
private companies
– benchmark interest rate ... 63
– trust entitlements ... 63, 132, 133
Divorce – see **Relationship breakdowns**
Documentation
core R&D activities ... 105, 109–111
legal professional privilege ... 62
lost trust deeds ... 68, 69
non-reversionary versus reversionary pension ... 159
notice to produce ... 7
petroleum resource rent tax ... 83
unexplained bank deposits ... 133–135
Double tax agreements
Australia–India ... 132
treaty shopping ... 133
Downsizer contributions ... 25
superannuation ... 131
Dutiable property (NSW)
acknowledgment of trust ... 50
change of beneficial ownership ... 49
Dwellings
building on pre/post-CGT land ... 138
CGT main residence rule ... 135–139
loss or destruction ... 136

E
e-commerce ... 188
e-invoicing ... 206
Economic disasters ... 75
Economic downturns
COVID-19 ... 23
GST ... 145
Economic growth
disincentives ... 75, 76
real property transfers ... 77
Economic rents
taxation ... 81
Education
Australian tax system ... 205, 206
self-education expenses $250 threshold ... 5
Effective life
depreciating assets ... 63, 64
El Salvador ... 62
Electric vehicles
electric car discount ... 5, 131, 187
GST ... 152, 153
luxury car tax ... 86, 87
Electronic platform operators ... 131
Eligible offsets projects
carbon farming ... 211, 212, 215–217
Embedded royalties ... 174
Emissions reduction ... 211
Employee/contractor distinction
casual employees ... 47, 48
multi-factorial test ... 113–115
PAYG withholding rules ... 46, 47
superannuation guarantee ... 47
Employee–employer relationship ... 75, 113
Employees
concept of "worker" ... 75
meaning and use of "employee" ... 75
"SG employee", definition ... 29
underpayment ... 8
Employers
superannuation guarantee liability ... 26
underpayment of employees ... 8
Evasion or fraud
onus of proof ... 164
Evidence
excessive assessments ... 191, 192
fraud or evasion ... 164
unexplained bank deposits ... 133–135
Excess concessional contributions
complex rules ... 24
taxation ... 21
timing issues ... 27
Excessive assessments ... 191, 192
burden of proof ... 134, 162
Excise duties ... 88, 147, 150
fuel tax credits ... 197–199
Exempt current pension income ... 157, 159
Exemptions
charities ... 80
payroll tax, SMEs ... 76
property tax ... 80
Expenditure – see **Deductions for expenditure**
Experimental activities ... 105–111
Expert evidence
R&D ... 109, 111
Exploration permits ... 82, 83, 85

F
Fairness
ATO ... 208
GST margin scheme ... 12
trust beneficiaries, present entitlement ... 35
Family provision claims
public policy considerations ... 231–233
Family trusts – see **Discretionary trusts**
Farmers – see **Primary production land**
Federal Budget 2021–22
self-education expenses ... 5
small business debt recovery action ... 5
Federal Budget 2022–23 ... 184, 186
deficit repair ... 184
primary production income ... 215
small business measures ... 5, 61
training ... 5
Financial dependant
superannuation beneficiaries ... 156
Financial services industry
GST ... 150, 151
First home buyers
stamp duty ... 78
Fixed trusts
whether unit trusts qualify as ... 228, 229
Flood
non-commercial business losses ... 6
Foreign currency
cryptocurrencies ... 58, 62
Foreign currency conversions
pension transfers (UK) ... 222, 223
Foreign pensions
Australian taxation ... 219–223
Foreign purchaser ... 100
Foreign purchaser surcharges
general land tax rates ... 78
maximum duty rates ... 78
NSW ... 50
residential property ... 77
Victoria ... 100
Foreign trusts
foreign purchaser surcharge ... 100
Fraud or evasion
onus of proof ... 163, 164
Freehold interest in land
GST margin scheme ... 10–14, 117–119
Freezing orders
variation ... 7, 8
Fringe benefits tax
electric car discount ... 5, 131, 187
Fuel-efficient vehicles
definition ... 187
GST ... 152, 153
luxury car tax thresholds ... 86, 131
Fuel excise scheme ... 87
claiming fuel tax credits ... 197–199
Functional currency
petroleum resource rent tax ... 82

G
Gaming
bank deposits, assessable income ... 190
Gender inequality
superannuation ... 23, 29
General anti-avoidance provisions
stamp duty (NSW) ... 50, 51
Global Reporting Initiative ... 174
Goods and services tax
background ... 144
broadening the base ... 149
compliance burden ... 146
COVID-19 effects on revenue ... 144, 145, 148
declining ratio to GDP ... 146
depreciation car limits ... 7
economic downturns ... 145
eligible emissions units ... 217
exemptions ... 146
financial services industry ... 149, 150
fuel tax credits ... 197–199
luxury items ... 153
margin scheme ... 10–14, 117–119
rates ... 150
revenue issues ... 144–152
small-scale property developments ... 96–100
tax reform ... 145, 148–153
Grant of options
stamp duty (NSW) ... 49
Greenfield liquefied natural gas ... 84
Greenhouse gas emissions
carbon farming ... 211
target ... 187
Groups
payroll tax ... 77

H
Harmonisation
meaning and use of "employee" ... 75
payroll tax ... 73–75
Henry review ... 81, 144
High-income households
GST tax mix ... 145
Higher education – see **Tax education**
Home office expenses
deductions ... 130
Housing affordability
stamp duty liability ... 79
Hybrid mismatch targeted integrity rule ... 174

I
Income
primary production ... 215
Income of the trust estate
calculation ... 35
Income tax
small-scale property developments ... 92–96
Income tax returns
lodgment ... 203, 204
unexplained bank deposits ... 133–135
Independent contractor/employee distinction
multi-factorial test ... 113–115
superannuation guarantee ... 47
India
Australia–India DTA ... 132
Information disclosure
electronic platform operators ... 131
notice to produce documents ... 7
Information-gathering
data sharing ... 204
legal professional privilege ... 62
private rulings ... 39, 40
Innovation
R&D activities ... 105, 106
Inspector-General of Taxation ... 209
Inspector-General of Taxation and Taxation Ombudsman ... 202, 207, 208
Instant asset write-off ... 5
Insurance levies ... 89
Intangibles
multinational enterprise tax deductions ... 132, 174
Integrity measures
multinational enterprises ... 131, 132
Inter vivos transactions
family provision claims ... 231–233
Interdependency relationships
superannuation beneficiaries ... 156
Interest
borrowing to preserve trust corpus ... 195
definition ... 194, 195
Intergovernmental Agreement on Federal Financial Relations ... 147, 148
International payments
pension transfers (UK) ... 219–223
unexplained bank deposits ... 133–135
International transfers
UK pensions ... 219–223
Invalidity pension payments
veterans ... 132
Investment
technology boost, small business ... 5, 188

J
JobKeeper ... 27

K
Knockdown rebuild
main residence exemption ... 136–139

L
Labor Government ... 5, 173
Land
adjacent to dwelling, CGT exemption ... 138
foreign purchaser additional duty (Vic) ... 100
GST margin scheme ... 10–14, 117–119
subdivision and construction of dwelling ... 139
vacant
– disposal after subdivision ... 139
– sale after demolition of buildings ... 137
Land taxes
exemptions ... 79
foreign purchaser surcharges
– general land tax rates ... 78
– maximum duty rates ... 78
– NSW ... 50
– Victoria ... 100
real property transfers ... 77–81
unit trusts ... 229
Landholder duty (Vic)
SMSF roll-overs ... 166–168
Legal personal representatives
death benefit nominations ... 155–157
superannuation beneficiaries ... 156
Legal professional privilege ... 62
Life insurance
SMSFs ... 159
Lifetime caps ... 22, 23
Limited recourse borrowing arrangements ... 166, 168
Liquefied natural gas ... 84

