THE JOURNAL FOR MEMBERS OF THE TAX INSTITUTE

Taxation in Australia

VOL 54(7) FEB 2020

Reconsidering the Commissioner's remedial power

Nathan De Zilva

International tax: "pillars" of strength or ruins in the making?

Chloe Burnett, ATI

Tax and estate planning in 2020: what has changed?

Matthew Burgess, CTA

THE TAX INSTITUTE

Contents

Cover article

359

Reconsidering the Commissioner's remedial power

Nathan De Zilva, Associate, PwC

Feature articles

365

International tax: "pillars" of strength or ruins in the making?

Chloe Burnett, ATI, Barrister, Sixth Floor Selborne & Wentworth Chambers

372

Tax and estate planning in 2020: what has changed?

Matthew Burgess, CTA, Director, View Legal

Insights from the Institute

346 President's Report

347 CEO's Report

348 Senior Adviser's Report

Regular columns

345 Tax News – at a glance

349 Tax News – the details

353 Tax Tips

356 Tax Education

357 Member Profile

380 A Matter of Trusts

384 Superannuation

388 Tax Cases

392 Alternative Assets Insights

394 Successful Succession

398 Events Calendar

399 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

December – what happened in tax?

The following points highlight important federal tax developments that occurred during December 2019. A selection of the developments is considered in more detail in the "Tax News – the details" column on page 349 (at the item number indicated).

Review of CGT roll-over provisions

In a media release of 12 December 2019, the Assistant Treasurer announced that the Board of Taxation has been requested to undertake a review into Australia's system of CGT roll-overs and associated provisions. **See item 1.**

Disaster relief payments: tax exemption

In a media release of 8 January 2020, the Treasurer announced that the government will introduce legislation that will exempt from income tax disaster relief payments that are being made to individuals and businesses impacted by the bushfires. **See item 2.**

Testamentary trust amendments

An amending Bill (the Treasury Laws Amendment (2019 Measures No. 3) Bill 2019) that was introduced into parliament on 5 December 2019 contains amendments to implement the changes announced in the 2018-19 Budget in relation to testamentary trusts. **See item 3.**

Deductibility of employee labour costs: construction or creation of capital assets

The Commissioner has released a draft ruling that explains when certain labour costs related to constructing or creating capital assets (tangible or intangible) cannot be deducted as general deductions (under s 8-1 ITAA97) because they are costs of capital or of a capital nature (TR 2019/D6). **See item 4.**

The "in Australia" condition

The Commissioner has released a final ruling that provides his views on the "in Australia" condition that must be met by certain deductible gift recipients and income tax-exempt entities to achieve deductible gift recipient status or tax-exempt status (TR 2019/6). **See item 5.**

GST: "supply of accommodation"

The Federal Court (Kerr J) has held that the sale by a registered charity of an apartment to a person eligible to receive social housing on a non-commercial basis for a consideration less than 75% of the GST-inclusive market value of the property was a GST-free supply of accommodation and, so, was exempt from GST (*Melbourne Apartment Project Pty Ltd (as Trustee for Melbourne Apartment Project) v FCT* [2019] FCA 2118). **See item 6.**

Expenditure: capital or income?

The Federal Court (Perram J) has held that lump sum payments made by the taxpayer company to doctors in respect of contracts to conduct, for a certain period, their practice at medical centres operated by the taxpayer were allowable as general deductions (*Healius Ltd v FCT* [2019] FCA 2011). **See item 7.**

Market value of shares

On a remittal from the Federal Court, the AAT has held that, for the purposes of applying the maximum net asset value test, the market value of the taxpayer's one-third shareholding in a company was the price paid under a contract of sale that was about to be entered into, despite the fact that the sale agreement contained employment and restrictive covenants which did not in fact exist just before the relevant CGT event (the entry into the contract) (*Miley and FCT* [2019] AATA 5540). **See item 8.**

Public trading trust

The Full Federal Court (Griffiths, Derrington and Steward JJ) has dismissed an appeal by the Commissioner from a decision of Logan J that a trust was a public trading trust for the 2010 to 2014 income years within the meaning of Div 6C ITAA36 (as then enacted) (*FCT v The Trustee for the Michael Hayes Family Trust* [2019] FCAFC 226). **See item 9.**

Final rulings etc

The Commissioner has released a number of final rulings and determinations, including these relating to the following topics:

– base rate entities and base rate entity passive income (LCR 2019/5);

– trust split arrangements (TD 2019/14);

– the central management and control test of corporate residency (PCG 2018/9); and

– GST: when a supply of anything other than goods or real property is connected with the indirect tax zone (Australia) (GSTR 2019/1).

Residence of individual

The Federal Court (Logan J) has held that an individual taxpayer was a resident of Australia but, for several of the income years in question, the Thailand DTA had the effect that he was a resident in Thailand (*Pike v FCT* [2019] FCA 2185).

Active asset

The Federal Court (Derrington J) has allowed an appeal by the Commissioner from the decision of the AAT that certain land owned by the taxpayer and his spouse was an active asset for the purposes of the CGT small business reliefs (*FCT v Eichmann* [2019] FCA 2155). The decision in this case is considered in the Tax Tips column in this issue of the journal (see page 353).

President's Report

by Peter Godber, CTA

Looking ahead with 2020 vision

Incoming president Peter Godber's first report for the *Taxation in Australia* journal.

Welcome to 2020, and what a big and significant year this will be for The Tax Institute. It is my privilege to be president in 2020. I'm sharing the tremendous enthusiasm that our CEO, Giles Hurst, and our team across the country have for the year ahead. I am very pleased to see the willingness that exists within the Institute at present for us to grow and be agile as an organisation as we pursue our strategic goals.

Let me initially offer thanks and praise for Tim Neilson, CTA, and his achievements as president in 2019. Tim personalised his engagement with members, and was responsive and unyielding in his efforts to lead the Institute. He will stay on National Council as the immediate past president. On National Council, we have continuity in our state representatives, and we will be working hard together this year. I am also very pleased that Jerome Tse from King & Wood Mallesons has taken on the national vice-presidency.

In 2019, we enhanced a positive culture and efficiency within the organisation, and I thank all of those who worked hard for us to achieve this. We expect there to be a sound operational and overall financial surplus for the past 12 months which enables us to invest more into areas of development for the future benefit of members.

Operationally, there is much to be celebrating, including our successful transition into new head office premises at 100 Miller Street, North Sydney. These premises are vibrant and offer plenty of space for members to visit, for us to host events, and for us to utilise new technologies in the preparation of learning materials and communication with members. Giles has touched on this in his report this month — we are all glowing about the move.

I'd like to take this chance to mention a few of the key initiatives that will have the focus of National Council for the year ahead.

However, before I do so, please let me reach out and offer thoughts and condolences for any of the Institute members who have been affected, directly or indirectly, by the damaging bushfires experienced over the country in the past few months. We are reflecting on the impact that this has had, and will continue to have, this year on so many communities. We welcome announcements of government financial support, together with related tax exemptions for individuals and businesses which are to be legislated in the next sittings of federal and state parliaments.

Our continuing focus is to lead the way in the tax community, and support the great and diverse membership that we have, with the effective use of changing technologies. We have to make a difference for the modern tax professional.

The Tax Summit 2020, to be held in Sydney in March this year, will in many ways showcase the important role of the Institute in our tax community. It offers unprecedented quality and engagement within its program. If you have not already registered, I implore you to have a good look at the program and consider the benefits from attending, for you, your staff, or others in your organisation. It will be the largest premium event ever undertaken by the Institute, and it welcomes a return to Sydney for our premier annual member event.

Please keep an eye out for other CPD events happening across the country in 2020. Programs for several of these are already in the market. Our programs for CPD and learning will be as attractive as ever.

Apart from our core knowledge and learning activities, we also want to stand up for issues that require advocacy on behalf of members. We receive active media mentions, and make many technical submissions, but we will be increasingly alert for opportunities to engage with key regulator and stakeholder bodies within the tax community to make sure that our voice is proactive, valuable and appreciated.

As an organisation, we rely on our volunteer member input to develop our technical knowledge base, and, importantly, to help govern the organisation. In this context, I would like to acknowledge one longstanding member, Professor Dale Pinto, CTA (Life), as he steps down as chair of our Education Quality Assurance Board (EQAB) in order to focus on other commitments and to allow for succession following his long tenure, during which time he has greatly helped guide and develop the Institute's education initiatives. Dale has made an outstanding contribution at a national level to our structured education programs since 2005, and as chair of EQAB since 2010 — thank you, Dale.

In the meantime, I encourage all members, at a state or national level, to attend our events, participate in committees, talk to our elected representatives, and engage as members. This is what keeps the Institute vibrant and relevant.

CEO's Report

by Giles Hurst

The best is yet to come

CEO Giles Hurst looks forward to another exciting year at The Tax Institute.

It's the beginning of a new decade and, in many ways, a new era for The Tax Institute. By now, you would have all heard that we settled into our new office at the end of December. We would like to invite all members to visit us at Level 37, 100 Miller Street, North Sydney.

If you are passing through Sydney from interstate or you are visiting the city on business for just the day, consider yourself welcome to come and say hello. We would love to extend the invitation for you to use the office as a base for a few hours, have a cup of coffee or just come and enjoy the view.

We also start the year in a strong financial position, and as a result of this, we are in a better state to invest downstream, provide support for our members, and advocate for improvements to our tax system. Our teams are working hard to provide customer-centric service and support to continually enrich the experience of our members.

Celebrating and supporting our people

I take this opportunity to welcome Peter Godber, CTA, as The Tax Institute's president for 2020. Peter has worked tirelessly on our National Council for a number of years and is committed to the Institute's goals and aspirations. His efforts to transform our financial position have led to some great strides forward in the past few years, and we are all excited about the year ahead and working closely with Peter.

I would also like to echo Peter's sentiments regarding the contributions that Professor Dale Pinto, CTA (Life) has made to The Tax Institute. Dale has been a member since 1986 and has been heavily involved with the Institute through various committees (including the International, Not-for-Profit and Large Business and International Committees, to name a few), he has been state chair of the WA Education Committee and its state council, and has played an integral national role in our structured education programs since 2005. We thank him for his substantial contributions over a long period, and recognise and acknowledge the part he has played in making the Institute what it is today.

Like many of you, I have watched in horror at the bushfire crisis which has brought many regional communities to a standstill. I know that, for many families, it has been a difficult start to 2020. Some of our members and their clients have faced significant challenges and we have done what we can to efficiently direct members to websites and resources in one place in order to support them. We've received wonderful feedback from many of you in this regard and we remain committed to providing support to the whole tax community in this time of unrest.

The Tax Summit 2020

The Tax Summit is just around the corner and I am delighted to report that, over the holiday period, registrations have continued to roll in for what will be the biggest tax event in Australia. While The Tax Summit will bring together the best of what you know and love about National Convention and the New South Wales Tax Forum, it will be significantly bigger than anything you have experienced previously.

Our speakers are increasingly excited about this inaugural event. It is certainly one of the best programs we've seen, with practical takeaways at all levels. This is key to developing and maintaining trusted tax adviser status. The many networking opportunities and activities on offer are second to none, so if you haven't registered yet, be sure to do so before February 7 to take advantage of early bird pricing and save $200.

I am very much looking forward to hosting you at The Tax Summit in March.

Senior Adviser's Report

by Bruce Quigley, CTA

Tax reform can't wait

An important anniversary for Australia's taxation system passed without much notice late last year and another significant anniversary will occur later this year.

On 23 December 2009, Dr Ken Henry, AC, the then Secretary to the Treasury, submitted his comprehensive pathway of tax reform to the then Treasurer, Wayne Swan. In another significant tax event, Australia's GST commenced on 1 July 2000. Little has changed in the intervening periods. Tax reform cannot wait any longer. It is time for the government to show some political courage and revisit Dr Henry's recommendations, and also review our GST system.

Dr Henry's report, *Australia's future tax system, report to the Treasurer* (Henry review), was commissioned by the Rudd Government in May 2008 and contained 138 recommendations. On 23 December 2019, in an interview (the interview) with the ABC's business reporter, Michael Janda, to mark the 10th anniversary of his review, Dr Henry stated that he was "absolutely stunned that so little has actually been implemented".

In fact, none of the recommendations in the Henry review have been implemented as proposed! Those that were attempted, such as the resource super profits tax and the carbon tax, were not totally consistent with the review's recommendations and were short-lived due to political considerations.

Another recommendation to reduce the company tax rate to 25% has partially been achieved for small and medium companies, but the proposal for that to also apply for large companies was blocked in the Senate. While the Coalition's personal income tax cuts to abolish the 37% bracket is broadly consistent with the review's recommendation to simplify the personal income tax system, Dr Henry points out that the biggest winners are higher-income earners, which was never the intention.

The Tax Institute's pre-Budget submission (the submission) lodged with the Treasurer, the Hon. Josh Frydenberg, MP, in October 2019 highlighted a number of the recommendations and observations made in the Henry review. This included recommendations to simplify the personal income tax system and for all companies to have a tax rate no higher than 25%, irrespective of their aggregated turnover.

The submission also recommended that the government should adopt a policy of shifting away from being as dependent on income tax for the bulk of revenue collections towards more simple and efficient consumption taxes. Australia's current tax mix is out of step with our counterparts in the OECD. We rank 2nd highest (in 2016) for taxes on income, profits and capital gains, while we rank 34th out of 36 countries in terms of the share of revenue from GST/VAT. And things aren't improving. Even with personal income tax cuts, the latest government Budget predicts that personal income tax will rise to 49% of total tax for 2019-20 and even higher for 2020-21.

Australia's GST will be celebrating its 20th anniversary on 1 July this year. The GST we have today is a far cry from the one that the then Treasurer, the Hon. Peter Costello, AC, wanted and the one that Australia needed. The government's white paper (*Tax reform, not a new tax a new tax system: the Howard Government's plan for a new tax system*), circulated in August 1998, made it clear that the policy intent was to apply the GST to a broad range of economic activity. This was reaffirmed by Treasurer Costello in the second reading speech for the Bill, where he described the GST as a "modern, broad-based, low rate, goods and services tax that *will apply to most goods and services consumed in Australia*" (emphasis added). It is true that the base was narrowed during the passage of the legislation (in particular by making "basic food" GST-free) as a matter of political expediency. However, GST revenue continues to fall, both as a percentage of GDP and according to the Australian Bureau of Statistics data category of "household final consumption expenditure".

While the Henry review's terms of reference excluded a consideration of Australia's GST, Dr Henry nevertheless made some observations during his recent interview. He stated that, in 2000, the GST base covered around two-thirds of total consumption, while that has fallen to around half of total consumption now. Dr Henry considers that a broader GST "will have to happen". To some extent, the reduction in the GST coverage can be explained by the changing consumer spending patterns away from taxable goods to GST-free services, particularly health, as the population ages. If not addressed, this trend will only get worse.