Litigation
discretionary trusts 66–69
Loans
"interest", definition 194, 195
Div 7A, benchmark interest rate 63
for producing assessable income 191, 194, 195
to preserve trust corpus 195
Local government charges 79
Lodgment
tax returns 203, 204
Losses
non-commercial 6
– carbon farming 216, 217
partnerships, cash flow boost 64
Lost trust deeds 68, 69
Low-emission vehicles 87, 187
Low-income earners
superannuation 23
Low-income households
GST tax mix 145
Low-rate lender rule 174
Lump sum superannuation benefits
historical rules 19
reasonable benefit limits 20
taxation 20, 219–223
Luxury cars
GST 153
luxury car tax
– depreciation limit 7
– fuel-efficient vehicles 131
– reform 86, 87
Luxury items
GST 152, 153

M

Main residence
building concession 137–139
sale, downsizer contributions 131
Main residence exemption
adjacent land issues 138
building dwellings on pre/post-CGT land 138
knockdown rebuild 136–139
small-scale property developments 95
Management fees
deductions for expenditure 192–194
Margin scheme
GST 10–14, 117–119
Master–servant control test 46, 48, 114
Material tax risks 132, 173, 175
Medicare levy 157, 158, 160
Member Profile
Aldrin De Zilva 18
Military superannuation benefits 132
Mineral resource rent tax 81
Mining industry
resource rent taxes 81–85
Motivation
work recognition 129
Motor vehicles
car limits 7
cents per kilometre deduction 187
congestion charges 81, 87, 88
electric cars 5, 86, 87, 131, 187
fuel tax credits 197–199
GST 7
low-emission vehicles 87, 187
luxury car tax 7, 86, 87
pollution charges 88
taxes 87, 88
travelling on public roads 197, 198
vehicle, definition 197
zero or low-emission vehicles 87, 187
Multi-factorial test
employee/contractor distinction 46–48, 113–115
Multinational enterprises
tax integrity proposals 131, 132, 173–175
thin capitalisation rules 132, 173, 174

N

National Fraud or Evasion Advisory Panel 164
Natural disasters 61, 75
Natural gas 84
Networking 128
New knowledge 108–110
New South Wales
foreign purchaser surcharge duty 78
land tax rates 78
stamp duty changes 49–51
New Zealand
GST 149, 151, 152
tax registration 204
Non-arm's length income
safe harbour 5
Non-commercial losses
carbon farming 216, 217
safe harbour 6
Non-fixed trusts
extra capital gains, foreign-resident beneficiaries 189
Non-residents
amounts "attributable to sources in Australia" 189
non-fixed trusts, capital gains 189
pension transfers (UK) 219–223
Non-reversionary pensions
superannuation death benefits 158–160
Northern Territory
foreign purchaser surcharge duty 78
land tax rates 78

O

Objections
ATO 207
OECD
BEPS action plan 173
multinational enterprise profits, digitalisation 132
tax compliance, four pillars of 203
VAT/GST rates 151
Offshore petroleum resources 81, 82
On-time payments 206
Onus of proof
fraud or evasion 163, 164
reform, tax disputes 162–165
trust expenditure 195
unexplained bank deposits 133–135
Oral rulings 43
Ordinary time earnings
SG contributions 25, 26
Overtime meal allowances 63

P

Part-time employees
superannuation 25
Partnerships
losses, cash flow boost 64
PAYG withholding rules
employee/contractor distinction 46, 47
"SG employee", definition 29
Payroll tax
alternatives 76
– business turnover tax 76, 77
– state income tax 76
compliance costs 73–77
consolidated groups 77
economic growth disincentives 75, 76
exemptions, SMEs 76
harmonisation 73–75
rates and thresholds 74–76
record-keeping 76
Single Touch Payroll 76
tax revenue 73, 74
Penalties
assessment of shortfalls 191
bank deposits, assessable income 190
deductions for expenditure 195
significant global entity, default 50
superannuation guarantee non-compliance 5, 26
transfer balance account 25
unexplained bank deposits 133–135
Pension payments
death benefit instructions 157
veterans 132
women 29
Pension transfers (UK)
applicable fund earnings 220–222
Australian taxation 219–223
foreign currency conversions 222, 223
Petroleum resource rent tax
distribution of profits 82, 83
filing of returns 83
functional currency 83
issues and options 82
production licence, reversion 85
rate of tax 82
substituted accounting periods 83
tolling arrangements 84
Pollution charges 88
Premium transfer duty (NSW) 49
Primary production business 215
Primary production income 215
Primary production land
carbon farming 211–217
foreign purchaser surcharge (Tas) 78
Primary production write-offs 215, 216
Private companies
Div 7A
– benchmark interest rate 63
– trust entitlements 63, 132, 133
Private rulings
favourable/unfavourable 40
information-gathering 39, 40
refusal/failure to rule 40, 41
relevant provision 39
self-assessment and 205
whether to apply 38–44
withdrawn or superseded 40
Production licences
petroleum resource rent tax 85
Property development
small-scale, tax issues 92–102
Property settlements
unpaid present entitlements 36
Property tax
administration 80, 81
choice of payment 79
concessions and exemptions 80
housing affordability 79
local governments 80
reform 79–81
revenue neutrality 80
thresholds 80
Protected information
notice to disclose 7
Public policy
family provision claims 231–233
Public roads
vehicles travelling on 197, 198
Public rulings 42, 43

Q

Queensland
foreign purchaser surcharge duty 78
land tax rates 78

R

Rates of tax
GST 150
petroleum resource rent tax 82
R&D
core activities 105–108
dispute resolution 105–111
eligibility disputes 105–111
expert evidence 109, 111
new knowledge 108–110
supporting activities 108, 109
tax incentive 105, 106, 111
Real and genuine consideration
discretionary trust beneficiaries 225–227
Real estate industry
rental property investments, reporting 204
small-scale developments 92–102
Real property transfers
land taxes 77–81
stamp duties 77, 78
Reasonable benefit limits 20
Record-keeping
ATO tax education 131
lost trust deeds 68, 69
payroll tax 76
unexplained bank deposits 133–135
work-related expenses 130
Reform — see also **Tax reform**
superannuation 27–30
– superannuation guarantee system 25
– taxation of contributions 27
– transfer balance cap 28
Registered emissions units 213
Registration
tax administration 203
Reimbursement agreements
administration 62
disclaimers by beneficiaries 36
trust provisions 62, 63
Relationship breakdowns
BDBNs 170
SMSF roll-overs 166
unpaid present entitlements 36
Relevant provision 39
Remote technical services
Australia–India DTA 132
Rent taxes
resources 81–85
Rental property investments
correct reporting 204
Reporting obligations
multinational enterprises 175
superannuation guarantee 29
tax administration 204–206
transfer balance account 24, 25
Research and development — see **R&D**
Residency
Australian Government contract tendering 132
lump sum foreign superannuation benefits 219, 220
Residential property
foreign purchaser surcharge 77, 78
Resource rent taxes 81–85
Resource super profits tax 81
Retirement
defence forces 132
gender inequality 23, 29
pension transfers (UK) 219–223
small business CGT concessions 24
Returns
income tax — see **Income tax returns**
petroleum resource rent tax 83
unexplained bank deposits 133–135
Revenue account or capital account 94
Reverse mortgages 81
Reversionary pensions
superannuation death benefits 157–160
Risk management
carbon farming 213
unit trusts, variation of deeds 228, 229
Road user charge 197
Roll-overs
SMSFs, landholder duty (Vic) 166–168
Royalties
mining and natural resources 72, 81, 82
multinational enterprise tax deductions 132, 174
treaty shopping 133

S

Safe harbour
non-arm's length income 5
non-commercial losses 6
Sale of land
after demolition of buildings 137
GST margin scheme 10–14, 117–119
Scheme 39
Second Commissioners 208
Self-assessment 205
Self-education expenses 5, 131, 133
Self-managed superannuation funds
BDBNs 158, 170–172
death benefit nominations 155–160
life insurance 159
roll-overs, landholder duty (Vic) 166–168
Settlement agreements 43
SG employee 29
Sham transactions 191, 193, 232, 233
Shareholders
material tax risks 132, 173, 175
Shortfall interest charge
unexplained bank deposits 134
Shortfalls
superannuation guarantee 26, 27
Significant global entity
definition 175
penalty tax 50

Single Touch Payroll 76, 204
Single women
retirement equity 29
Skills and training
boost for small business 5, 61, 188
Small business
ATO debt 5, 206
cash flow management 206
Skills and Training Boost 5, 61, 188
Technology Investment Boost 5, 188
Small business CGT concessions
retirement exemption 24
Small business entities
AAT stay order 131
assessments, shorter period of review 188, 189
Small-scale property developments (Vic) 92–102
duty, transfer of land 100–102
GST 96–100
income tax 92–96
main residence exemption 95
windfall gains tax 102
Small to medium-sized businesses
exemptions from payroll tax 76
Sole trader businesses
cash flow boost 64
Source concept
Div 6, capital gains 189
South Australia
foreign purchaser surcharge duty 78
land tax rates 78
Spouse
BDBNs 170, 171
SMSF roll-overs 166
superannuation beneficiaries 132, 156, 160, 171
Stamp duties
housing affordability 79
insurance 89
real property transfers, effects on 77, 78
Stamp duty (NSW)
acknowledgment of trust 50
change of beneficial ownership 49
foreign purchaser surcharge duty 50
foreign surcharge land tax 50
general anti-avoidance provisions 50, 51
penalty tax 50
State income tax
payroll tax alternative 76
State revenue authorities
administration and funding 206, 207
Stay orders
small business entities 131
Structuring issues
carbon farming 216
Sub-sales duty
transfer of land (Vic) 100
Sub-trust arrangements
Div 7A 132, 133
Subcontractors — see **Contractor/ employee distinction**
Subdivision of land
construction of dwelling 139
Substituted accounting periods
petroleum resource rent tax 83
Succession and estate planning
death benefit nominations 155–160, 170–172
family provision claims 231–233
Superannuation
contributions
– age limits and $450/month limit 25, 28
– caps and thresholds 21–24, 27, 28
– concessional contributions cap, inadequacy 23, 24
– rules 24
– taxation 21, 22
designing a sustainable system 19–30
downsizer contributions 25, 131
early access 5, 23
historical overview 20, 21
part-time employees 25
pension transfers (UK) 219–223
reform 30
succession and estate planning 155–160, 170–172
transfer balance cap 24, 25, 28
veteran invalidity pension payments 132
vulnerable workers 23
withdrawal of benefits 19, 22
Superannuation death benefits
BDBNs 22, 157, 158, 170–172
children 156
death benefit pensions 157
defence forces 132
exempt current pension income 157, 159
financial dependant 156
legal personal representative 155–157
nomination options 155–160
non-reversionary pensions 158–160
reversionary pensions 157–160
spouse 132, 156, 160, 171
Superannuation guarantee
amnesty 26, 27
calculation 25, 26, 29
contractor/employee distinction 47
design failure issues 26
employer liability 26
harmonisation of SG contributions 25
legislation 21
non-compliance 5, 26
"SG employee", definition 29
shortfalls 26, 27
timing of contributions 26, 27
SuperFund Lookup 29
Supply
GST margin scheme 12, 118
Supporting R&D activities 108, 109
Surcharge purchaser duty — see **Foreign purchaser surcharge duty**

T
Tasmania
foreign purchaser surcharge duty 78
land tax rates 78
Tax administration — see **Administration**
Tax agents
termination of registration 190
Tax avoidance
tax integrity package, multinational enterprises 131, 132
Tax debts
disclosure of information 7
freezing orders varied 7, 8
small business 5, 206
Tax disputes
objections and appeals 207
onus of proof, reform 162–165
Tax education
CommLaw3 Property Law Dux Award, study period 2, 2021
– Albert Meintjes 16
CTA2B Advanced Dux Award, study period 3, 2021
– Runxiang Wang 143
– Vicky Tang 200
CTA3 Advisory Dux Award, study period 3, 2021
– Clare Pendlebury 70
Graduation Diploma of Applied Taxation
– 2021 graduates 141
Tax Adviser of the Year Award finalists 186
Tax evasion
bank deposits, assessable income 190
Tax file number 203
Tax incentives
R&D, eligibility 105–107
Tax integrity measures
multinational enterprises 131, 132, 173–175
Tax liability
on-time payments 206
Tax policy development 202, 203, 208, 209
Tax practitioners
discretionary trusts, drafting deeds 68, 69
family provision claims 233
lapsed tax measures 5
networking 128
work recognition 129
Tax Practitioners Board
termination of tax agent registration 190
Tax reform — see also **Reform**
2021 Intergenerational Report 61
GST 145, 148–153
land taxes 77–81
luxury car tax 86, 87
motor vehicle taxes 87
payroll tax 76, 77
petroleum resource rent tax 82, 85
policy development 208, 209
property tax 79–81
wine equalisation tax 88
Tax revenue
excise and customs duties 88
GST 144–152
payroll tax 73, 74
petroleum resource rent tax 82, 83
revenue-raising 73
stamp duty 78
Tax risks
private rulings 38–44
shareholders, material tax risk 132, 173, 175
Taxpayer Charter 208
Technological changes
e-invoicing 206
motor vehicle use 87
Technology Investment Boost
small business 5, 188
Termination of registration
tax agents 190
The Tax Institute
2021 Intergenerational Report 61
Chair of National Council
– Clare Mazzetti 58
Incoming Government Brief 61
networking 128
Tax Knowledge Exchange 184, 186
Tax Summit 2022 59, 128, 129, 184
wellbeing 2, 3
work recognition 129
Thin capitalisation rules
multinational enterprises 131, 132, 173, 174
Thodey report 89
Timing issues
excess concessional contributions 27
non-reversionary versus reversionary pension 158
on-time payments 206
superannuation guarantee contributions 26, 27
trust income, present entitlements 34
Tobacco excise rates 147
Tolling arrangements
petroleum resource rent tax 84, 85
Tourism
GST revenue 145
Training 188
boost for small business 5, 61, 188
Transfer balance account
non-reversionary versus reversionary pension 158, 159
reporting obligations 24, 25
Transfer balance cap
proportional indexation 25
reform 28
rules 24
taxation of excess 24
transfer balance account 24, 25
Transfer duty (Vic)
small-scale property developments 100–102
Transparency
Australian tax system 208
multinational tax integrity proposals 131, 132, 173–175
Travelling on public roads 197, 198
Treaty shopping
withholding tax rates 133
Trust beneficiaries
adding a beneficiary 66, 67
disclaimers of rights 33–36, 66
private companies, Div 7A 63, 132, 133
unfairness 35
Trust deeds
amendment, adding a beneficiary 66, 67
construction 66
lost 68, 69
rectification 67, 68
variation 228, 229
Trust distributions
borrowing to preserve trust corpus 195
Trust income — see **Distributable income**
Trustees
exercise of discretion 225–227
non-residents, amounts "attributable to sources in Australia" 189
Trusts — see also **Discretionary trusts**
acknowledgment of 50
change of beneficial ownership 49
reimbursement agreements 62, 63