Only 13% of revenue in Australia comes from GST compared with the OECD average of 20%. We have the fourth lowest GST/VAT rate in the OECD and a plethora of concessions and exemptions. There is a trade-off between making GST concessions and exemptions available for certain classes of taxpayers and the increased revenue that could be obtained from removing them. The submission recommended that a comprehensive review of the current exemptions and special rules in the GST law which impact the size of the GST base and revenue should be undertaken.

The introduction of the GST (and other reforms) in 2000 was arguably the most significant tax reform ever, the likes of which may never be repeated. Let's hope that this is wrong. As Dr Henry stated during the interview, the current state and Commonwealth tax systems are "unsustainable" and "people are going to lose out big time if we don't have tax reform".

Tax News – the details

by TaxCounsel Pty Ltd

December – what happened in tax?

The following points highlight important federal tax developments that occurred during December 2019.

Government initiatives

1. Review of CGT roll-over provisions

In a media release of 12 December 2019, the Assistant Treasurer announced that the Board of Taxation has been requested to undertake a review into Australia's system of CGT roll-overs and associated provisions.

The terms of reference for the review asks the Board to focus on considering practical ways to simplify existing roll-overs.

The terms of reference also state that, if the Board comes to the view that the system would benefit from additional categories of roll-overs, the Board may suggest these as options for the government to consider. In doing so, the Board should ensure that any proposals that defer CGT encourage the active use of assets in the economy and, consequently, support the payment of income tax on profits generated from using those assets (for example, when compared with no change in ownership).

The Board has been asked to report to the government by 30 November 2020.

2. Disaster relief payments: tax exemption

In a media release of 8 January 2020, the Treasurer announced that the government will introduce legislation that will exempt from income tax disaster relief payments that are being made to individuals and businesses impacted by the bushfires.

The exemption will extend to payments such as:

- Disaster Recovery Allowance payments made to individuals; and
- payments that would otherwise be taxable under the Disaster Recovery Funding Arrangements, such as grants that may be made to small businesses and primary producers.

Legislation to give effect to these changes will be required as was the case to give effect to similar tax exemptions in relation to the North Queensland floods.

This announcement follows on from an earlier announcement on 29 December 2019 that the payments being made to eligible Rural Fire Service volunteers will be free from tax.

3. Testamentary trust amendments

An amending Bill (the Treasury Laws Amendment (2019 Measures No. 3) Bill 2019) that was introduced into parliament on 5 December 2019 contains amendments to implement the changes announced in the 2018-19 Budget in relation to testamentary trusts.

The amendments will ensure that the tax concessions available to minors in relation to income from a testamentary trust only apply in respect of income generated from assets of the deceased estate that are transferred to the testamentary trust (or the proceeds of the disposal or investment of those assets).

Higher tax rates are generally imposed (under Div 6AAA of the *Income Tax Assessment Act 1936* (Cth) (ITAA36)) on income distributed to minors, with an exception for income from a testamentary trust. The amendments in the Bill are intended to ensure that taxpayers are not able to access concessional tax treatment by injecting assets that are unrelated to a deceased estate into a testamentary trust, and distributing such income to minors who can enjoy ordinary tax rates rather than the higher rates otherwise applicable to minors. The amendments will provide that, to access this exception, the income from the testamentary trust must be derived from assets of a deceased estate transferred to the trust, or the accumulation of such income.

The amendments are to apply in relation to assets acquired by or transferred to the trustee of a testamentary trust estate on or after 1 July 2019.

The Commissioner's perspective

4. Deductibility of employee labour costs: construction or creation of capital assets

The Commissioner has released a draft ruling that explains when certain labour costs related to constructing or creating capital assets (tangible or intangible) cannot be deducted as general deductions (under s 8-1 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97)) because they are costs of capital or of a capital nature (TR 2019/D6).

The draft ruling applies to a taxpayer who or which incurs capital asset labour costs, these being:

- salary and wages, for employees who perform functions in relation to the construction or creation of capital assets, and other costs associated with the employment of that labour; and/or
- other amounts for labour or principally for labour incurred in relation to the construction or creation of capital assets.

The draft ruling does not apply to the extent that capital asset labour costs that the taxpayer incurs are:

- made deductible under other provisions;
- specifically taken not to be an outgoing that is capital or of a capital nature under other provisions; or
- otherwise taken into account when working out an amount of assessable income or allowable deduction.

To the extent that capital asset labour costs are incurred specifically for constructing or creating capital assets, their essential character is considered to be capital or of a capital nature and therefore cannot be deducted as a

general deduction. This is not limited to those involved in the construction work itself, but can include the costs of labour for those who perform functions in relation to the construction or creation of capital assets.

It is a question of fact and degree whether costs are incurred specifically for constructing or creating a capital asset. Not all capital asset labour costs will be regarded as being specifically incurred for constructing or creating capital assets. The cost of workers or employees whose role has a remote connection with constructing or creating capital assets, or who have a broader role that involves incidental activities connected with constructing or creating capital assets, will generally not be regarded as being incurred specifically for constructing or creating capital assets and therefore will not be capital or of a capital nature.

Whether capital asset labour costs are incurred specifically for constructing or creating capital assets is ordinarily to be ascertained at the time the loss or outgoing is incurred.

In some circumstances, an apportionment may be required, for example, where an employee is specifically employed for constructing or creating a capital asset and for other duties.

5. The “in Australia” condition

The Commissioner has released a final ruling that provides his views on the “in Australia” condition that must be met by certain deductible gift recipients (DGRs) and income tax-exempt entities to achieve deductible gift recipient status or tax-exempt status (TR 2019/6).

More particularly, the ruling is concerned with the following conditions in the ITAA97 dealing with DGRs and exempt entities:

– the condition that certain DGRs be “in Australia” before a gift or contribution to them is tax deductible (the “DGR in Australia” condition);
– the condition that certain entities have a “physical presence in Australia”, and, to that extent, incur their expenditure and pursue their objectives principally “in Australia”, before their income is exempt from tax (the “Division 50 in Australia” condition); and
– the condition that a registered charity or DGR has a “physical presence in Australia” before it qualifies for a refund of franking credits.

The following are some points from the ruling.

DGR in Australia condition

In the context of the “DGR in Australia” condition, the word “be” is considered to mean “to exist”, “have reality”, or “to be found or located”, whereas the word “in” is considered to mean “inclusion within”. Accordingly, a DGR will be “in Australia” where Australia can be described as its real location, taking into account its legal form and substance.

The DGR in Australia condition is concerned with the location of the fund, authority or institution as an entity or organisation, rather than the physical presence of particular assets or transactions. It therefore requires Australia to be the focal point of the DGR in a legal or organisational sense.

Whether a fund, authority or institution is located in Australia is a question of fact, to be determined based on the circumstances in each case. A DGR would satisfy this requirement where it is established or legally recognised in Australia and makes operational or strategic decisions mainly in Australia.

Division 50 in Australia condition

An entity satisfies the “Division 50 in Australia” condition if it has a physical presence in Australia and, to that extent, incurs its expenditure and pursues its objectives principally in Australia.

The entities that must satisfy the Division 50 in Australia condition include: registered charities; scientific institutions; public educational institutions; and public hospitals and hospitals carried on by a society or an association.

An entity does not need to meet the Division 50 in Australia condition if the entity itself meets the qualifying conditions to be a DGR, including the DGR in Australia condition. In contrast, an entity that merely controls a fund which is a DGR is not a DGR itself and so may still need to meet the Division 50 in Australia condition.

The words “to that extent” require an examination of the degree to which the entity has a physical presence in Australia, as opposed to other places. Accordingly, all of the entity’s operations and objectives must be identified and compared.

Incurs its expenditure

The place where an entity “incurs its expenditure” requires a characterisation of the expenditure, based on the facts in each case. The required connection will ordinarily exist where the decision to pay is made in Australia, and payment is to occur from an Australian source, for example, an account held with an Australian financial institution.

Pursues its objectives

An entity does not pursue its objectives in Australia merely because it undertakes some of its activities in Australia. An entity ordinarily pursues its objectives in the place where it seeks to realise its purposes, whether by making distributions to other entities or supplying goods or services in the course of its operations.

Continuous periodic testing

To maintain Division 50 income tax exemption, an entity must continue to satisfy the Division 50 in Australia conditions, including the condition that the entity incurs its expenditure and pursues its objectives principally in Australia.

While the test applies continuously and requires an overall assessment of the entity’s operations, it operates periodically, with a focus on the current income year.

Recent case decisions

6. GST: “supply of accommodation”

The Federal Court (Kerr J) has held that the sale by a registered charity of an apartment to a person eligible to receive social housing on a non-commercial basis for a consideration less than 75% of the GST-inclusive market value of the property was a GST-free supply of accommodation and, so, was exempt from GST (*Melbourne Apartment Project Pty Ltd (as Trustee for Melbourne Apartment Project) v FCT*[1]).

The basic issue was whether the sale by the vendor charity was a supply that was GST-free. The relevant GST-free category was "a supply of accommodation" within the meaning of s 38-250(1)(b)(i) of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (GSTA99). It was clear that the sale was a sale of "residential premises" that would be input-taxed under s 40-65(1) GSTA99 (the premises not being new residential premises). If a supply is potentially both a GST-free supply and an input-taxed supply, GST-free status prevails (s 9-30(3) GSTA99). That would mean that the vendor charity would be entitled to claim relevant input tax credits.

The vendor charity contended that the composite phrase "supply of accommodation" incorporated a spectrum of meanings, which included the sale of an apartment. Inherent in any supply of "real property" (as it is broadly defined in the GSTA99) on which an apartment is constructed, is the right of the acquirer to occupy and use the apartment as accommodation (as a residence or a place to live) whether that supply be: the sale of a freehold interest in land; the grant of a leasehold interest in land; or the grant of a licence to occupy land.

Kerr J was satisfied that the ordinary and natural meaning of a supply of accommodation was that for which the vendor charity contended. Having regard to the context of the legislation in which the provision appears, there was no reason to depart from that ordinary and natural meaning. There was no adequate foundation to support a finding that a literal or grammatical construction of the provision, the purpose of the statute, or the canons of construction required the relevant words to be read other than in accordance with their plain meaning.

7. Expenditure: capital or income?

The Federal Court (Perram J) has held that lump sum payments made by the taxpayer company to doctors in respect of contracts to conduct, for a certain period, their practice at medical centres operated by the taxpayer were allowable as general deductions (*Healius Ltd v FCT*[2]).

During each of the income years ending 30 June 2003 to 30 June 2007, the taxpayer paid doctors lump sums in return, loosely speaking, for their promise to conduct their practices exclusively from one of its medical centres for a period, usually of five years. At the expiry of these agreements, some doctors were paid further lump sums to extend the term of the arrangements. The lump sum acquisition costs for the income years in question were: $31,012,599 (2003); $15,514,000 (2004); $20,488,023 (2005); $36,706,780 (2006); and $40,104,463 (2007). It was not in dispute that the only issue for decision was whether the lump sums were not allowable as a general deduction (under s 8-1 ITAA97) because they were outgoings of capital or of a capital nature.

Perram J pointed out that some doctors might arrive at a medical centre without a patient base because the doctor in question did not have one, or because the doctor had moved from a sufficiently distant place such that the patients would not follow. His Honour said that this matter was to be emphasised because it showed that the lump sum payments, while not necessarily unrelated to the extent of a pre-existing practice, were also by no means driven by that matter alone and, in some circumstances, were not driven by that matter at all. What was important from the taxpayer's perspective was to have as many doctors in each medical centre. Further, this ongoing demand was present not only in the case of new medical centres which had only been open for a matter of months, but also in the case of medical centres which had been open for some years.

Perram J accepted that it was essential from the taxpayer's perspective that there were doctors operating their practices from its medical centres and that that commercial imperative gave it good reasons to seek to tie the doctors, so far as possible, exclusively to it. But it was not correct that the provision by the doctors of medical services at the medical centres was a component of the taxpayer's business structure. That structure consisted of the premises from which the centres were operated, the equipment provided to the doctors at those premises, the various staff who provided administrative assistance, and the arrangements by which those services were provided to the doctors. The fallacy in the Commissioner's submission lay in the impermissible elision of that which is commercially essential to a business structure with the business structure itself.

The nature of the taxpayer's business was more accurately described in the prospectus that it issued to the market in 1998. That business was the provision of "a comprehensive range of services and facilities to general practitioners, specialists and other health care providers who conduct their own practices and businesses at its medical centres, licensed day surgeries and specialist clinics".

Perram J accepted that the taxpayer's profit-making structure was the provision of its premises and services for a fee to its customers who were the doctors. They had their own businesses, to be sure, but their businesses were emphatically not the taxpayer's business which was quite different and which did not, and could not, involve any patients. Its business structure or organisation was the different business of providing premises and services to medical practitioners at its medical centres in return for fees.

The identification of the taxpayer's business, structure or organisation was important because the distinction between expenditure and outgoings on revenue account and capital account corresponds with the distinction between "the business entity, structure or organisation set up or established for the earning of profit and the process by which such an organisation operates to obtain regular returns by means of regular outlay". Consequently, it was necessary to identify the profit-yielding subject and to distinguish it from the process of operating the profit-yielding structure.

In his Honour's opinion, the payments of the lump sums were to be seen as recurrent and ongoing as the taxpayer consistently tried to engage doctors to meet its ongoing demand for them. It did so 505 times in the relevant period and this showed that the expenditure was in every sense recurrent. That recurrence pointed to the outgoings being on revenue account.

Nor was Perram J disposed to affirm the correctness of the Commissioner's submission that the outgoings were of an enduring nature. While the enduring nature of an outgoing is a very relevant matter to the current issue, the five-year term obtained under the contracts was not of such a nature. At the

end of the five-year period, the doctor was free to go, and the evidence disclosed several examples where the taxpayer had had to make further payments to keep a doctor whose five-year term had expired working in one of its medical centres.

Consequently, Perram J concluded that the character of the outgoings was as a payment to win a customer. It was a payment which secured the service of each doctor for a period of five years and ensured that, during that period and within a defined geographical area, the doctor worked only at its medical centre. By so doing, it locked in a valuable set of customers who were tied to it and who were bound to purchase its services.

8. Market value of shares

On a remittal from the Federal Court, the AAT has held that, for the purposes of applying the maximum net asset value test, the market value of the taxpayer's one-third shareholding in a company was the price paid under a contract of sale that was about to be entered into, despite the fact that the sale agreement contained employment and restrictive covenants which did not in fact exist just before the relevant CGT event (the entry into the contract) (*Miley and FCT*[3]).