U
Underpaid award entitlements 8
Unfairness — see **Fairness**
Unit trusts
variation of deeds 228, 229
United Kingdom
pension transfers 219–223
Units trusts
SMSF roll-overs, landholder duty (Vic) 166–168
Unpaid present entitlements
disclaimers by trust beneficiaries 33–36

V
Vacant land
disposal after subdivision 139
sale after demolition of buildings 137
Victoria 78
Valuation
GST margin scheme 11, 12, 119
Value added tax — see **Goods and services tax**
Vehicles — see **Motor vehicles**
Vertical fiscal imbalance
Australian tax system 72, 73
Veteran invalidity pension payments 132
Victoria
foreign purchaser additional duty 100
foreign purchaser surcharge duty 78
land tax rates 78
landholder duty 166
small-scale property developments 92–102
windfall gains tax 102
Voluntary Tax Transparency Code 174
Vulnerable workers
superannuation 23

W
Wash sales 58
Wellbeing 2, 3
Western Australia
foreign purchaser surcharge duty 78
land tax rates 78
Wills
family provision claims, public policy 231–233
Wine equalisation tax
reform 88
Withholding system
small business 206
Withholding tax
treaty shopping 133
Women
retirement equity 29
superannuation 23
Work recognition 129
Work-related expenses
record-keeping 130
self-education expenses 131
Work test
superannuation contributions, age limits 25
Workers
concept of worker 75
low-income earners 23
vulnerable, superannuation 23

Working from home 2, 27
deductions, office expenses 130
Workplace culture 2
Write-offs
primary production 215, 216

Z

Zero or low-emission vehicles 87, 187

Legislation

A New Tax System (Commonwealth-State Financial Arrangements) Act 1999
s 11(1) 147
Sch 2 147
A New Tax System (Goods and Services Tax) Act 1999 10, 144
Div 51 96
Div 75 10, 11, 13, 14, 117
Div 129 98
Subdiv 38-J 103, 218
Subdiv 38-O 103, 218
Subdiv 40-C 103
Subdiv 129-C 99
s 7-1(1) 103
s 7-1(2) 103
s 9-5 13, 103
s 9-40 103
s 11-5 103
s 11-30(3) 98
s 27-40 98
s 38-590 218
s 40-65(2)(b) 103
s 51-5 96
s 51-5(1)(a) 103
s 51-5(1)(e) 103
s 51-5(1)(eb) 103
s 51-10 96
s 75-5 13
s 75-5(1) 13, 103
s 75-5(1)(a) 12, 13
s 75-5(1)(b) 12
s 75-5(1)(c) 12
s 75-5(1A) 103
s 75-5(2) 13
s 75-5(3) 103
s 75-10 13
s 75-10(1) 103
s 75-10(2) 12, 103
s 75-10(3) 10–12, 117, 118
s 75-10(3)(a) 12, 13
s 75-11(1) to (7) 13
s 75-16 13
s 75-22 13
s 129-20(1) 98, 103
s 129-25 103
s 184-1(1) 103
s 184-1(1A) 103
s 195-1 103
A New Tax System (Goods and Services Tax) Regulations 2019
reg 51-5.01(1)(f) 103
A New Tax System (Luxury Car Tax) Act 1999
s 25-1(4) 187
Administration and Probate Act 1958 (Vic) 233
Administrative Decisions (Judicial Review) Act 1977 41, 162
Sch 1(e) 164, 165
Australian National Registry of Emissions Units Act 2011 217
Bankruptcy Act 1966
s 116(2)(d) 170
Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020 64
s 5(1)(f) 64
s 5(5)(a) 64
Carbon Credits (Carbon Farming Initiative) Act 2011 211
Pt 5 217
s 5 217
s 11 217
s 12 217
s 13 217
s 15 217
s 16(2) 217
s 18(2) 217
s 20 217
s 22 217
s 23(1)(g) 217
s 27(3)(e) 217
s 27(3)(f) 217
s 27(4)(e) 217
s 53 217
s 53A 217
s 54 217
s 69(2) 217
s 69(3) 217
s 69(4) 217
s 69(5) 217
s 76(1)(c) 217
s 76(1)(d) 217
s 76(1)(e) 217
s 135 217
s 150 217
s 150 to 153 217
s 157A 217
Carbon Credits (Carbon Farming Initiative) Rule 2015 211
Climate Change Bill 2022 187
Commonwealth of Australia Constitution Act
s 51(ii) 72
s 96 147
s 114 10
Corporations Act 2001 213
s 1305 165, 192, 193, 196
Duties Act 1997 (NSW) 49, 50
Ch 9 90
Duties Act 2000 (Vic) 166
Ch 2
– Pt 4A 100
Ch 3 167
s 3 100
s 3(1) 103
s 3B 103
s 3B(2) 103
s 12 103
s 18A 102
s 27 101
s 27(1) 101
s 27(2) 102
s 28A 102
s 32B 103
s 32I 103
s 32P 103
s 35 103
s 36 103
s 36A 103
s 36B 103
s 40 167, 168
s 40(1) 168
s 40(1)(c) 167, 168
s 41 103
s 41A 103
s 43 103
s 43A 103
s 56 103
s 71 166, 167
s 71(1) 167
s 77 167, 168
s 78 167, 168
s 79(1) 167
s 79(2)(a) 167
s 80 167
s 89D 167
s 89D(a) 167
s 89D(d) 167, 168
Evidence Act 1995
s 69 196
s 140(2) 192
Excise Tariff Act 1921 81
Fair Work Act 2009 26
Family Law Act 1975
s 4 156
s 79 36
Family Provision Act 1969 (ACT) 233
Family Provision Act 1970 (NT) 233
Family Provision Act 1972 (WA) 233
Federal Court of Australia Act 1976
s 21 42, 43
s 22 43
Fuel Tax Act 2006 197
s 43-10(4) 198
Income Tax Act 1986
s 5 37
s 7 37
Inheritance (Family Provision) Act 1972 (SA) 233
International Tax Agreements Act 1953 132
ITAA36 76
Pt III
– Div 5 37
– Div 6 33–35, 189
– Div 7A 36, 63, 132
Pt IVA 133, 196
s 73B 105
s 73B(1) 105
s 73B(2B) 106
s 82A 131
s 95AAA 37
s 96 34, 35
s 97 33–36
s 97(1) 33–35
s 98 34, 35, 189
s 98(2A) 189
s 98A(2) 189
s 99 34, 35
s 99A 34, 35
s 100A 36, 62, 63
s 109D(1) 63
s 109E(5) 63
s 109N(1)(b) 63
s 109XB 63
s 170(1) 165
s 177D(b) 44
s 190(b) 165
Sch 2F 228
ITAA97 50, 76, 131
Div 35 216
Div 40 63, 216, 218
Div 43 188, 216
Div 70 214
Div 115 93
Div 152 93, 218
Div 293 31
Div 313 22, 31
Div 355 111
Div 392 218
Div 393 218
Div 420 213, 214
Subdiv 40-F 215, 216
Subdiv 40-G 215
Subdiv 108-D 136
Subdiv 115-C 189
Subdiv 118-B 93, 95
Subdiv 124-D 93
Subdiv 290-B 31
Subdiv 295-I 31
Subdiv 328-G 218
Subdiv 900-B 63
s 6(5) 219
s 6(10) 219
s 8-1 191, 194–196, 214, 218
s 8-1(1) 194
s 8-1(2)(a) 218
s 10(5) 219
s 25-35 191, 194, 196
s 26-95 31
s 35-10(2E) 6
s 35-10(4) 218
s 35-55(1)(a) 6
s 40-25 63
s 40-30(1) 218
s 40-30(1)(a) 218
s 40-30(3) 218
s 40-95 63
s 40-100 63
s 40-100(5) 63
s 40-525 218
s 70-10 218
s 70-12 218
s 70-25 218
s 82-160 21
s 103-25 139
s 104-20 136
s 104-20(4) 136
s 108-5(2)(a) 136
s 108-55(2) 136
s 108-70 139
s 112-25 103
s 112-30 137
s 112-30(2) 137
s 112-30(3) 137
s 112-30(4) 137
s 115-215(3) 189
s 115-220 189
s 115-222 189
s 118-15 218
s 118-110 103
s 118-115 136
s 118-115(2) 103
s 118-120 103
s 118-120(1) 138
s 118-120(2) 138
s 118-130 136
s 118-140 137–139
s 118-150 137, 138
s 118-150(2) 138
s 118-150(3) 137
s 118-150(4) 137
s 118-150(5) 137
s 118-155 139
s 118-165 103
s 118-240 to 118-255 139
s 152-40 216
s 152-40(4)(e) 216, 218
s 290-60 31
s 290-170 31
s 290-230 22, 31
s 291-20(2) 21
s 291-20(3) 22, 31
s 291-465 31
s 292-85(2) 21
s 292-85(2)(b) 30, 31
s 292-85(3) to (4) 22, 31
s 292-85(5) to (7) 21
s 292-95 31
s 292-100 31
s 292-102 22, 31
s 292-105 21
s 293-20 21
s 294-35 21
s 294-135 21
s 295-200 222
s 302-195(1) 160
s 305-60 219
s 305-70 219, 220
s 305-70(2) 221
s 305-75 220
s 305-75(3)(a)(i) 221
s 305-75(3)(a)(ii) 221
s 305-75(3)(b) 221
s 305-80 222
s 305-80(1)(d) 222
s 306-10 222
s 307-345 21
s 307-550 21
s 355-5 110, 111
s 355-25 105–107, 109, 111
s 355-25(1) 106, 107, 109–111
s 355-25(1)(a) 107, 109
s 355-25(1)(b) 109
s 355-25(2)(b) 110
s 420-5 217
s 420-10 217
s 420-12 216
s 420-12(1) 217
s 420-15 217
s 420-15(4) 218
s 420-25 217
s 420-42 217
s 420-45 217
s 420-50 218
s 420-51 218
s 420-55 218
s 420-55(4) 218
s 420-55(5) 218
s 420-57(1) to (3) 218
s 420-57(5) 218
s 420-57(6) 218
s 420-57(7) 218
s 420-57(8) 218
s 420-65 218
s 420-70 218
s 855-10 189
s 855-40 189
s 995-1 39, 103, 215
Judiciary Act 1903
s 39B 43, 162
s 39B(IA)(c) 42
Land Tax Management Act 1956 (NSW) 49
s 3A(3B) 228
Landcom Corporation Act 2001 (NSW)
s 17 10
Major Bank Levy Act 2017 39
Minerals Resource Rent Tax Act 2012 81
Minerals Resource Rent Tax Repeal and Other Measures Act 2014 81
Partnership Act 1958 (Vic)
s 5(1) 103
Payroll Tax Act 1971 (Qld)
Div 2 90

Payroll Tax Act 2007 (NSW)
Sch 2 90
Payroll Tax Act 2007 (Vic)
Sch 2 90
Petroleum Resource Rent Tax Assessment Act 1987 82
s 4 85
s 5 85
s 20 85
s 37 85
Petroleum Resource Rent Tax Assessment Amendment Act 2012 90
Petroleum Resource Rent Tax Assessment Regulation 2015 82
Petroleum Resource Rent Tax Assessment Regulations 2005 90
Product Grants and Benefits Administration Act 2000
s 8 39
State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022 (NSW) 49
Succession Act 1981 (Qld) 232, 233
s 41 232, 233
Succession Act 2006 (NSW) 233
Pt 3.3
– Div 1 233
Superannuation (Excess Non-concessional Contributions Tax) Act 2007 31
Superannuation (Government Co-contribution for Low Income Earners) Act 2003 22, 31
s 9 21
s 10A 21
s 12E 21
Superannuation Guarantee (Administration) Act 1992 21
Pt 7 5, 26
s 12 29, 47
s 12(3) 47, 113, 115
s 15 21, 31
s 15A 31
s 19AA 22
s 19AB 22
s 19AC 22
s 23 31
s 27(2) 21, 28
s 28 28
s 31 31
s 49(3) 31
s 62(3) 31
s 62(4) 31
Superannuation Industry (Supervision) Act 1993
Pt 3A 31
s 10 160
s 32A to 32ZAA 31
s 66 168
s 66(1) 168
s 66(2A)(a)(iv) 168
s 67A 166, 168
s 67A(2)(b) 168
s 71(1)(j) 168
Superannuation Industry (Supervision) Regulations 1994 168
reg 6.17A 158, 170, 171
reg 6.21 160
reg 6.44 31
reg 7.04 31
reg 13.22C 168
reg 13.22C(2) 168
Sch 7 21
Tax Agent Services Act 2009
Div 30 190
s 20-5(1)(a) 190
s 20-5(3)(a) 190
Tax and Superannuation Laws Amendment (2015 Measures No. 5) Bill 2015 187
Tax Laws Amendment (Research and Development) Bill 2010 105, 112
Taxation Administration Act 1953 117, 131
Pt IVC 40, 42–44, 111, 162, 165
Div 95 31
Div 131 31
Div 138 31
Div 268 31
Div 269 31
Div 357 39
Div 359 38
Div 384 31
s 14ZVA 40
s 14ZYA 41
s 14ZZ 162
s 14ZZK 162
s 14ZZK(b) 165
s 14ZZO 162
s 14ZZO(b) 165
Sch 1
– Pt 2-5 46
– Subdiv 265-C 31
– s 10-1 to 20-80 46
– s 12-35 46
– s 16-182 31
– s 97-20 31
– s 97-25 31
– s 260-5 31
– s 284-90(1) 196
– s 355-25 7
– s 355-50 7
– s 355-50(1) 7
– s 355-75 7
– s 357-60 40, 196
– s 357-75(1) 40
– s 357-85 40
– s 357-90 40, 41
– s 357-105 39, 40
– s 357-110 40
– s 357-120 40
– s 358-5(1) 42
– s 359-5 39, 40
– s 359-10(3) 40
– s 359-15 39, 40
– s 359-20 39, 40
– s 359-25 39
– s 359-35 40
– s 359-50 41
– s 359-50(3) 41
– s 359-50(4) 41
– s 359-55 39, 40
– s 359-60 39
– s 359-60(1) 40
– s 359-60(2) 40
– s 359-60(3) 40
– s 360-5(2A) 43
Taxation Administration Act 1996 (NSW) 49, 50
Taxation Laws Amendment (No. 3) Act 1991 165
Testator's Family Maintenance Act 1912 (Tas) 231, 233
Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2018 31
Treasury Laws Amendment (2022 Measures No. 2) Bill 2022 131
Treasury Laws Amendment (Electric Car Discount) Bill 2022 131, 187
Treasury Laws Amendment (Recovering Unpaid Superannuation) Act 2020 31
Trustees Act 1962 (WA)
s 92 67
Uniform Civil Procedure Rules 2005 (NSW)
r 21.10 7