The basic facts were as follows:

- the taxpayer owned 100 shares in a company, AJM Environmental Services Pty Ltd (AJM). The company had two other shareholders, Mr Perry and Mr Minshull, who also each owned 100 shares;
- the three shareholders entered into a single contract of sale and purchase (the sale contract), dated 7 March 2008, under which they each agreed to sell their shares in AJM to EIMCO Water Technologies Pty Ltd (EIMCO). They also agreed to sell their shares in another company that they jointly controlled, called AJM Properties Pty Ltd;
- each of the sellers received a total of $5.9m from the purchaser in connection with the sale; and
- the purchaser, EIMCO, was at arms' length from the vendors.

The sale contract included a term requiring each of the sellers to enter into an employment agreement with the company for a term of five years, and also terms requiring the individual vendors to promise AJM and EIMCO not to compete with the company or any member of the purchaser's group for five years after the sale. The sale contract did not attribute or assign any value to the vendors' agreement to enter into the employment agreements or to their agreement to the non-competition clauses.

The taxpayer contended that the value attributed to his shares should be reduced to reflect a finding that part of the price he received under the sale contract was attributable to the non-competition clauses in the contract, rather than the value of the shares. The taxpayer's case was that the rights created by the restrictive covenants did not even exist "just before the CGT event" when the valuation of the applicant's net assets was to occur. Prior to that point, the taxpayer was not under any obligation not to compete with the company or to remain in the company's employ. It followed, so the taxpayer's argument ran, that any value attributable to his agreement to accept those obligations did not become available until after the contract was concluded, and did not form part of his assets for the purposes of the maximum net asset value test.

Although the value of the shares just before their sale (the relevant point for assessing their value for the purposes of the maximum net asset value test) was impacted by the terms of the deal that was formally struck immediately thereafter, the AAT held that there was no justification for looking beyond the evidence of value suggested by that transaction, nor was there any justification for splitting hairs over the nature of the assets that were sold. The parties to the sale were quite clear on what they wanted to achieve in the contract: they wanted to achieve a sale of the shares, and they negotiated a price which delivered an agreed value to the vendors as consideration for that outcome.

The AAT, however, fully remitted the penalties that the Commissioner had imposed on the taxpayer (on the basis that the taxpayer's position was not reasonably arguable). The AAT commented that the Commissioner does not have to impose an administrative penalty every time there is a shortfall. The law in this area is advanced when taxpayers make reasoned arguments in good faith about their liability.

9. Public trading trust

The Full Federal Court (Griffiths, Derrington and Steward JJ) has dismissed an appeal by the Commissioner from a decision of Logan J that a trust was a public trading trust for the 2010 to 2014 income years within the meaning of Div 6C ITAA36 (as then enacted) (*FCT v The Trustee for the Michael Hayes Family Trust*[4]). This meant that the trust was assessable as a company, with the result that the Commissioner's assessment (under s 99A ITAA36) of the trustee of a family trust that held units in the public trading trust was erroneous.

Although amendments to the provisions of Div 6C mean that the arrangement that was held to be successful in the present case would not be effective if implemented now, there are a number of issues of a more general nature that were considered by the Full Court that continue to be of considerable interest. These include:

- the proper approach to the construction of a trust deed where there is ambiguity;
- the effect of a deed of rectification of a trust deed; and
- whether the trustee of a trust exercised the power to accumulate income by crediting its accounting profit to a "retained profits account" rather than distributing it to the unitholders.

TaxCounsel Pty Ltd
ACN 117 651 420

References

1 [2019] FCA 2118.

2 [2019] FCA 2011.

3 [2019] AATA 5540.

4 [2019] FCAFC 226.

Tax Tips

by TaxCounsel Pty Ltd

Active asset test

A recent decision of the Federal Court considers aspects of the active asset test that apply for the purposes of the CGT small business reliefs.

Background

The decision in question is that of Derrington J in *FCT v Eichmann*.[1] The ultimate genesis of the case was an application to the Commissioner by the taxpayer (on his and his spouse's behalf) for a private ruling as to the status of certain land that he owned with his spouse and was used by their discretionary trust that carried on a business. The private ruling issued to the taxpayer was adverse and the taxpayer successfully appealed to the AAT (*Eichmann and FCT*[2]). From that decision, the Commissioner has successfully appealed to the Federal Court.

The facts

The taxpayer and his spouse carried on a business through the Eichmann Family Trust (the trust) which commenced operations before the relevant land was purchased. The trust carried on a business of building, bricklaying and paving. Eichmann and Sons Pty Ltd was the sole trustee of the trust. The taxpayer and his spouse were beneficiaries of the trust and were the shareholders and directors of the corporate trustee.

The taxpayer and his spouse purchased their matrimonial home in 1997. They acquired the property next door ("the relevant land") in 1999 as joint tenants. There were two sheds on the relevant land which each measured 4 metres × 3 metres, and the land had a 2 meter high block wall and a gate to secure it. There was no business signage on the land. The land was sold in October 2016.

As noted above, the trust carried on a business of building, bricklaying and paving. The other facts stated in the private ruling issued by the Commissioner were that the usage of the relevant land involved:

- the two sheds were used for the storage of work tools, equipment and materials;
- the open space on the land was used to store materials that did not need to be stored under cover, including bricks, blocks, pavers, mixers, wheelbarrows, drums, scaffolding and iron;
- work vehicles and trailers were parked on the property;
- tools and items were collected on a daily basis;
- in some cases, the land would be visited a number of times a day in between jobs, depending on what each job required;
- the land was mainly for storage, as work would be done on work sites; and
- on occasion, some preparatory work was done at the land in a limited capacity.

The business of the trust had an aggregated turnover of less than $2m a year and was thus a small business entity for the purposes of the CGT small business reliefs. There was no dispute that the business was carried on by an entity that was connected with the taxpayer during the relevant period; what was in issue was whether the land fell within the expression "is used … in the course of carrying on a business" within the meaning of s 152-40(1)(a) of the *Income Tax Assessment Act 1997* (Cth) (ITAA97).

The legislation

The relevant provision of the ITAA97 was the definition of "active asset" in s 152-40. So far as is relevant, the section provides:

> "**152–40 Meaning of active asset**
>
> (1) A CGT asset is an ***active asset*** at a time if, at that time:
>
> (a) you own the asset (whether the asset is tangible or intangible) and it is used, or held ready for use, in the course of carrying on a business that is carried on (whether alone or in partnership) by:
>
> (i) you; or
>
> (ii) your affiliate; or
>
> (iii) another entity that is connected with you; or
>
> (b) if the asset is an intangible asset — you own it and it is inherently connected with a business that is carried on (whether alone or in partnership) by you, your affiliate, or another entity that is connected with you."

The AAT decision

The AAT (constituted by Deputy President Hanger, QC) rejected the Commissioner's contention that the phrase "in the course of" requires the use to be integral to the process by which the business is carried on.

In the tribunal's view, the phrase only required the asset to be used "in the course of carrying on a business", encompassing, necessarily, a fairly wide range of activities. Nothing in the ITAA97, any applicable case authority or explanatory memoranda detracted from the ordinary and common sense meaning of the words "used in the course of carrying on a business". The legislature could easily have used the word "necessary", "integral" or "essential" in order to further limit the availability of the concession should it have so desired. It did not do so.

The tribunal also noted that the extent of the use of the relevant land was far from minimal, or incidental to the carrying on of the business.

On appeal, the Federal Court has now reversed the decision of the AAT.

The Federal Court

Derrington J noted that it was not often that the words used in statutory provisions are entirely free of either patent or

latent ambiguity. This was particularly so with phrases which have a chameleon-like quality and which take their meaning from the context in which they are used. To overcome that ambiguity and to give meaning to the words used, reference may be made to the context in which the provision was enacted. The curial task is to construe the words employed by the legislature in the context in which they have been used. In this case, the history and context included the long-established CGT concessions which are granted to small businesses in relation to active assets, being those which are utilised in the course of carrying on a business.

"an asset … used … in the course of carrying on a business"

In the present case, the expression which required interpretation was "asset … used, or held ready for use, in the course of carrying on a business". Derrington J said that, here, the asset was a parcel of land and the business was one of "building, bricklaying and paving". Accordingly, the question could be refined to whether the land was used in the course of the carrying on of a building, bricklaying and paving business. Within that general question, there were two subsidiary ones. First, was there a relevant "use" of the land and, second, was the use in the course of carrying on the building, bricklaying and paving business?

Earlier AAT decision

In relation to the question of what constitutes a "use", the Commissioner relied on the decision of the AAT in *Rus and FCT*.[3] His Honour said that the facts of that case had some similarities with the present. The taxpayer had sought a private ruling as to whether a 16 hectare block of land was an "active asset" for the purposes of the CGT small business concessions. On the land were two domestic residences and a shed. Two storage containers were situated close to the shed. These fixtures accounted for about 10% of the land and the remaining 90% was vacant. One house was occupied by the taxpayer and her husband, and their adult children resided in the other. The taxpayer and her husband operated a construction business through a corporate entity and used one room in their residence as its office. They used the sheds for the storage of the company's plant, equipment, motor vehicles and tools. The activities of the construction business were conducted off site, and building materials were delivered to the relevant work sites. The Commissioner ruled that the land was not an active asset in relation to the company's business, and the taxpayer sought review by the AAT.

The tribunal identified that the asset under consideration was the whole 16.16 hectares of land owned by the taxpayer. When considering whether that asset was relevantly "used", the AAT observed that the word "use" is of wide import and that the taxpayer sought to reduce the gain arising on the disposal of the whole of the land for the purposes of CGT, even though only 10% of it was used for purposes related to the business. That being so, it could not be said that the land was relevantly "used" in the carrying on of that business. The business was not a farming operation in respect of which vacant land is exploited for business, and only a fraction of the land was used for purposes related to the business. The tribunal added that the vacant land did not contribute to the business activities of the company, but part of it was used merely for storage and office facilities.

"used"

Derrington J said that the following observations of Taylor J in *Council of the City of Newcastle v Royal Newcastle Hospital*[4] were applicable to the definition of "active asset":

> "The word 'used' is, of course, a word of wide import and its meaning in any particular case will depend to a great extent upon the context in which it is employed. The uses to which property of any description may be put are manifold and what will constitute 'use' will depend to a great extent upon the purpose for which it has been acquired or created. Land, it may be said, is no exception and [the relevant statutory provision] itself shows plainly enough that the 'use' of land will vary with the purpose for which it has been acquired and to which it has been devoted … But where an exemption is prescribed by reference to use for a purpose or purposes it is sufficient, in my opinion, if it be shown that the land in question has been wholly devoted to that purpose even though, the fulfilment of the purpose does not require the immediate physical use of every part of the land."

His Honour said that the purpose of the definition of "active asset" was to identify those assets which are used in the carrying on of a business and, in respect of which, gains made on their disposal will not be subject to the full liability for CGT. There was nothing in the terms of the legislation which suggested that a taxpayer ought to be entitled to claim a CGT concession in respect of the gains made on the disposal of an asset where only part of it had been utilised in the carrying on of a business for the requisite time. The obvious intent of the CGT small business relief provisions was to afford relief to small business operators by recognising that they frequently utilise their own assets or those of associated entities for the operation of their businesses and, where they have done so, the CGT burden arising on the subsequent disposal of such assets ought to be reduced.

Where it is claimed that an asset has been used in the course of carrying on a business, such that the owner is entitled to a CGT concession in relation to the capital gain made on its disposal, it needs to be established that the whole, or predominantly the whole, of the asset had been so used. The characteristic of the asset which qualifies the gains made on its disposal for a concession is its use in the course of carrying on a business. It would be an unusual construction were the legislature to have intended that a CGT concession would apply to all of the gains on the sale of an asset where only a small portion of it had been so used.

"use" of the land in the present case

Derrington J said that a not insignificant difficulty which arose in this case was that the facts stated in the scheme did not expressly identify the extent to which the property was used for purposes associated with the trust's business. The size of the property was not identified, nor was there any indication of the proportionate areas covered by the sheds used for storage areas, or used for car parking. However, while the detail in the scheme facts as to the nature and extent of the uses to which the land was put was vague, it nevertheless implied that the only uses of the land were those as set out in the Commissioner's decision in relation to the private ruling application (see above).

"in the course of carrying on a business"

The requirement of the definition of "active asset" is that the asset be used "in the course of carrying on a business".

Derrington J said that there was force in the submission made on behalf of the taxpayer that the Commissioner sought to read the words of s 152-40(1) ITAA97 as if the words "is used or held ready for use, in the course of carrying on a business" were to be read and understood as "is used or held ready for a use which is integral to the process or processes by which the business is carried on". It was difficult to identify that any requirement existed that the use of the asset was "integral" to the business processes, in the sense of being critical or fundamental to the business processes. The requirement that the use of the asset be integral in that way does not arise from the expression "in the course of carrying on a business".

However, while the Commissioner's submission that, for the purposes of the "active asset" test, the asset's use must have some centrality to the business processes of the relevant entity should be rejected, it did not follow that the expression "used in the course of carrying on a business" required no more than that the asset is used by an entity which is carrying on a business. The requirement that the asset be used "in" the carrying on of the business, rather than merely "in the business" or of having some relationship to the business, indicated that the use must be in the activities of the business which were directed to the gaining or production of assessable income. Derrington J said (at [61]-[63]):

> "In essence, in order for an asset to be used 'in' the course of carrying on a business it is necessary for the use to have a direct functional relevance to the carrying on of the normal day-to-day activities of the business which are directed to the gaining or production of assessable income.
>
> The scheme on which the private ruling was made did not include facts which disclosed that the identified uses of the land were part of the business activities of Eichmann & Sons directed to the gaining or production of assessable income. The business of the [trust] was the provision of services in the nature of construction, bricklaying and paving, and the activities engaged in the course of that business would be those directed to the securing and performing of those services. To a large extent that occurred on the work sites where the services were provided.
>
> Conversely, the uses to which the land was put were preparatory to the undertaking of activities in the ordinary course of business. The property was used for the storage of materials for use by the company when it engaged in its business activities if those materials were required, but the storage itself was not an activity in the ordinary course of Eichmann & Sons' business. Whilst it may have been a use of the land 'in relation to' the carrying on of the business, it was not, of itself, an activity in the course of carrying on the business. There was no direct connection between the uses and the business activities and the uses had no functional relevance those activities. It follows that the land which was the subject of the private ruling was not 'used, or held ready for use, in the course of carrying on a business' and the Commissioner was correct to conclude that the land was not an active asset."

Later, his Honour said that the use must be a constituent part or component of the day-to-day business activities, and may in that way be described as "integral" to the carrying on of the business. Here, the use of the land did not have that character. At best, the use was "in relation to" the course of carrying on a business. The facts stated in the scheme could not have fallen within the meaning of the scope of the statutory expression "used … in the course of carrying on a business", and the tribunal erred in concluding otherwise.