Rulings and other materials

Australian Taxation Office
FTD 2016/1 198
FTR 2008/1 197, 198
GSTR 2002/2 154
GSTR 2003/9 154
GSTR 2004/1 154
GSTR 2004/2 103
GSTR 2006/3 154
GSTR 2006/4 98, 154
GSTR 2008/1 154
GSTR 2009/2 103
GSTR 2009/4 98, 103
GSTR 2012/5 103
ID 2003/810 137
ID 2004/634 216
ID 2004/809 223
ID 2009/124 221
ID 2012/48 221
ID 2012/49 221
ID 2015/7 223
IT 210 215
IT 225 218
MT 2006/1 103
NAT 749757 44
PBR 1012927800595 218
PBR 1013032138063 218
PBR 1051237204348 218
PBR 1051426020916 103
PBR 1051757260120 103
PBR 1051786568488 103
PCG 2016/11 198
PCG 2020/6 31
PCG 2022/D1 62, 63
PCG 2022/D2 6
PS LA 2008/6 165
PS LA 2010/4 63, 133
PS LA 2020/4 31
SGR 2005/1 47
TA 2018/2 174
TA 2020/1 174
TA 2022/2 133
TD 7 103
TD 92/147 137
TD 92/148 93, 103
TD 1999/43 139
TD 1999/79 136
TD 2000/13 139
TD 2000/14 139
TD 2012/21 229
TD 2013/2 218
TD 2014/25 58
TD 2017/13 138
TD 2022/10 63
TD 2022/11 64, 132, 133
TD 2022/12 189
TD 2022/13 189
TD 2022/D1 36, 63
TR 92/3 102, 103
TR 2005/16 46
TR 2006/10 44
TR 2010/1 31
TR 2010/3 63, 132, 133
TR 2013/5 160
TR 2021/3 64
TR 2022/1 63, 64
TR 2022/D1 62
Double tax agreements
Australia–India
– art 12(3)(g) 132
– art 23 132
European Union
Global Reporting Initiative GRI 207 175
Federal Government
Intergovernmental Agreement on Federal Financial Relations 147, 148
Revenue NSW
Revenue Ruling DA.017 101, 102

Cases

A
Alan Gough and Vision Business Group Pty Ltd and Tax Practitioners Board [2022] AATA 2757 190
Anglo American Investments Pty Ltd (Trustee) v FCT [2022] FCA 971 191, 196
Attorney-General (Cth) v Breckler (1999) 197 CLR 87 225
Aurizon Holdings Ltd v FCT [2022] FCA 368 38
Australian Securities and Investments Commission v Rich [2009] NSWSC 1229 192
B
Bamford; FCT v [2010] HCA 10 34, 35
Barns v Barns [2001] SASC 303 231–233
Begg v DCT (SA) [1937] SASR 97 195
Bellinz Pty Ltd v FCT 98 ATC 4634 41, 43
Benz v Armstrong [2022] NSWSC 534 170
Brady King Pty Ltd v FCT [2008] FCAFC 118 12
Branir Pty Ltd v Owston Nominees (No. 2) Pty Ltd [2001] FCA 1833 192, 193
Bridgwater v Leahy (1998) 194 CLR 457 233
Brooks v Burns Philp Trustee Co Ltd [1969] HCA 4 232
C
Calvert v Badenach [2015] TASFC 8 231
Camalic Pty Ltd and Innovation and Science Australia [2020] AATA 1590 110
Carey v Field [2002] FCA 1173 42
Carter; FCT v [2022] HCA 10 33–36, 66
Casimaty v FCT [1997] FCA 1388 102, 103
Cassaniti; FCT v [2018] FCAFC 212 162, 165
Chhua and FCT [2022] AATA 2593 190
Chief Commissioner of State Revenue v Benidorm Pty Ltd [2020] NSWCA 285 50
Chief Commissioner of State Revenue v Smeaton Grange Holdings Pty Ltd [2017] NSWCA 184 37
Clark; FCT v [2011] FCAFC 5 196, 229
Cleeve Group Pty Ltd, Re [2022] VSC 342 68
Coal of Queensland Pty Ltd and Innovation and Science Australia [2020] AATA 126 110
Coal of Queensland Pty Ltd v Innovation and Science Australia [2021] FCAFC 54 110
Colonial First State Investments Ltd v FCT [2011] FCA 16 228
Commonwealth of Australia v Kupang Resources Pty Ltd (ACN 098 773 785) [2022] NSWCA 77 7
Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 47, 48, 113, 114
Cooperative Bulk Handling Ltd v FCT [2010] FCA 508 45
Corporate Business Centres International Pty Ltd v FCT [2004] FCA 458 41
CPT Custodian Pty Ltd v Commr of State Revenue [2005] HCA 53 171, 228
CTC Resources NL v FCT [1994] FCA 947 41
Cunningham v Gapes [2017] FCA 787 170
D
Dalco; FCT v [1990] HCA 3 163
Dental Corporation Pty Ltd v Moffet [2020] FCAFC 118 47, 114, 115
Dinshaw v Bombay Commr of Income Tax (1934) 50 TLR 527 194
Docklands Science Park Pty Ltd and Innovation Australia [2015] AATA 973 106
Douglas; FCT v [2020] FCAFC 220 132
E
Eichmann; FCT v [2019] FCA 2155 45
Eichmann v FCT [2020] FCAFC 155 45
Equuscorp Pty Ltd v Glengallan Investments Pty Ltd [2004] HCA 55 193
Executors of the Estate of Subrahmanyam; FCT v [2001] FCA 1836 41
F
Finch v Telstra Super Pty Ltd [2010] HCA 36 160, 225
Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq) [2002] FCAFC 285 229
FKYL and FCT [2016] AATA 810 103
Futuris Corporation Ltd; FCT v [2008] HCA 32 45
G
Galland; FCT v (1986) 162 CLR 408 37
Gauci v FCT [1975] HCA 54 164
Goldsworthy and FCT [2022] AATA 2472 133
Grofam Pty Ltd v FCT [1997] FCA 660 45
Guttikonda and Sheth and FCT [2022] AATA 1325 8
GXCX and FCT [2009] AATA 569 103
H
H2O Exchange Pty Ltd and Innovation and Science Australia [2019] AATA 4195 110
H2O Exchange Pty Ltd v Innovation and Science Australia [2021] FCA 11 110
Harmer v FCT [1991] HCA 51 37
Havilah Resources Ltd and Innovation and Science Australia [2020] AATA 933 110