It followed that the Commissioner was entitled to succeed and the matter should be remitted to the tribunal for determination according to law.

Comment

It is submitted that the reasoning of Derrington J in the *Eichmann* case is not entirely satisfactory and that the decision produces a somewhat harsh result by imposing too high a test for the application of provisions that are expressly directed at assisting small businesses.

As a general comment, assume, for example, that the trust in the *Eichmann* case had owned a parcel of land that encompassed its offices (for convenience, "the office land") and also land that was used in the way the relevant land in the *Eichmann* case was used (for convenience, "the storage land"). Two scenarios that could arise are:

1. The storage land was in area 60% of the parcel and the whole parcel was sold by the trust in one transaction. In light of the decision in the *Eichmann* case, why wouldn't any capital gain be ineligible for the CGT small business reliefs since the predominant use of the land would be an ineligible use?
2. As a variation of 1, assume the same proportions of use but that the area of land is subdivided into its two parts and each part is sold off separately. The active asset test states that a "*CGT asset satisfies the active asset test if …". As the expression "CGT asset" is asterisked, it takes the meaning ascribed to it in the definition in s 108-5 ITAA97. That definition states (inter alia) that a part of a CGT asset is a CGT asset (s 108-5(2)(a) ITAA97). That would mean that the active asset test would need to be applied separately in relation to each part. Why couldn't the office land qualify for the CGT small business reliefs even if the storage land did not?

It is to be hoped that the taxpayer will appeal to the Full Federal Court from the decision of Derrington J and that the status of the case for this purpose remains a funded case under the ATO Test Case Litigation Program.

The downside of an appeal in the *Eichmann* case are the limitations that may arise out of the fact that the objection decision involved is a decision of the Commissioner in relation to an application for a private ruling. But it would be preferable for a Full Court ruling in an appeal in the present case in order to achieve some certainty, rather than waiting for another case to arise.

Alternatively, the government could consider the possibility of making clarifying amendments.

TaxCounsel Pty Ltd

References

1 [2019] FCA 2155.

2 [2019] AATA 162.

3 [2018] AATA 1854.

4 [1957] HCA 15 at 515.

Tax Education

How The Tax Institute propelled a partner's career

Suzie Boulous, CTA and partner at Brown Wright Stein, shares her journey to partner and the role that membership has played in her success.

Suzie works in estate planning, business succession, asset protection and restructuring.

"I love working in tax because I believe tax knowledge is fundamental to providing a holistic service to clients," she says.

"I was fortunate to have recognised fairly early in my career that tax issues intersect across all facets of the law. As such, I took steps to educate myself in tax, as well as become involved in working in tax. Working in tax has provided me with the tools to be a better lawyer."

Suzie says that being promoted to partner represents a culmination of years of hard work and dedication to her network of clients.

"As a female lawyer working in tax and estate planning, it also represents an opportunity to be a leader in my field, with the hope that I can act as a role model for younger practitioners who wish to progress in their career," she adds.

The best thing about membership

Suzie has been a member of The Tax Institute for over six years and has completed the Chartered Tax Adviser (CTA) Program and Graduate Diploma in Applied Tax Law at the Institute.

"Personally, the best thing about being a member of The Tax Institute has been having access to CPD events and education programs such as the CTA Program," she admits.

"The presentations and classes were given by respected tax practitioners in the industry. I found that I walked away with a very practical approach to tax which I could apply to my day-to-day work."

Suzie also says that The Tax Institute is a great advocate for Women in Tax, with multiple events being hosted yearly, nationally. She says that these events not only promote the development of women in tax, but also provide ample opportunity to network with fellow peers working in tax.

Tax and soft skills: you need them both!

It's no surprise that Suzie is an advocate for tax education.

"Tax education is vital for new practitioners," she says. "It can give you a head start on your client work and better inform you about key issues. However, I feel that tax education is important at every stage of your career," she adds.

This is because tax is constantly changing from new laws, new policies or new government.

"It is important to keep up to date with the changes so that a practitioner can stay ahead with the service they provide to clients," she adds.

Suzie says that soft skills are also essential for her line of work.

"I work in the area of estate planning, business succession, asset protection and restructuring, and this type of work is predominantly client-facing," she explains.

"Soft skills such as empathy and strong communication skills are vital to be able to properly connect with clients — particularly having regard to the subject matter that may be raised in my line of work, such as death, incapacity, varying family dynamics and relationships."

But regardless of her specialisation, Suzie says that soft skills are key in managing day-to-day relationships with fellow partners and younger practitioners at Brown Wright Stein.

"Empathy, leadership qualities and communication skills assist in forging and characterising those relationships," she adds.

Advice: "back yourself"

Suzie's advice for new practitioners is two-fold:

- commit to tax education as early as possible and maintain that education consistently throughout your career; and
- start networking and attend networking events. The best form of business development and education is getting to know people just like you in the industry and learning through shared experiences.

"As a woman in tax and a mother of two young children, I have found myself constantly dealing with competing priorities," she admits.

"These competing priorities can sometimes be overwhelming and may lead to self-doubt or lack of confidence. It is about taking a moment to focus, surround yourself with a supportive network of family, friends and work colleagues, and backing yourself.

"It is about training yourself psychologically to constantly push through to achieve the career goals you have set and recognising that obstacles can be opportunities in disguise," she adds.

The Tax Institute is dedicated to supporting the career progression of women in the tax, accounting and legal professions. As the leading forum for Australia's tax community, we are committed to representing our 12,000 members and to the continuous improvement of the tax system. Find out more about the benefits that membership of The Tax Institute can deliver for your role.

Member Profile

This month's column features Amanda Donald, FTI, from Keays & Associates, Western Australia.

Member since

2014

Areas of specialty

I specialise in providing tax advice for SMEs, in particular on Div 7A, capital gains tax, self-managed superannuation fund compliance and accounting software implementation.

Why are you a member of The Tax Institute?

The Tax Institute is renowned for providing exemplary professional development and education. I became a member of The Tax Institute to obtain access to these resources, and throughout my membership, I have also been fortunate enough to have developed professional relationships with other Institute members. These relationships, along with the technical CPD, have been essential in maintaining and developing my taxation knowledge.

How is your membership beneficial to your practice and clients?

The technical tax CPD provided by The Tax Institute is incomparable. Having access to these resources is beneficial for my technical development and thus has a positive impact on the tax advice that we provide our clients.

I have also had the opportunity to be involved with the CPD topics provided to members via being a committee member of the Western Australian professional development committee. It is through this forum that I can relay the relevant tax issues that my clients are facing and ensure that there is CPD that addresses these issues.

How did you end up in tax?

While completing my Bachelor of Commerce, I was provided with the opportunity to commence employment at a boutique business services firm. This experience, in conjunction with my studies, gave me a basic understanding of taxation, particularly in the SME space.

After completing my degrees, I was interested in understanding other areas within accounting. I worked as an external auditor and financial accountant before determining that I missed the technical aspects of taxation. I was fortunate enough to return to tax at Keays & Associates, where the focus is on providing technical tax advice.

On a frequent basis, I am able to utilise my tax knowledge and problem-solving skills to the benefit of our clients.

What are the challenges for tax practitioners this year?

As tax practitioners, it is crucial that we are up to date with current technology and its associated benefits and pitfalls for our clients. The available technology and the information that government departments have access to are substantial. Our role is now to utilise these resources in an efficient and feasible manner for the benefit of our clients. As practitioners, it can be difficult to move away from our routine, so it is imperative that we stay informed and embrace the technological advancements in this constantly changing global, political, economic and technological environment.

Most memorable career moment to date

It's difficult to pinpoint one notable career moment. However, some highlights of my career include the completion of my chartered accountant designation, chairing the Western Australian Div 7A day, and presenting a session for the Western Australian Young Tax Professionals series.

How do you relax?

Spending time with my family and being outdoors is an important part of relaxation for me. I enjoy gardening, hiking and running. I'm hoping to run my first marathon in 2020.

Advice to those entering the profession

I believe that having a balance between your career and your life is a crucial part to maintaining interest and longevity in any profession. It is easy to be caught up in the deadlines, study and ongoing CPD, and there will be points during your career when the work–life balance is not ideal. However, it is imperative to have interests outside of taxation and to prioritise these when you can.

The *Tax* Summit

11 – 13 MARCH / ICC SYDNEY

Powered by National Convention & NSW Tax Forum

THE TAX INSTITUTE

Tax Adviser of the Year Awards

Tax Adviser of the Year Awards

Congratulations to our finalists

The winners of the Tax Adviser of the Year Awards will be announced on 12 March at The Tax Summit Gala Dinner. The finalists are:

Chartered Tax Adviser

Matthew Cridland, CTA, K&L Gates
Peter Feros, CTA, Clayton Utz
Julianne Jaques, CTA, Victorian Bar
Manuel Makas, CTA, Greenwoods & Herbert Smith Freehills

Corporate Tax Adviser

Cameron Blackwood, ATI, Greenwoods & Herbert Smith Freehills
Daryl Choo, ATI, EY
Scott Farrell, ATI, KPMG
Matthew Popham, CTA, Newmont Goldcorp Australia
Norah Seddon, ATI, PwC
Adrian Varrasso, ATI, MinterEllison

SME Tax Adviser

Joanne Casburn, FTI, Australian Taxation Office
Natalie Claughton, MC Tax Advisors
Leanne Connor, CTA, WGC Business Advisors
Karen Rooke, CTA, Australian Taxation Office
Tania Waterhouse, Waterhouse Lawyers
Chris Wookey, CTA, Chris Wookey Chartered Accountants

Emerging Tax Star

Christopher Annicchiarico, WRP Legal & Advisory
Melissa Bader, ATI, KPMG Law
Donovan Castelyn, Curtin University and Curtin Tax Clinic
Amy Liu, CTA, Kelly Partners
Peter Scott, FTI, Arnold Bloch Leibler
Louise Van Wyk, FTI, Greenwoods & Herbert Smith Freehills

Good luck to all of this year's finalists.
You can find out more about each of them on our website.

taxinstitute.com.au/taxawards

0654NAT_02/20

Reconsidering the Commissioner's remedial power

by Nathan De Zilva, Associate, PwC

In February 2017, the Commissioner's remedial power (CRP) was introduced into Div 370 of Sch 1 to the *Taxation Administration Act 1953* (Cth). The CRP was intended to provide a mechanism to resolve the growing number of unintended outcomes and deficiencies within Australia's tax system (without having to inundate the limited parliamentary and Treasury resources). The explanatory memorandum to the Bill that became the *Tax and Superannuation Laws Amendment (2016 Measures No. 2) Act 2017* (Cth) estimated that the CRP may be used up to 10 times per annum. However, to date, the CRP has only been successfully exercised twice — highlighting a discrepancy between its policy intent and operation. This article examines the effectiveness of the CRP and suggests that it needs to be reconsidered to ensure that it can operate as intended and alleviate the significant legislative uncertainty borne by taxpayers.

Introduction

Australia's income tax system is one of the most complex tax systems in the world. The system is ever-changing through the announcement and enactment of new measures and laws to deal with changing business practices and the transforming economy.

Government continually announces proposed amendments and modifications. The volume of announced tax measures places significant pressure on the already limited parliamentary and Treasury resources, creating a backlog of announced but unenacted measures (some dating back three to four years).[1] For example, draft legislation released in 2016 to implement the Board of Taxation's (BoT's) recommended approach to improve the debt-equity tax rules in Div 974 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97) remains unattended despite the "urgency" given to the matter at the time.[2]

There are a myriad of unintended consequences and deficiencies within the income tax system which remain unaddressed, resulting in great uncertainty for taxpayers wanting to comply with the provisions.[3]

Given the more significant legislative priorities that parliament and Treasury have, any minor technical updates and deficiencies are likely to be overshadowed by those more significant priorities.[4] The neglect in addressing these technical amendments increases complexity and reduces the effectiveness of the tax system (as noted by the Financial Services Council).[4]

While the Commissioner of Taxation (the Commissioner) applies purposive principles to the interpretation of the taxation laws, this may not always remedy unintended consequences.[5]

The growing number of deficiencies, and (more importantly) the limited resources to resolve them, was acknowledged by the government, and after much consultation and deliberation, in February 2017, the Commissioner's remedial power (CRP) was introduced. The CRP was introduced into Div 370 of Sch 1 to the *Taxation Administration Act 1953* (Cth) (TAA53) to provide a mechanism to resolve unintended outcomes and deficiencies (without having to inundate the limited parliamentary and Treasury resources).[6]

The explanatory memorandum to the Bill that became the *Tax and Superannuation Laws Amendment (2016 Measures No. 2) Act 2017* (Cth) (the EM) estimated that the CRP may be used up to 10 times per annum.[7] However, to date, the CRP has only been successfully exercised twice — highlighting a discrepancy between its policy intent and operation.[8]

This article examines the effectiveness of the CRP and suggests that it needs to be reconsidered to ensure that it can operate as intended and alleviate the significant legislative uncertainty borne by taxpayers.

Overview of the Commissioner's remedial power

According to the EM, the CRP allows the Commissioner, by legislative instrument, to make one or more modifications to the operation of a taxation law to ensure that the law can be administered to achieve its intended purpose or object (subject to satisfying certain requirements).[9]

The CRP is able to apply to any "taxation law", meaning its application is not limited to Australia's income tax system (ie it may also apply in respect of certain indirect tax and superannuation provisions).[10] This article is focused on the application of the CRP from an income tax perspective.

While the CRP offers a broader application of the Commissioner's discretion (ie the power to modify the operation of *any* taxation law), the Commissioner has long been provided with discretionary power to modify the operation of specific provisions. For example, the discretion to treat an interest in the income or capital of a trust as being a "fixed entitlement" in the trust loss recoupment provisions.[11] Such a phenomenon is therefore not new to the Commissioner.

Operation

The CRP allows the Commissioner, by legislative instrument, to modify the operation of a provision where:

– the modification is not inconsistent with the intended purpose or object of the provision, being an objective test (the "not inconsistent test");[12]

– the Commissioner considers the modification to be reasonable, having regard to both the intended purpose

or object of the relevant provision and whether the costs of complying with the provision are disproportionate to achieving the intended purpose or object (the "reasonableness test");[13] and
- Treasury or the Department of Finance advises the Commissioner that any impact of the modification on the Commonwealth budget would be negligible (the "negligible test").[14]

The CRP is further limited in application in that:

- an entity must treat a modification as not applying to it and any other entity where the modification would produce a less favourable result;[15] and
- a modification cannot affect a right or liability under any court order made prior to the commencement of the modification.[16]

The EM explains that "favourable" could mean a reduction in either tax liability or compliance costs.[17] Alternatively, a modification could be favourable when taking into account changes in both tax liability and compliances costs (eg a reduction in compliance costs may outweigh an increase in tax liability).[17]

Tests

The not inconsistent test. For the purposes of the CRP, determining the intended purpose or object of a provision must be done in a broader context, and (unlike in statutory interpretation) does not require weight to be placed on the text of the provision.[18] This is a sensible approach as the CRP is, inter alia, required to resolve deficiencies within the text of a provision so as to prevent it from achieving an unintended purpose.