Hay's Settlement Trusts, Re [1981] 3 All ER 786 ... 226
Hill v Zuda Pty Ltd [2022] HCA 21 ... 160, 171
Hitch v Stone (Inspector of Taxes) [2001] STC 214 ... 194
Hollis v Vabu Pty Ltd [2001] HCA 44 ... 47, 48, 114
Huang; DCT v [2021] HCA 43 ... 8
Huang (No. 4); DCT v [2022] FCA 618 ... 7

J
Jacob Morris, Re (1943) 43 SR (NSW) 352 ... 232
Jamsek v ZG Operations Australia Pty Ltd [2020] FCAFC 119 ... 47, 115
JLSP and Innovation Australia [2016] AATA 23 ... 105–107
Johnson and FCT [2007] AATA 1322 ... 93
Jonshagen v FCT [2016] FCA 1545 ... 45
Jordan, Commissioner of Taxation v Second Commr of Taxation [2019] FCA 1602 ... 165
JW Broomhead (Vic) Pty Ltd (in liq) v JW Broomhead Pty Ltd (1985) 9 ACLR 593 ... 229

K
Karger v Paul [1984] VR 161 ... 225

L
Landcom v FCT [2022] FCA 368 ... 38, 41
Landcom v FCT [2022] FCA 510 ... 10, 12–14, 117–119

M
Ma v FCT [1992] FCA 359 ... 163
McCurry v FCT [1998] FCA 512 ... 102, 103
McMahon; FCT v 97 ATC 4986 ... 42, 44
Mercanti v Mercanti [2016] WASCA 206 ... 66
Moana Sand Pty Ltd v FCT [1988] FCA 401 ... 102
Moreton Resources Ltd and Innovation and Science Australia [2018] AATA 3378 ... 112
Moreton Resources Ltd v Innovation and Science Australia [2019] FCAFC 120 ... 105–107, 111
Mount Pritchard & District Community Club Ltd v FCT [2011] FCAFC 129 ... 42
Myer Emporium Ltd; FCT v [1987] HCA 18 ... 194, 195

N
National Speakers Association of Australia Inc v FCT 97 ATC 5131 ... 41, 44

O
On Call Interpreters and Translators Agency Pty Ltd v FCT (No. 3) [2011] FCA 366 ... 47, 48, 114
Owies v JJE Nominees Pty Ltd [2022] VSCA 142 ... 225, 226

P
Palmer v Bank of New South Wales [1975] HCA 51 ... 233
Paul Geoffrey Mason, Application of [2022] NSWSC 808 ... 67
Permewan No. 2, Re [2022] QSC 114 ... 231, 233
PKWK and Innovation and Science Australia [2021] AATA 706 ... 105–107, 111

R
Radilo Enterprises Pty Ltd; FCT v (1997) 72 FCR 300 ... 194
Raftland Pty Ltd (as Trustee of the Raftland Trust) v FCT (2006) 227 ALR 598 ... 233
Raftland Pty Ltd v FCT [2008] HCA 21 ... 193
Razzy Australia Pty Ltd v Commr of State Revenue [2021] VSC 124 ... 167
Roberts and Smith; FCT v [1992] FCA 363 ... 195
Rosgoe Pty Ltd v FCT [2015] FCA 1231 ... 42
Royal Wins Pty Ltd and Innovation and Science Australia [2020] AATA 4320 ... 110, 111
Ruhamah Property Co Ltd v FCT [1928] HCA 22 ... 102

S
Scott v Commr of Taxation (No. 2) (1966) 40 ALJR 265 ... 191, 193
Sharrment Pty Ltd v Official Trustee in Bankruptcy (1988) 18 FCR 449 ... 193
Shord and FCT [2022] AATA 1536 ... 62
St Hubert's Island Pty Ltd (in liq); FCT v [1978] HCA 10 ... 103
State of Western Australia v Rothmans of Pall Mall (Australia) Ltd [2001] WASCA 25 ... 139
Statham v FCT [1988] FCA 463 ... 103
Stevens v Brodribb Sawmilling Co Pty Ltd [1986] HCA 1 ... 114
Stevenson v FCT [1991] FCA 224 ... 103

T
Telstra Super Pty Ltd v Flegeltaub [2000] VSCA 180 ... 226
Thiele and FCT [2022] AATA 2123 ... 64
TOC Processing Pty Ltd and FCT [2022] AATA 2479 ... 133

U
Ultimate Vision Inventions Pty Ltd and Innovation and Science Australia [2019] AATA 1633 ... 106
Union-Fidelity Trustee Co of Australia Ltd v FCT [1969] HCA 36 ... 37

V
Vidler v FCT [2010] FCAFC 59 ... 103
Vigolo v Bostin [2005] HCA 11 ... 233

W
Westfield Management Ltd v AMP Capital Property Nominees Ltd [2012] HCA 54 ... 232
Wheatland Holdings Pty Ltd as Trustee for the Rodney Manuel Family Trust [2022] WASC 211 ... 66
Whitfords Beach Pty Ltd v FCT 79 ATC 4648 ... 102
Whitfords Beach Pty Ltd v FCT [1983] FCA 97 ... 102
Williams; FCT v [1972] HCA 31 ... 102
WorkPac Pty Ltd v Rossato [2021] HCA 23 ... 47, 48, 114

Y
YDXM and FCT [2022] AATA 2382 ... 133
Yeung v FCT 88 ATC 4193 ... 195

Z
Zeta Force Pty Ltd v FCT [1998] FCA 728 ... 37
ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2 ... 47, 48, 113, 114

Authors

A
Abdalla, J
Tax Counsel's Report
- Setting tax priorities in an uncertain environment ... 61

B
Backhaus, S
Superannuation
- Varying unit trust deeds to minimise risk ... 228

Bailey, K
Superannuation death benefits: nomination options ... 155
Bobb, R
Reversing the onus of proof in tax matters ... 162
Briglia, P
A Matter of Trusts
- Unit trusts, landholder duty and SMSF roll-overs ... 166

Broderick, P
A Matter of Trusts
- Owies – end of trustees' discretion? ... 225

Burns, A
Mid Market Focus
- Fuel tax credits: a reminder ... 197

Butler, D
Superannuation
- BDBNs: what to look out for and what to avoid ... 170
- Employee or contractor – clarifying the multi-factorial test: part 2 ... 113
- Employee or contractor – PAYG and SG: part 1 ... 46
- Varying unit trust deeds to minimise risk ... 228

C
Chen, S
R&D: navigating disputes ... 105
Collins, B
High Court decides FCT v Carter ... 33

D
De Zilva, A
Member Profile ... 18
Donald, A
Associate Tax Counsel's Report
- Getting tax ready for electric vehicles ... 187
- Post-election uncertainty ... 5

Donlan, T
Successful Succession
- Public policy and provision avoidance ... 231

F
Fettes, W
Superannuation
- BDBNs: what to look out for and what to avoid ... 170
- Employee or contractor – clarifying the multi-factorial test: part 2 ... 113

Figot, B
Superannuation
- Employee or contractor – PAYG and SG: part 1 ... 46

H
Hurley, C
Superannuation
- BDBNs: what to look out for and what to avoid ... 170