Consideration must be given to the explanatory memorandum of a Bill, the second reading speech and reports, as well as any other material that would assist in determining the intended purpose or object of the provision (whether or not that material forms part of the provision).[19]

The double negative of "not inconsistent" within the test is deliberate as it provides a broader scope than the term "is consistent".[20] This is to ensure that the CRP can be used where it is reasonably clear that particular outcomes may not have been contemplated at the time the provision was drafted but provides an interpretation which is not inconsistent with the stated purpose or object.[20]

The reasonableness test. The reasonableness test requires the Commissioner to be satisfied that the modification would be reasonable, having regard to:

- the intended purpose or object of the provision sought to be modified;[21] and
- whether the costs of complying with the provision are "disproportionate" to achieving its intended purpose or object.[22]

While this requires the Commissioner to consider both factors, the EM explains that, in some cases, one factor may be more relevant than the other.[23]

In addition to the factors contained within the provision, the EM states that any other relevant matter may be considered to satisfy the reasonableness test (eg whether the modification would be favourable for entities).[24]

Interestingly, the provision itself does not state this to be the case, with only the two factors explicitly stated above being included (ie the provision does not provide that "any other relevant matters" may be taken into account). Ironically, the CRP may need to be interpreted by reference to the EM to permit the Commissioner to have regard to any other relevant matters.

The negligible test. The negligible test is the most ambiguous and limiting of the tests set out in s 370-5 TAA53. The EM provides no guidance on what may be considered "negligible" in the context of a modification, nor do any of the other CRP explanatory materials.

As discussed herein, given its limitations, the inclusion of the negligible test should be reconsidered. Windfall gains to the government caused by the operation of anomalous provisions should not preclude anomalies and deficiencies from being resolved.

Other aspects

Parliamentary scrutiny. The disallowance period provides parliament with the opportunity to scrutinise and disallow CRP legislative instruments.[25] Either house of the parliament has 15 sitting days following the tabling of an instrument to bring a notice of a motion to disallow it.[26] If no motion is made, the instrument will take effect on or after the first day it is no longer able to be disallowed.[27]

Life of legislative instruments. The Commissioner is able to review a modification where circumstances or provisions change and, by issuing a subsequent legislative instrument, can repeal or amend such a modification (eg if primary legislation is enacted which addresses a deficiency in lieu of a modification under the CRP).[28]

Commissioner's remedial power legislative instruments are subject to the 10-year statutory "sunsetting" period.[29] As such, the Commissioner will be forced to periodically review the appropriateness of modifications made (and, if still required, exercise the CRP again to remake modifications).[30]

Consultation. In accordance with the ordinary rules in respect of legislative instruments, the Commissioner must be satisfied that any appropriate and reasonably practicable consultation has been undertaken before exercising the CRP.[31]

The EM anticipates that the Commissioner will undertake public consultation with a technical advisory group (which includes private sector experts) before any exercise of the CRP — noting that the BoT would also be involved.[31]

Review period. Critically, the minister is permitted to seek a review of the operation of the CRP within three to five years of its commencement.[32] As this review period will open on 1 March 2020, it would be desirable for the minister to undertake a detailed review given the clear ineffectiveness of the CRP to date.

Use to date

To date, the CRP has only been successfully used on two occasions:

1. CRP 2017/1 — to better align foreign taxpayers' entitlement to credits under the foreign resident capital gains withholding (FRCGW) provisions against their

income tax liability.[33] In the absence of the CRP, foreign residents would typically be subject to tax under the capital gains tax regime in an earlier income year than their entitlement to tax credits under the FRCGW provisions arises — causing an inefficient timing difference;[34] and

2. CRP 2017/2 — to better administer the small business restructure provisions in Subdiv 328-G ITAA97 by ensuring that there are no inadvertent tax consequences under Div 40 ITAA97 in respect of the transfer of depreciating assets as part of such restructure (ie ensuring that genuine restructures are tax neutral).[35]

Based on key messages published from a National Tax Liaison Group (NTLG) meeting on 20 June 2019, these have been the only matters successfully remedied under the CRP despite over 40 matters being raised for consideration.[36]

In addition to the two legislative instruments outlined above, there is a third pending legislative instrument. In January 2020, a legislative instrument was released which proposes to modify the operation of s 355-25(2) TAA53 to allow a taxation officer to disclose protected information of a deceased person to the registered tax agent, BAS agent or legal practitioner of an executor or administrator of the deceased estate (CRP 2020/1).[37] To date, CRP 2020/1 has not taken effect (as it remains subject to the parliament disallowance period).

When considering the limited use of the CRP in comparison to the number of matters raised, and the comments in the EM indicating that the CRP is estimated to be used up to 10 times per annum, it is clear that issues exist with the provision and its use to date. Such issues have been acknowledged by the BoT and the NTLG.[38]

> *“Serious reconsideration needs to occur in respect of the CRP …”*

Integrity of the Commissioner’s remedial power

There is a clear discrepancy between the CRP’s policy intent and operation. It has been ineffective in addressing the myriad of deficiencies and unintended outcomes within Australia’s income tax system.

The EM notes that similar remedial powers in Commonwealth law are currently granted to the Australian Securities and Investments Commission (ASIC).[39] However, based on ASIC reports, ASIC’s delegated powers are exercised far more frequently (and with a far greater success rate) than the CRP.[40]

While there may be other contributing factors, excessive limitations would appear to be the key factor leading to the discrepancy between the CRP’s policy intent and operation.

Excessive limitations

Ambiguous drafting

The CRP contains a number of ambiguous key terms such as “reasonable”, “disproportionate” and “negligible”, which are not explicitly clarified within the CRP guidance material. This creates difficulty in ascertaining whether matters can be dealt with under the CRP. However, if amendments are made, it will be important to ensure that the terms are not too narrowly defined or prescriptive. Careful consideration is therefore required to obtain a balance between clarity and flexibility.

“Negligible”

The most limiting aspect of the CRP is the negligible test, requiring the Commissioner to be advised by Treasury or the Department of Finance that any impact of a modification on the budget would be “negligible”.

The EM provides no guidance on what may be considered a “negligible” impact, nor do the two CRP legislative instruments and their accompanying explanatory statements (other than noting that the Commissioner has been advised that any impact of the modifications would be negligible).[41]

No guidance has been provided on how an impact is determined (other than to say that it will be determined through “ordinary processes and budget rules”). It is unclear whether a negligible impact is to be determined having regard to:

- the budget revenue forecast based on the policy of the provision (forecast collections) in comparison to the impact of exercising the CRP; or
- the budget impact measured between what would be collected under the anomalous provision as it currently operates (actual collections) as compared to the impact of exercising the CRP.[42]

However, perhaps both of the above methods would be flawed in that:

- a budget revenue forecast based on the policy of the provision may not anticipate the unintended and unforeseen outcomes requiring the exercise of the CRP; and
- the amount collected under the anomalous provision (as it operates) may not align with the intended purpose or object of the provision.

It is also unclear whether a “negligible” impact is determined on a case-by-case basis having regard to the monetary aspects of each issue, or whether it is a fixed threshold. If the latter was adopted, such a threshold should be publicly announced.

Overall, the negligible test is contrary to the intention of the CRP as windfall gains to the government caused by the operation of anomalous provisions should not preclude anomalies and deficiencies from being resolved.

The NTLG and the BoT have recommended that the scope of the CRP be expanded to ensure that it can be used more efficiently and is applicable in a wider range of circumstances.[43]

Such expansion should therefore focus on removing the negligible test. This would ensure that anomalies and deficiencies which cause adverse outcomes for taxpayers

can be appropriately addressed by the CRP, notwithstanding that the budget impact may not be "negligible". Even if the negligible test were removed, the government would still retain control over modifications under the CRP by virtue of the parliament disallowance period.

Inadvertent limitation

There appears to be an inadvertent limitation in the drafting of the CRP which severely restricts its application. This is on the basis that a modification can only be made if any impact on the budget is negligible, yet a modification cannot apply to taxpayers where it would produce a less favourable outcome.

Given the lack of guidance in relation to the negligible test, combined with taxpayers self-assessing whether a modification is less favourable to them, it seems that only the very limited unintended outcomes which are practically tax neutral are capable of rectification under the CRP.

While the provision preventing a modification from negatively impacting taxpayers is welcomed (since it is the Commissioner (an unelected delegate) making such a modification), the negligible test should be removed to provide greater scope for the CRP to be used.

Other matters

While the excessive limitations of the CRP severely curtail its application, several other issues have been raised.

Timely resolution

The EM indicates that the CRP will allow for a more "timely" resolution of unintended outcomes (a process that is estimated to take between six and nine months).[44]

While the CRP should be "timelier" than other resolution mechanisms (ie amendments to primary legislation), a process which could take at least nine months may not be "timely" given the likelihood that this could straddle at least one lodgment deadline. However, while the Australian Taxation Office has sought to remedy the existing process by which applications under the CRP are assessed,[36] it is hoped that this process can be efficient in providing a "timely" (as opposed to a "timelier") resolution for taxpayers.

Separation of powers

Key concerns raised by stakeholders included the potential separation of powers issues. It was suggested that giving such broad quasi-legislative power to the unelected Commissioner could create a number of potential risks, as:

- broad discretionary power appears contrary to the rule of law; and
- excessive delegation to unelected executives challenges the purpose of the separation of powers doctrine.[45]

These issues are perhaps overstated given the CRP does not allow the Commissioner to make or change the law in any fundamental way, but rather permits the Commissioner to modify and administer the law in a manner that is in line with what parliament intended.

Any residual concerns from the separation of powers issues are mitigated through the parliament disallowance period and the limited scope of the CRP preventing modifications from overturning existing court orders.

Increased complexity

The CRP as currently enacted could have the contrary effect of increasing complexity through a proliferation of matters left by parliament and Treasury for the Commissioner to address, despite the Commissioner's inability to do so (due to the issues and limitations of the CRP).

Announced but unenacted measures

Significant uncertainty is borne by taxpayers from the backlog of announced but unenacted measures.[1] The impact of announced but unenacted measures is particularly challenging as each year taxpayers are forced to speculate on the potential application of future legislation (which could be retrospective) when lodging their income tax return.[46] While the ATO has introduced administrative procedures to minimise the risk of taxpayers being subject to penalties where their anticipated lodgment positions are later found to be incorrect, such risks are not wholly eliminated.[46]

While broader measures cannot be dealt with under the CRP, the CRP was introduced, inter alia, to address minor amendments and deficiencies in lieu of amendments to primary legislation (which may ultimately not occur due to their low priority on the parliament and Treasury's agenda).[47] However, as a result of the CRP's restricted use, anomalies and deficiencies are continuing to be diverted towards the already limited parliamentary and Treasury resources.

In December 2019, the Treasury Laws Amendment (2019 Measures No. 3) Bill 2019 was introduced into parliament.[48] Proposed amendments include:

- altering the operation of the modified company loss recoupment rules to ensure that the interposition of a holding company does not, of itself, cause a failure of the continuity of ownership test in Div 166 ITAA97 ("the proposed Div 166 modification");[49] and
- resolving erroneous cross-references within the tax consolidation provisions.[50]

While these changes are welcomed, one may question why the CRP has not been used instead, given such amendments would be of low priority when compared to the more pressing measures currently on the parliament and Treasury's agenda. Interestingly, the proposed Div 166 modification was also included in the explanatory memorandum to the CRP as an example of where the CRP could be applicable (subject to satisfying the negligible test — further highlighting its excessive limitations).[51]

Due to the significant uncertainty borne by taxpayers, calls have been made for parliament to undertake a stocktake of all announced but unenacted measures.[1] In undertaking such a stocktake, parliament should publish an update of those measures which will be proceeded with, and those which will not be (similar to the process which occurred in 2013).[1] For those measures which will be proceeded with, it is advised that parliament provide an indicative timeline of enactment and effective dates.[1] Parliament may also wish to identify measures which are of lower priority and would be more appropriately addressed by an improved CRP.

While this stocktake would better alleviate taxpayer uncertainty, it would also assist the Commissioner in exercising the CRP. For instance, if a measure (presumed

to be minor and of low priority) would only be dealt with in four to five years, the Commissioner could exercise the CRP to address the issue in a more "timely" manner up until it is addressed by a law change (at which point, the legislative instrument containing such a modification could be repealed). This would also give parliament and Treasury the opportunity to disregard proposed amendments if the CRP could be used to address certain anomalies and deficiencies instead.

Improving the CRP and undertaking a stocktake of announced measures should occur soon after the review period opens on 1 March 2020. This will prevent further neglect and accretion of minor amendments prior to an influx of broad reforms, and newly announced measures further inundating parliamentary and Treasury resources.

Process

Concerns have been raised over the process in which matters are assessed under the CRP given that, to date, over 40 matters have been raised for consideration and only two have been successful.[36] However, the ATO has advised that a revised process has been implemented to address these concerns.[36]

As this change was only implemented recently (June 2019), on review of the CRP, such process should be scrutinised to make sure that matters raised for consideration are appropriately assessed (and that remedies to the process, as alluded to by the ATO, have been effective).

Alternatives

If a consensus cannot be achieved on improvements to ensure that the CRP can operate as intended, parliament should instead consider introducing a more efficient process of legislating minor tax law amendments to resolve deficiencies and unintended outcomes. This would ensure that such issues are appropriately dealt with in a timely manner (as they may not require the same amount of resources as broader measures) and will prevent such issues from failing to be addressed. However, given parliamentary and Treasury resources are already limited (hence the need for the CRP), improving the CRP should be the priority.

Another possible alternative could be to alter the rules of statutory interpretation (ie to provide an interpretative (as opposed to legislative) solution to minor deficiencies).

The current purposive principles of interpretation in the *Acts Interpretation Act 1901* (Cth) may not remedy unintended outcomes where the words of a law do not support its purpose or object.[52] Expanding these principles to allow the Commissioner to interpret and administer the law having regard to its intended purpose or object (determined through means beyond the words of the law and in a manner which cannot adversely impact a taxpayer) may allow these unintended outcomes to be resolved — being a similar approach to the not inconsistent test.

This alternative would be an expansion of interpretative scope, and not a delegation of legislative power.

Given the broad ramifications of a change to statutory interpretation, careful consideration of this option would be required.

Takeaways and conclusion

Serious reconsideration needs to occur in respect of the CRP and its ability (in practice) to provide a timely resolution to certain unforeseen and unintended outcomes in the income tax system — as to date, it has failed to fulfil its policy intent.

Excessive limitations appear to be the key factor which has curtailed the CRP's use and effectiveness. At a minimum, the negligible test should be removed.

It is unacceptable that the CRP has only been successfully exercised twice since inception. It would be desirable for the minister to seek a statutory review into the effectiveness of the CRP and take actions to ensure that the CRP operates as intended.

Such a review is paramount. Failure to act will lead to increased uncertainty being borne by taxpayers through a growing number of anomalies and deficiencies, and place increased pressure on the already limited parliamentary and Treasury resources. Inaction will ultimately jeopardise the integrity of Australia's income tax system.

Nathan De Zilva
Associate
PwC

Disclaimer

The views expressed in this article are those of the author and do not reflect the views of PwC.

References

1 M Molesworth, *Announced but un-enacted measures — everything old is new again*, The Tax Institute blog, 7 June 2019. Available at https://blog.taxinstitute.com.au/2019/06/announced-but-un-enacted-measures.html.

2 Page 4 of the exposure draft explanatory memorandum to the Tax and Superannuation Laws Amendment (debt and equity scheme integrity rules) Bill.

3 Paragraph 1.6 of the explanatory memorandum to the Bill that became the *Tax and Superannuation Laws Amendment (2016 Measures No. 2) Act 2017* (Cth) (the EM).

4 Ibid at para 1.103.

5 Ibid at para 1.7.

6 Ibid at para 1.1.

7 Ibid at para 1.152.

8 ATO, CRP 2017/1: Taxation administration (remedial power — foreign resident capital gains withholding) determination 2017; ATO, CRP 2017/2, Taxation administration (remedial power — small business restructure roll-over) determination 2017.

9 Para 1.2 of the EM.

10 Ibid at para 1.24.

11 S 272-5(3) of Sch 2F to the *Income Tax Assessment Act 1936* (Cth).

12 S 370-5(1)(a) of Sch 1 TAA53.

13 S 370-5(1)(b) of Sch 1 TAA53.

14 S 370-5(1)(c) of Sch 1 TAA53.

15 S 370-5(4) of Sch 1 TAA53.

16 S 370-5(5) of Sch 1 TAA53.

17 Para 1.57 of the EM.

18 Ibid at para 1.30.

19 Ibid at para 1.31.

20 Ibid at para 1.29.

21 S 370-5(1)(b)(i) of Sch 1 TAA53.

22 S 370-5(1)(b)(ii) of Sch 1 TAA53.

23 Para 1.37 of the EM.
24 Ibid at para 1.39.
25 Ibid at para 1.70.
26 Ibid at para 1.71.
27 S 370-20 of Sch 1 TAA53.
28 S 370-15 of Sch 1 TAA53.
29 Para 1.72 of the EM.
30 Ibid at para 1.73.
31 Ibid at para 1.12.
32 Item 4 of Sch 1 to the *Tax and Superannuation Laws Amendment (2016 Measures No. 2) Act 2017*.
33 ATO, CRP 2017/1 explanatory statement, para 2.
34 Ibid at para 21.
35 ATO, CRP 2017/2 explanatory statement, para 2.
36 ATO, *National Tax Liaison Group key messages 20 June 2019*, meeting minutes, 20 June 2019 (NTLG key messages).
37 ATO, Taxation administration (remedial power — disclosure of protected information by taxation officers) determination 2020.
38 NTLG key messages; National Tax Liaison Group, *Improvements to consultation on tax policy and administration of the tax system*, discussion paper, 27 May 2019, p 5 (NTLG discussion paper).
39 Para 1.8 of the EM.
40 ASIC, *Overview of decisions on relief applications (April 2018 to September 2018)*, report 602, 6 December 2018; ASIC, *Overview of decisions on relief applications (October 2018 to March 2019)*, report 620, 21 June 2019.
41 CRP 2017/1 explanatory statement, para 71; CRP 2017/2 explanatory statement, para 31.
42 S Caredes, The Commissioner's remedial power, (2016) 50(8) *Taxation in Australia* 441.
43 NTLG discussion paper, p 5.
44 Paras 1.9 and 1.150 of the EM.
45 N Wilson-Rogers, A proposed statutory remedial power for the Commissioner of Taxation – A Henry VIII clause to benefit taxpayers?, (2016) 45(4) *Australian Tax Review*.
46 PS LA 2007/11.
47 Para 1.22 of the EM.
48 Treasury Laws Amendment (2019 Measures No. 3) Bill 2019.
49 Explanatory memorandum to the Treasury Laws Amendment (2019 Measures No. 3) Bill 2019, para 3.80.
50 Ibid at para 3.107.
51 Example 1.3 of the EM.
52 Ibid at para 1.180.

The *Tax* Summit
11 – 13 MARCH / ICC SYDNEY
Powered by National Convention & NSW Tax Forum
Now &
2020
When
EXPLORING OUR FUTURES
The biggest tax event of the year will set the agenda for the tax profession for 2020 and beyond. With a stellar line up of
60+ sessions
90+ speakers
8 streams
This is THE EVENT of the year that should be on every tax practitioner's radar.
Register now
taxinstitute.com.au/taxsummit
0653NAT_02/20

International tax: "pillars" of strength or ruins in the making?

by Chloe Burnett, ATI, Barrister, Sixth Floor Selborne & Wentworth Chambers

The taxation of multinational corporations is undergoing a paradigm shift in Australia and around the world. Taxing multinationals appears to be a win–win for governments: it satisfies voter concern that multinationals aren't paying their "fair share", it isn't as politically fraught as increasing the taxes (directly) paid by said voters, and it raises much-needed revenue. The main risk is capital flight, but this is minimised where countries act together. To this end, in addition to Australia's recent unilateral and multilateral measures (the multinational anti-avoidance law and diverted profits tax, and the anti-hybrid rules, the multilateral instrument and country-by-country reporting, respectively), Australia and the 134 other countries in the Inclusive Framework of the Organisation for Economic Cooperation and Development are currently considering an ambitious plan to harmonise and increase the taxation of multinationals — the "two pillars" plan. This article examines the plan and makes predictions about its future.

Introduction

Two pillars: the thought evokes two different mental images. One is that of a strong foundation supporting a weighty edifice. The other is crumbling ruins, evocative but no longer serving any purpose.

This article looks at the "pillar one" and "pillar two" proposals in the OECD/G20 Inclusive Framework papers released on 9 October 2019 (pillar one)[1] and 8 November 2019 (pillar two),[2] and makes some predictions as to how these rules will develop and what their consequences may be. Australia is a member of the Organisation for Economic Cooperation and Development (OECD) and the G20, and is expected to be part of the consensus position, anticipated to be reached during 2020. If and when these rules are adopted in Australia, they will fundamentally change how multinational businesses, both Australian-headquartered multinationals and the Australian arms of foreign multinationals, are taxed.

The duality of the pillars imagery — strong support versus crumbling ruins — comes through in the prognosis for these rules. They are highly complex and novel, and they will permeate all aspects of the corporate tax systems of the 135 countries in the Inclusive Framework, if adopted. For this reason, they are likely to either become the new standard for the future, or fail at the threshold because sufficient support is absent or because, a few years into their implementation, they are found to be problematic and are abandoned. There is also the possibility of a global deal to adopt one pillar but reject the other, even though they are not alternatives to each other.

Overview of the two pillars

Pillar one is the new nexus and profit allocation rule directed at consumer-facing "digitalised" multinational businesses. However, it now seems that the degree of digitalisation does not need to be substantial. Pillar two is a new set of minimum global taxation rules intended to apply to multinationals generally.

The proposals are aimed at raising more corporate tax from large multinationals by moving the tax base out of tax havens and, to some extent, "hub" jurisdictions (like Ireland and Singapore) into higher tax countries. Exactly how much higher taxes will be, and how the mix paid to each country will change, is still open; this will be the core of the negotiations. The October 2019 OECD Secretary-General report to the G20 finance ministers[3] says this about the estimated impact:

> "Pillar Two would yield significant increase of corporate income tax revenue globally. Pillar One involves a significant change to the way taxing rights are allocated among jurisdictions but it would also lead to a modest increase in tax revenues. multinationals in digital-oriented and intangible-intensive sectors would naturally be significantly impacted by both pillars. Overall, on average, low and middle-income economies would gain from Pillar One, experiencing a higher rate of increase in revenues than high-income economies even though, larger market jurisdictions will benefit more in absolute. Investment hubs, where the analysis suggests that levels of residual profit are high, would experience significant losses in tax base."

Ironically, though, at least some of the extra tax cost is likely to be passed on to consumers in the "market" countries, such as Australia. The underlying tax issues typically arise out of economic rents from intellectual property or other competitive advantages, which also result in these companies enjoying relatively price-inelastic demand for their goods and services. There is a complex economic and policy question about who will bear the incidence of these tax increases, shareholders, employees, consumers and so on, but no analysis of this has yet been released, at least publicly. On the consumer front, it would not be surprising if market countries introduce a price control rule, as in Australia when the GST was introduced, aimed at preventing companies from passing on the tax increase.

Pillar one: transfer pricing and market jurisdictions

The pillar one public consultation paper (pillar one paper or paper) puts forward a proposal for taxing "consumer-facing" multinationals with some degree of "digitalised" operations.

It is a transfer pricing rule aimed at allocating more profit to the "market" country — the country where sales are made. The scope of pillar one, that is, the types of multinationals that it will apply to, is not yet clear. Scope is discussed in more detail below. At the moment, it is broad: consumer-facing multinationals, including those selling through unrelated distributors. "Digitalised" may be a misnomer now; the project is obviously broader, and it is said that the United States would pull out if the project targeted the tech giants only.

The impetus for these rules is that a number of market countries, Australia included, thought that traditional transfer pricing rules were allocating too little of the profit of large multinationals, particularly the tech giants, to their country. Either there was no physical presence in the country, or the in-country activities could be described as "routine", which would not justify a sales- or profit-based transfer pricing methodology. In Australia, there have been a large number of transfer pricing audits of inbound multinationals in the last five to 10 years, focused particularly on their sales, marketing and/or distribution activities in Australia.

The ATO and other tax authorities came to learn the global profit margin on some of these products (the "pie"), and size of the "slices" allocated to various countries. For example, if an item sold in Australia earned for the multinational a global profit of $100, it may be that $10 went to Australia, $30 to Singapore, $30 to Bermuda and $30 to the US. Australia's $10 may have been well justified under traditional transfer pricing methodologies. But the ATO wanted, at the very least, some of Bermuda's slice and possibly some of Singapore's as well. As did several other market countries, where simultaneous transfer pricing audits have also been going on.

Several countries have in the last few years introduced or proposed "unilateral measures" to combat perceived base erosion and profit shifting (BEPS) by multinationals. The high-profile ones are the "digital services taxes" levied on the (mainly US) tech giants, particularly in Europe, which are often gross basis taxes and designed to stand outside tax treaties. Speaking of treaty sidestepping, there are also the diverted profits taxes (DPTs) in Australia and the United Kingdom. The political deal is that all of these will be dismantled when (or if) the agreed-on pillar one (replacing digital services taxes) and pillar two (replacing DPTs) rules take effect.

The proposal: three tax "amounts"

The pillar one paper's proposal is for three "amounts" of tax:

- the first amount (referred to as amount A) is the "new taxing right" where market countries (ie countries where the multinational's customers are) have a right to tax a fraction of the foreign multinational's global group profits based on the quantum of sales in the market country. All in-scope multinationals are exposed to amount A, but in any given case, there may not be an amount A amount; it depends on the calculations described below; and
- amounts B and C, on the other hand, only apply if the multinational has a physical presence in the market country, in addition to making sales there (as mentioned, in Australia, most large multinationals have local subsidiaries, particularly after the multinational anti-avoidance law (MAAL) was introduced, but this is not the case for all countries, particularly smaller countries or developing countries). Amounts B and C are essentially a reworking of the transfer pricing rules for sales, marketing services and distribution functions. Amount B is a fixed return for routine marketing and distribution functions, and amount C is an additional return for non-routine functions.

No numbers have yet been slotted into the formulas. That is for political negotiation.

Amount A

Amount A is the pillar one blockbuster. It is formulary apportionment, with sales as the allocation key. It looks like a cross-border consumption tax. The formula is not complex, but quantifying the specific percentages will be contentious.

The formula is this (whether done on a whole-of-multinational basis, or, as is more likely, but more complicated, a segment-by-segment and/or region-by-region basis):

1. take the multinational's profit and revenue from its reported financial statements, subject to potential "standardised adjustments" for different accounting standards;
2. divide profit by revenue to work out the profit margin, for example, 30%;
3. exclude the "routine" component of this profit margin — this is to be a specific percentage agreed as a "simplified convention", again, likely to be on a segment and region basis. The idea seems to be that "routine" profits will still be able to be taxed by the residence country of the taxpayer entity; the market country can't have those. For example, routine profit margins for this sector in this region may be deemed to be 10%, so 20% remains as the non-routine profit margin;
4. exclude from the non-routine profit margin the part that is "not attributable to the market jurisdiction" but is instead "attributable to other factors such as trade intangibles, capital and risk". Again, this is near-impossible to quantify so "simplified conventions" will be used. In this example, it may be that, in this sector/region, half of the 20% is deemed to be attributable to the market jurisdiction, so 10% remains;
5. take this 10% of the multinational's global profits — say the profits are $10b, so the amount to be allocated is $1b — and allocate it among the market jurisdictions based on an allocation key. The key proposed is sales, although this is up for consultation. If Australian sales are 8% of global sales, for example, Australia can tax 8% of $1b, being $80m. It will not always be easy to work out where a sale is made, particularly for online-based businesses;
6. identify which entity is liable to the tax — this is not clear from the paper, but is suggested to be the member of the multinational group "that should be treated as owning the taxable profit", "eg entity(ies) with high profitability [or] owning certain intellectual property". How this squares with the exclusion at step 4 above is unclear. This step seems highly contentious. In the "pie" example above, it is not clear whether Australia would be levying amount A

on the Singaporean subsidiary, the Bermudan subsidiary or the US subsidiary;

7. once the entity is identified, presumably the market country applies its corporate tax rate to the identified profit. So, in this example, Australia could tax $24m (30% of $80m);
8. this tax might be collected by way of withholding tax, or by making the foreign entity jointly and severally liable with the local subsidiary. Alternatively, practical cross-border tax collection mechanisms may be introduced as part of pillar one; the legal architecture is there in the Multilateral Mutual Assistance Convention but it is not yet widely used; and
9. the residence country of the liable entity would have to give a foreign tax credit or exemption for the profit taxed in the market jurisdiction. Less pie for them.