Hurst, G
CEO's Report
- A busy October for the Institute and our members ... 186
- Recognition for work well done ... 129
- The Tax Summit: bigger and brighter in 2022 ... 59

J
Jury, J
Carbon farming: tax issues for primary producers ... 211

K
Kinkade, I
Alternative Assets Insights
- Landcom case: GST implications ... 117

M
Malone, J
Alternative Assets Insights
- Multinational tax integrity proposals ... 173

Marateo, D
Carbon farming: tax issues for primary producers ... 211
McNab, P
Private rulings: are they worth it? ... 38

P
Pfaff, J
Alternative Assets Insights
- Landcom case: GST implications ... 117

Price, J
Acting CEO's Report
- Keep the good, leave the bad behind ... 3

S
Sanderson, J
UK pension transfers: part 1 ... 219
Sealey, M
Alternative Assets Insights
- NSW duties: significant law changes ... 49

Shekhawat, A
Associate's Report
- Australia's approach to work-related expenses ... 130

Slegers, P
Carbon farming: tax issues for primary producers ... 211

T
TaxCounsel Pty Ltd
Tax News – what happened in tax?
- June 2022 ... 6
- July 2022 ... 62
- August 2022 ... 131
- September 2022 ... 188

Tax Tips
- CGT main residence: knockdown rebuild ... 136
- Discretionary trusts: non-tax litigation ... 66
- GST margin scheme issues ... 10
- Some basic tax principles ... 191

The Tax Institute
Design of a sustainable superannuation system ... 19
Reshaping the GST for the future ... 144
State taxes and indirect taxes ... 72
Tax policy development and tax administration ... 202
Thompson, J
Alternative Assets Insights
- Multinational tax integrity proposals ... 173

Tse, J
President's Report
- Good tax policy is key to our future ... 184
- The importance of a professional network ... 128
- The importance of authenticity ... 2
- Welcome to our new governance Chair ... 58

V
Verma, R
Small-scale property developments: tax issues ... 92

Giving back to the profession

The Tax Institute would like to thank the following presenters from our September CPD sessions. All of our presenters are volunteers, and we recognise the time that they have taken to prepare for the paper and/or presentation, and greatly appreciate their contribution to educating tax professionals around Australia.

Roy Abbas, CTA
Julie Abdalla, FTI
Nadia Alfonsi
Anthony Bach, CTA
John Bassilios
Philip Bender, ATI
Peter Bobbin, CTA
Elizma Bolt
Caite Brewer
Mathew Brittingham, CTA
Phil Broderick, CTA
Daniel Butler, CTA
Rhiannan Canto, CTA
Heng Chan
Stephen Chen, CTA
Dinh Dinh Dang
Craig Day
Tom Delany, CTA
Harrison Dell
Fiona Dillon, CTA
Adam Dimac
Stanley Drummond
Tracey Dunn
Linda Farmer, CTA
Bryce Figot, CTA
Michael Flynn, KC, CTA (Life)
Brett Freudenberg, CTA
Jeremy Geale, CTA
Alan Gill, CTA
Stuart Glasgow, CTA
Brett Griffiths
David Hall, CTA
Fletch Heineman, CTA
Natalie Hewson, CTA
Cedric Hodges
Anita Hong
Simon How, CTA
Tony Ince, CTA
John Ioannou, CTA
Brad Ivens, ATI
Robyn Jacobson, CTA
Lyndal Kimpton
Roland Lagarnia
Darius Lalkaka, CTA
Dung Lam, CTA
Matthew Lane
Sharon Lim
Holly Marchant
David Marks, CTA
Marg Marshall, CTA
Sonia Mascolo, CTA
Anthony Milton, CTA
Cherelle Murphy
Sarah Pang
Shahzeb Panhwar
Matthew Pawson, CTA (Life)
Karen Payne, CTA
Kim Pike
Tom Polkinghorn
Ian Roberts, ATI
Nicole Rubinsztein
Jemma Sanderson, CTA
Shirley Schaefer
Alex Schoenfisch, CTA
Ken Schurgott, CTA (Life)
Abhishek Shekhawat, ATI
Blake Sly
Andrew Smyth
Paul Sokolowski, CTA
Meghan Speers
Julie Steed
Kimberley Stefan
King Tan, FTI
Linda Tapiolas, CTA
Liam Telford
Adele Towsend, CTA
Scott Treatt, CTA
Julie Van der Velde, CTA
Connie Van Werkum, ATI
Chris Wallis, CTA
Jacqueline Wood, CTA
Emma Wooley, CTA
Nathan Yii, CTA

Contacts

National Council

President
Jerome Tse, CTA

Vice President
Marg Marshall, CTA

Treasurer
Paul Banister, CTA

National Councillors
Leanne Connor, CTA
David Earl, FTI
Eddy Moussa, CTA
Tim Sandow, CTA
Todd Want, CTA
Ian Heywood, CTA
Bill Keays, CTA

National Office

CEO: Giles Hurst

Level 37, 100 Miller Street
North Sydney, NSW 2060

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

State Offices

New South Wales and ACT
Chair: Glen Hutchings, FTI

Level 37, 100 Miller Street
North Sydney, NSW 2060

T 02 8223 0031
E nsw@taxinstitute.com.au

Victoria
Chair: Fiona Knight, CTA

c/o Level 37, 100 Miller Street
North Sydney, NSW 2060

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

Queensland
Chair: John Ioannou, CTA

Level 11, Emirates Building
167 Eagle Street
Brisbane, QLD 4000

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

Western Australia
Chair: Bill Keays, CTA

Level 32, Central Park
152 St Georges Terrace
Perth, WA 6000

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

South Australia and Northern Territory
Chair: Nick Wilkins, CTA

The Tax Institute, WOTSO Adelaide
217/219 Flinders Street
Adelaide, SA 5000

T 08 8463 9444
E sa@taxinstitute.com.au

Tasmania
Chair: Ian Heywood, CTA

The Tax Institute, WOTSO Adelaide
217/219 Flinders Street
Adelaide, SA 5000

T 1800 620 222
E tas@taxinstitute.com.au

Taxation *in* Australia ISSN 0494-8343

Publishing House
The Tax Institute
ABN 45 008 392 372

Level 37, 100 Miller Street
North Sydney, NSW 2060

Editorial Board (appointed September 2021)
Michael Walpole, CTA, Professor, UNSW (Chair)
Celeste Black, FTI, Associate Professor, The University of Sydney
David W Marks QC, CTA, Queensland Bar
Helen Hodgson, CTA, Professor, Curtin University
Paul O'Donnell, CTA, Principal, Deloitte

General Manager – Commercial Transformation & Special Projects
James Paterson

Content Delivery Manager, Knowledge & Learning
Carla Reddy

Managing Editor
Deborah Powell

Graphic Designers
Mei Lam; Nicole Welch; Claus Huttenrauch

Typesetter
Midland Typesetters, Australia

Advertising
Business Relationship Manager
Brian Martin 08 6165 6600

© 2022 The Tax Institute
This journal is copyright. Apart from any fair dealing for the purpose of private study, research, criticism or review, as permitted under the Copyright Act, no part may be reproduced by any process without written permission.

Disclaimer
Unless otherwise stated, the opinions published in this journal do not express the official opinion of The Tax Institute. The Tax Institute accepts no responsibility for accuracy of information contained herein. Readers should rely on their own inquiries before making decisions that touch on their own interests.

taxinstitute.com.au

22-018RES_09/22