So, while amount A initially looks like a new nexus rule for multinationals without a permanent establishment (PE), it is in fact much more than this. It is essentially a cross-border consumption tax for highly profitable multinationals with PEs and subsidiaries in the market country, as well as those without, for which another country must give a credit (if that other country has a corporate income tax).

The idea seems to be that all 135 countries will agree on the fixed percentages to be slotted into the various points in the formula. Presuming amount A is done separately for each geographical region and each sector or industry, there are a lot of different percentages to agree on. And the underlying economics on which these percentages are to be based will keep changing over time. Will there be some kind of "standing body" within the OECD's Inclusive Framework which meets regularly to negotiate changes to the percentages?

Amount B

Amount B is a fixed return on "baseline" or "routine" marketing and distribution activities taking place in the market country. Return on what is not stated. Presumably, it is a return on local costs or investment, given the reference to routine activities, and because a return on sales is already there in amount A. The prospect of different amount B margins for different industries and/or regions is flagged. Unlike for amount A, here it seems pretty clear who the taxpayer is: the subsidiary or PE in the market country which conducts the activities. The plan is that, as in amount A, double taxation should be minimal as all countries will agree on the fixed percentages.

The fixed return is not yet quantified. Nor is there a definition of what constitutes "baseline" or "routine" marketing activities. The objective of amount B is said to be greater certainty, less disputation and less double taxation. In this part of the paper, the OECD Secretariat refers to "the aggressive enforcement of current transfer pricing rules" in some jurisdictions! It is true that many of the current transfer pricing disputes in market countries, like those in Australia, concern the proper return to marketing and distribution functions. These often involve disputation over whether given activities are routine or not. Without a detailed definition of "routine" or "baseline" activities, amount B will still leave room for plenty of contest.

The paper rightfully acknowledges the need for a clear definition in this respect, but the width and variety of such activities in all of the industries and countries to be subject to this rule, and the ever-changing nature of marketing and distribution, will make concrete definitions a challenge.

It is ironic that amount B borrows from the transfer pricing rules of Brazil, which is seeking to join the OECD and has been on a "re-education" program within the OECD aimed at bringing it into the arm's length fold!

Amount C

Amount C is an "add-on" to amount B where:

- the marketing and distribution activities in the market country go beyond the routine or baseline; and/or
- the multinational conducts other activities in the market country beyond marketing and distribution.

Any amount C will be added to the tax base in the market country. Again, the taxpayer appears to be the subsidiary or PE undertaking the actual activities. The country giving up "pie" here is that where the related counterparty resides, but only if that country agrees on the transfer price.

Amount C is stated as being "supported by the application of the arm's length principle". That is, it seems to preserve the existing methodologies for determining appropriate transfer prices, but these methods only kick in if the activities go beyond the "routine".

What is new is that, under amount C, it is said to be "essential to consider existing and possible new approaches to dispute prevention and resolution". The existing approaches which are mentioned are unilateral and bilateral advance pricing agreements, the ICAP (International Compliance Assurance Program, of which the ATO is a founding member) and mandatory binding mutual agreement process (MAP) arbitration. Interestingly, the MAP itself is not mentioned. There is mention of the prospect of new mandatory mechanisms which avoid protracted disputes, but no further details are given.

Query whether any new dispute prevention or resolution methods would be able to apply to transfer pricing across the board. If a new method is developed and it is effective, there is no obvious reason to restrict it to disputes over marketing and distribution.

The paper recognises that amount C will often overlap with amount A, and states the need for further work on the interaction between these amounts, presumably to prevent duplication of profits. In some cases, one would think, there will also be an overlap between amount A and amount B. Although amount A aims to exclude routine profits, these are those of the multinational as a whole and not necessarily the same as the profits from the routine activities the subject of amount B. The paper does not avert to this.

The three "amounts" together

It is telling that the paper says at one point that:

> "The new rules, taken together with existing transfer pricing rules, will need to *deliver the agreed quantum of profit to market jurisdictions*." (emphasis added)

This tells us that the language of tax "amounts" is not accidental. Policy is somewhat absent. The idea is that

market jurisdictions will get more tax, and other jurisdictions will get less. These other jurisdictions are of course tax havens, but they are also the "hub" jurisdictions and perhaps even large, intellectual property-generating jurisdictions like the US as well. The paper gives no policy guidance as to the sort of jurisdictions which will have to give up the amount A tax base. The issue is highly political, so the policy vacuum and unquantified percentages are probably deliberate. These can be flexed in either direction to meet some form of political consensus, if consensus is possible. The other ingredient is pillar two, discussed below, which appears to be designed to raise enough revenue so that all countries, other than tax havens and potentially hubs, will embrace the total package.

Lastly, what needs to be remembered in all of the urgency and noise is that this proposal aims to be the new rule going forward indefinitely. It is not a grandfathered solution to deal with the business model shifts of the last 10 years. It has to apply to all business models going forward, and these will keep evolving into forms we cannot currently picture. We may all find that pillar one's formulae become outdated sooner than their apparent simplicity would suggest.

> *"... it follows that China will not have first taxing rights over BHP, but watch this space ..."*

Scope

The scope of pillar one is currently open for consultation. Agreement will not be easy, as industries scramble to get out of scope, and countries consider whether the companies they wish to favour (either because they are local or because they provide other local benefits) are in or out of scope.

The pillar one paper suggests that the rule "should be focused on large consumer-facing businesses, broadly defined, eg businesses that generate revenue from supplying consumer products or providing services that have a consumer-facing element."

The paper speaks of excluding some industries. Extractive industries are "presumed to be out of the scope". This probably means that Australia can breathe a sigh of relief; it follows that China will not have first taxing rights over BHP, but watch this space, as the pillars consensus will be all about geopolitics. Also mentioned for potential exclusion are financial services and commodities industries. So the recent transfer pricing victories enjoyed by Glencore in the Federal Court of Australia[4] and Cameco[5] (a Canadian uranium company) in the Tax Court of Canada have not, apparently, swayed the OECD. Although, there is always pillar two.

The language of exclusion or "carve outs" suggests that the scope of pillar one will be broadly defined and the only way to escape will be through specific exclusions.

The rules will only apply to multinationals sales above a certain monetary amount in the market jurisdiction, calibrated by economy size.

Significant questions arise from the "scope" discussion in the paper:

- While the paper seems to focus on "digital centric businesses which interact remotely with users", the actual scope proposed is wider: consumer-facing businesses. Will *all* consumer-facing businesses be included, or only those making online sales or interacting with users online? How *much* online interaction or "remote selling" is required? All sizeable consumer-facing multinationals have websites or apps where at least some activity takes place, so will they all be covered? The actual taxing proposal, described below, is applicable to any business, so it tells us nothing about scope.
- Obvious candidates are Google, Facebook, Amazon, Netflix, Booking.com, Uber, Apple, Microsoft and the like. But what about Toyota, Starbucks, H&M, Aldi, Ikea, Unilever, Vodafone, Coca-Cola, Singapore Airlines or Pfizer, for example?
- "Consumer-facing" is the byword of the paper. In a footnote, the paper distinguishes between "consumers", who are individuals acquiring goods or services for personal consumption, and "customers", which is broader and includes businesses acquiring the goods or services for use in their business. The word "customer" is not otherwise used in that context in the paper, suggesting business-to-business (B2B) multinationals are not the focus. But surely Google and Facebook, which make most of their revenue from selling advertising to businesses, will not be excluded. Presumably, they are included because they have individuals as "users", but for them, the market jurisdiction will be where the advertiser is (which may be a low-tax jurisdiction), not where the user is. What happens with a company like Microsoft for whom large corporate customers are the lifeblood? What about digitalised businesses who sell *only* to businesses, and do not rely on individuals as "users", such as business software providers like SAP or Atlassian, or B2B online service providers? Clearly, there is a political justification (business-to-consumer (B2C) businesses are more visible to voters), but is there a policy justification for taxing the B2C and B2B markets so differently?
- The actual taxing proposal does not obviously distinguish between B2C and B2B sales, nor digital sales compared to "bricks and mortar" sales, so is it the case that, once a company is in scope (eg because it has *some* B2C sales or *some* digital sales), *all* of its sales are included?
- The paper indicates that businesses selling through intermediaries or using a franchise structure and those selling component parts will also be considered; how far will this notion of "consumer-facing" extend?

If it succeeds, the pillar one model may in future be extended, not just to those multinationals which end up

just outside the "scope", but also to other transfer pricing areas, such as manufacturing, services, intragroup financing, research and development and so on. Once the formulary apportionment ice is broken, it seems likely that we will see more and more formula-based transfer pricing.

Pillar two: global minimum tax rate

Pillar two takes the BEPS project and turbo-charges it. It proposes a global minimum corporate tax rate, to be enforced not by telling countries to change their rates, but by requiring *other* countries to top up low foreign taxes to this minimum rate, even if what is earned in the other country is active business income. The minimum rate is yet to be determined. It is being deliberately parked until other design features are settled. It will probably be between 10% and 15%, but perhaps it will need to go below 10% for consensus to be achieved.

Pillar two reveals its ambition by calling itself the "GloBE" proposal (standing for global base erosion). The four proposed components are:

1. an income inclusion rule — essentially, harmonised controlled foreign company (CFC) rules but for active income (passive income will still probably be taxed at the local tax rate in those countries which have CFC rules) and for branches too. As well as CFC rules, the US's global intangible low tax income rules (GILTI; a 10.5% to 13.125% tax) share some common features with this proposal;
2. an undertaxed payments rule, which denies a deduction (or imposes withholding tax) on related party payments taxed below a minimum rate in the recipient country. Interest, royalties, franchise and other service fees are obvious candidates, but the categories won't be closed. Think the hybrid mismatch rules, but without the hybrid mismatch. Australia's targeted integrity rule rings a bell here, as does the base erosion and anti-abuse tax (BEAT) in the US, and the DPTs in Australia and the UK;
3. a "switch over" rule which allows countries to switch from the exemption method to the foreign tax credit method where foreign branch income is taxed below a minimum rate; and
4. a "subject to tax" rule, which is said to complement the undertaxed payment rule and involve withholding tax or other taxes at source and the turning off of certain treaty benefits where a minimum tax rate is not met.

The first and third items generally benefit residence countries (capital exporters) and the second and fourth source countries (capital importers).

If you thought anti-hybrid rules had a flavour of international tax policing, pillar two is the international tax army. The GloBE model is apparently a Franco–German proposal, so we shouldn't let the military analogies get out of hand.

Interestingly, the pillar two public consultation paper (pillar two paper or paper) is relatively narrow, and calls for submissions on a few specific technical issues only. Whether the proposal is a good idea at all and how it will work at an overall policy level are not questions posed. Only the first of the four proposed minimum tax rules — the income inclusion rule — is described in any substantial way, and even then, key details are lacking.

The paper gets down to three design issues, and does little else:

1. the first is whether a multinational's taxable income and tax expense (for working out whether it has cleared the minimum tax rate or not) should be worked out using financial statements or tax rules. A preference for using financial statements emerges in the paper, and questions for consultation include what book-to-tax and timing adjustments should be made, how to deal with differences in financial reporting rules (particularly between international financial reporting standards, US generally accepted accounting principles (GAAP) and Japanese GAAP) and how to deal with losses. This discussion takes place before the discussion of "blending", but the two issues are interrelated;
2. the second is the "blending" issue. This is a big issue. The question here is whether you test clearance of the minimum tax rate at the level of:
   a. all of the multinational's foreign income and its foreign tax (worldwide blending approach);
   b. each jurisdiction in which the multinational operates (jurisdictional blending approach); or
   c. each entity in the multinational (entity blending approach); and

   The "blending" referred to is the ability to blend high-tax and low-tax income. The more granular the level at which blending takes place, the more likely it is that tax top-ups will be applied. Worldwide blending has major simplicity attractions because it involves the fewest adjustments to consolidated financial statements, but would leave plenty of room for shenanigans in tax havens and hub jurisdictions for those multinationals large and diverse enough to have a bulk of unavoidably high-taxed income; and
3. the third question for consultation is whether there should be carve-outs for multinationals below a certain size or those in certain industries. While there will certainly be some de minimis threshold, the paper does not hint at any other substantive carve-outs. The ethos of pillar two is against carve-outs.

The minimum rate is not stated. A worked example in the paper uses 15%, but stresses that this is just for illustration purposes and no inference should be drawn that it will be the rate agreed on.

The paper says that the rate will be worked on after other design features have been settled. This makes sense; for example, if worldwide blending is used, the minimum rate should be higher that it would be were jurisdictional or entity blending used. It is unclear whether the minimum rate will be the same in some or all of the four components of GloBE.

At first glance, the minimum rate might be predicted to be something around the corporate tax rates of "hubs" like Ireland (12.5%), Hong Kong (16.5%) and Singapore (17%), or even the 10% rates of some European countries which seem to be designed to attract investment (eg Romania, Bosnia

and Herzegovina, Malta); very few countries worldwide have a corporate rate below 10%.

However, these are all just headline rates. Effective corporate tax rates are often lower due to tax base differences and special regimes. Pillar two works off actual tax expense, not headline rates. So it may be that a minimum rate of around 10% or even slightly less will be necessary in order to achieve consensus. Of course, that will not help the tax havens. Surprisingly, it may help the hub jurisdictions; they may experience an influx of activities formerly done out of tax havens.

Trends in corporate tax rates change over time, so query also whether there will be periodic review of the minimum rate at a multilateral level; another standing committee.

Minimum rate aside, so many other questions arise out of the pillar two proposal.

There is the threshold question of whether we should invest time getting familiar with a plan which seems somewhat unlikely to achieve consensus. Pillar two has something for residence countries and something for source countries, but nothing for tax havens, and it is a mixed bag at best for hub jurisdictions. Several of the 135 countries are tax havens or hubs. Each has a veto power, at least in theory. Tax rates are often said to be the last bastion of sovereignty. As for tax base harmonisation, it has failed to get off the ground even inside Europe. The OECD's last foray into "harmful tax practices" was not a success. And how would 135 diverse countries implement and enforce rules as mind-bogglingly complex as the CFC, anti-hybrid, GILTI and BEAT rules all rolled into one? But perhaps these pesky lawyer's concerns will be swept aside in the politicians' desire to implement pillar two.

A few more specific questions are:

- In the income inclusion rule, can a country midway through the ownership chain impose part or all of the tax? If not, the US and the handful of other headquarter jurisdictions will be the only beneficiaries of this component. The paper mentions the need for ordering rules to prevent double taxation, so presumably multiple countries can tax and the issue will be which has the primary right to do so. Presumably, this also means that, if one country chooses not to tax, the other country gets to levy all of the top-up tax even if there is scant connection to that country from a policy perspective.
- How are 135 countries going to negotiate the major differences between their corporate tax bases? For example, what if certain countries want to preserve their research and development incentives, but see that these will result in multinationals simply being top-up taxed in another country? More generally, it will become hard for countries to set domestic tax policy for multinationals — the impact of local rule changes will routinely depend on tax treatments in numerous foreign countries. Will pillar two eventually force a harmonisation of corporate tax bases?
- Will the undertaxed payments rule apply to *any* outbound transaction currently subject to transfer pricing rules? That is, not just interest and royalties and the like, but any payment for inputs into the value chain? If so, this extends an erstwhile earnings-stripping rule to a transfer pricing floor price rule.
- Will the undertaxed payments rule raise the issue of violating treaty non-discrimination rules, similar to the question being debated at present in the context of the BEAT in the US? It seems to be part of the plan that treaties will be amended to prevent such challenges, but this just illustrates the radical and potentially harsh operation of these rules.
- The switch-over rule (exemption to foreign tax credit) will make lightly taxed foreign branch income taxable at the head office country's corporate income tax rate. That is, the top-up will be all the way to that rate, whereas the top-up for foreign subsidiaries is just to the minimum rate. Is there any reason for privileging subsidiaries over branches in this way?

There are also many imponderables about how pillar two would be implemented in Australia. Some of our rules already go part of the way towards the pillar two outcomes, particularly the CFC rules, the DPT and the anti-hybrid rules. Would we expand those rules so that they achieve in-substance compliance with pillar two? Or would we introduce a whole new architecture over the top (minus the DPT which, as one of the unilateral measures, we will presumably be required to repeal)? And how will we all deal with the insane levels of complexity that will result?

What's next?

The OECD's tax chief, Pascal Saint-Amans, has said that the OECD is aiming to achieve political agreement on the solution by June 2020. The technical solution will then be hammered out in the balance of the calendar year. This timetable looks ambitious, but the political will is there.

Australia has been an enthusiastic adopter of most of the OECD's international tax proposals in recent years. There are no indications that Australia will be an obstacle to consensus on the "pillars", unless there is a major change to the taxation of mining and resources companies.

The public political stoush between the US and France continues to play out, with the US suggesting late last year that pillar one should be a "safe harbour" (code for "voluntary"), France hitting back with its digital services tax and the US retaliating with threats of sanctions on French wines, cheeses and other desirables. As this article went to print, the US and France announced that they had reached a breakthrough in their negotiations, with a "ceasefire" until the end of 2020 while the OECD project progresses. However, the world can expect many more negotiations, and not just between those two countries, as the "political solution" is shaped over the next six months. Game theory experts can have a field day.

With the US's recent cooling on pillar one, it is possible that the OECD will focus on achieving consensus on pillar two. Pillar one may be parked for a few years to let the world catch up to it, or it may be abandoned altogether and go the way of the ancient ruins. Whatever the ultimate deal, the OECD will have to produce something this year, which means that tax professionals in the 135 countries, including

Australia, will be busy with yet more international tax law to absorb and advise on.

Chloe Burnett, ATI
Barrister
Sixth Floor Selborne & Wentworth Chambers

References

1 OECD, *Secretariat proposal for a "unified approach" under pillar one*, 9 October 2019 – 12 November 2019. Available at www.oecd.org/tax/beps/public-consultation-document-secretariat-proposal-unified-approach-pillar-one.pdf.

2 OECD, *Global anti-base erosion proposal ("GloBE") - pillar two*, 8 November 2019 – 2 December 2019. Available at www.oecd.org/tax/beps/public-consultation-document-global-anti-base-erosion-proposal-pillar-two.pdf.pdf.

3 OECD, *OECD Secretary-General tax report to G20 finance ministers and central bank governors*, October 2019, p 8. Available at www.oecd.org/tax/oecd-secretary-general-tax-report-g20-finance-ministers-october-2019.pdf.

4 *Glencore Investment Pty Ltd v FCT* [2019] FCA 1432 (under appeal).

5 *Cameco Corporation v The Queen* [2018] TCC 195.

THE TAX INSTITUTE

Learn tax from renowned tax experts

Study Period 1 key dates:

Early bird close 14 Feb 2020 — Save $100
Enrolment close 26 Feb 2020
Commences 02 Mar 2020

CTA3 Advisory:
(Required to become a Chartered Tax Adviser)

Early bird close 14 Apr 2020 — Save $100
Enrolment close 06 May 2020
Commences 11 May 2020

Enrol now
taxinstitute.com.au/education

00059LEARN_02/20

Tax and estate planning in 2020: what has changed?

by Matthew Burgess, CTA,
Director, View Legal

In light of ongoing changes to the taxation regime and the expanding wealth of Australia's ageing population, there has for many years been a growing need for estate planning to utilise appropriate structuring. Estate planning related areas have largely been outliers from radical simultaneous rule overhauls. 2018 was an exception to this position, with a range of changes announced. Indeed, the 2018 changes were, in theory, destined to see a potentially radical impact on a number of areas, including trust vesting, trust splitting, testamentary trusts, excepted trust income and family law roll-overs. One year on, however, the question needs to be asked: what has actually changed? Arguably, 2019 has shown that most critical aspects of the 2018 changes remain in a state of flux. With the post-baby boomer intergenerational wealth transfer wave gathering pace, the inertia during 2019 in a number of key areas is disappointing.

Introduction

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

This time last year, an article in this journal argued that 2018 had seen more changes in key estate planning areas in that calendar year than in each of the previous 30 years combined.[1] In particular, potentially important shifts in approaches across the following areas were explored:

- trust vesting;
- trust splitting;
- testamentary trusts and excepted trust income; and
- capital gains tax (CGT) roll-overs on relationship breakdowns.

Twelve months on, this article explores the status of each of the above areas, while also exploring three of the key estate planning related developments in 2019, namely:

1. the latest instalment in arguably the highest profile estate planning exercise in Australia's recent history (involving Lang Hancock, Gina Rinehart and her children);
2. the application of the so-called "safe harbour rule" under the small business restructure roll-over rules in Subdiv 328-G of the *Income Tax Assessment Act 1997* (Cth) (ITAA97); and
3. the use of (binding) financial agreements.

Final trust vesting ruling

In August 2018, the Australian Taxation Office issued its ruling in relation to trust vesting with TR 2017/D10 (finalised as TR 2018/6). The ATO also published details of its administrative approach.[2]

As flagged in last year's article, however, a range of important trust vesting questions remain unanswered.

Set out below is each question identified, a summary of what the position appears to be, and an acknowledgment that there has been no further substantive statement from the ATO in relation to any of these issues.

In what situations will a power of variation be deemed to be too narrow to allow an extension of a vesting date?

Generally, the decision in *Jenkins v Ellett*[3] is a useful point of reference here, given that it explains a number of principles concerning variations, including:

- if an attempt is made to amend fundamental provisions (such as appointor powers or indeed the amendment power itself), there must be a specific ability to do so under the trust instrument;
- conversely, ancillary provisions — of which it is argued the vesting date will generally be categorised as — should be able to be amended so long as there is a robust power of amendment in the trust deed;
- that said, the trust deed may expressly prohibit certain amendments, thereby effectively "hard-wiring" those clauses — again, the vesting date may be such a provision, depending on the terms of the trust deed; and
- the exercise of a power of amendment must comply with any restrictions on the exercise of power, for example, the need to obtain prior consent from a principal or an appointor. The case of *Re Cavill Hotels Pty Ltd*[4] is also often quoted in this regard.

If a power of variation expressly permits retrospective amendments, why will this not allow a vesting date to be extended after it has passed? (TR 2018/6 is blunt in its view that a trust vesting date can never be extended once it has passed.)

In situations where a purported amendment is not within the powers under the deed (or has the consequence of destroying the "substratum" of the trust), it will be held to be invalid and ineffective (see, for example, *Kearns v Hill*[5]).

However, where a deed from establishment expressly contemplates retrospective amendments, it is difficult to see how the ATO can sustain an argument that a variation that complies with the terms of the deed is invalid. In other words, with a properly crafted power of variation, the retrospective extension of a vesting date should be possible.

If there are no default beneficiaries and a trust vests without the trustee being aware, will the trustee of the trust be taxed on all income and capital gains derived (at the top marginal rate, with no CGT discount), pending the assets of the trust being distributed?

Arguably, this question, which we understand was raised during consultation about the draft ruling, is relatively simple to answer. Indeed, there are only two choices, yes or no.

The conservative view appears to be that the answer the ATO will apply here is, yes.

Alternatively, if there are no default beneficiaries, does the ATO instead believe that the assets of the trust pass on a resulting trust to the settlor?

The debate about whether discretionary trusts need provisions that detail how assets will be distributed in the event of a trustee failing to make a decision is longstanding, and arguably unresolved.

For those wishing to avoid being the subject of the next test case to resolve the issue, the conservative view appears to be that the lack of a default provision for capital means that the trust may be held to be void. If this is the case, the invalidity will be deemed to be from the date of creation of the trust, but only if the trustee fails to make a determination to distribute all of the capital on or prior to the vesting day.

While it is often possible to amend a trust deed to insert a default provision for capital, this amendment can potentially result in CGT and stamp duty being payable on the gross assets of the trust — generally, also an unacceptable risk.

Given that most trust deeds contain a clause excluding the settlor of a trust from being a beneficiary, in order to ensure that the trust is not subject to adverse tax consequences as a "revocable" or resulting trust under s 102 of the *Income Tax Assessment Act 1936* (Cth) (ITAA36), the issues here are, in a word, complex.

Perhaps it is understandable that the ATO has chosen not to provide guidance on this issue, either generally or in the context of trust vesting.

Is the position in PBR 1012191260298 still accepted as correct?

In PBR 1012191260298, the ATO confirmed that, where a bare trust that owned shares in a pre-CGT company had made all distributions of income to the same person when the trust vested to that same person, the beneficial interest was not taken to have changed. In other words, the vesting of the trust did not change the majority underlying interests in the company's assets for the purposes of the application of Div 149 ITAA97.

As PBR 1012191260298 remains available on the ATO website, it is assumed that the position adopted in it also remains correct.

Can a trustee resolve to change the jurisdiction under which a trust is administered to South Australia, and thus have any vesting date essentially abolished?

The answer to this question is potentially an entire article in itself.

South Australia has a unique approach (in Australia) in relation to perpetuity periods, having essentially abolished the rule against perpetuities (which is generally 80 years) and allowing trusts to potentially last indefinitely.

Broadly, it appears to be accepted that the settlor of a new trust should be able to nominate a trust's governing law and jurisdiction as South Australia to avoid the rule against perpetuities, even where the trust may otherwise be more closely connected with another jurisdiction.

In *Augustus v Permanent Trustee Co (Canberra) Ltd*,[6] the court held that a provision in a trust deed purporting to establish the trust under the laws of New South Wales was effective in validating a disposition that would otherwise have been void under Australian Capital Territory law. In particular, the court held that it was open to the settlor to specify the governing jurisdiction of the trust.

Applying, by extension, the logic set out above in relation to the ability to amend a trust deed to extend a vesting date, with a wide power of variation, it should also therefore be possible to change the jurisdiction under which a trust is administered.

If an individual default beneficiary of a vested trust dies before the trustee distributes the assets to them, do those assets pass in accordance with their will, without tax consequence due to Div 128 ITAA97?

Arguably, the answer to this question must be yes — if only on the basis that the inverted answer would seem to create an untenable position.

What approach will the ATO have in relation to lost trust deeds, where it is impossible to confirm the date of vesting?

Again, the answer to this question is potentially an entire article in itself.

The conservative, although admittedly unhelpful, best practice approach in relation to a lost trust deed is to find it. Where this is unsuccessful, the next best alternative is a court-approved replacement deed. Again, a broadly unhelpful solution in most situations.

It would seem reasonable to assume that the ATO is unlikely to adopt a conciliatory approach to any tax-related issues with a lost trust deed, although, in saying this, the CGT aspects on any vesting are likely to be the least of the taxpayer's concerns.

Trust splitting

In July 2018, the ATO released its views on trust splitting in TD 2018/D3.

There are a range of concerns with TD 2018/D3 for all trust advisers. The key issue, however, is that TD 2018/D3 remains in draft.

Critically, TD 2018/D3 also assumes a single factual matrix which is very specific, and it lists a number of line items that may, or may not, be a part of a trust splitting arrangement.

Many trust splitting arrangements involve a change of trustee in relation to specific assets and few (or indeed none) of the other features listed in TD 2018/D3 (for instance, no changes to the appointors, right of indemnity or range of beneficiaries).

Given the extended delays in finalising TD 2018/D3, there must be a legitimate question as to its correctness.

Practically, it also seems apparent that the ATO will not issue private rulings on trust splitting arrangements while TD 2018/D3 remains in draft, or at least, it will not issue positive rulings.

Certainly, proceeding with a trust splitting that corresponds exactly with the (one) example in TD 2018/D3 would seem unnecessarily risky. However, there are other approaches that may provide analogous pathways to those otherwise achieved by a trust splitting, for example:

- memorandums of directions;
- the bespoke crafting of trust control roles (such as appointor, principal, guardian or protector powers);
- family councils;
- bespoke trustee company constitutions;
- trust cloning (where other CGT roll-overs are available, given the abolition of the CGT "cloning" exemption on 31 October 2008 for inter vivos discretionary trusts);
- independent trustees; and
- gift and loan back arrangements.

> *"... with a properly crafted power of variation, the retrospective extension of a vesting date should be possible."*

2018 federal Budget attack on excepted trust income

The announcement in the 2018 federal Budget that "the concessional tax rates available for minors receiving income from testamentary trusts will be limited to income derived from assets that are transferred from deceased estates or the proceeds of the disposal or investment of those assets" was, for many, a surprise.

As is usually the case with Budget announcements that attack perceived arbitrage revenue opportunities, the exact impact of the changes will revolve almost entirely around how the legislation is crafted.

Thus, as flagged in last year's article, advisers in the estate planning industry should likely continue to be concerned about what the government means by suggesting that the mischief to be addressed is "that some taxpayers are able to inappropriately obtain the benefit of (a) lower tax rate by injecting assets unrelated to the deceased estate into testamentary trusts".

In turn, the Budget statement that the "measure will clarify that minors will be taxed at adult marginal tax rates only in relation to income of a testamentary trust that is generated from assets of a deceased estate (or the proceeds of the disposal or investment of these assets)" also has the distinct prospect of having much wider consequences than might otherwise be expected.

In a similar vein to the unfinalised trust splitting ruling, the significant delays in any progress in this area are problematic.

Another previous article in this journal[7] explained that, pursuant to Div 6AA ITAA36 and, in particular, s 102AG(2)(a)(i), excepted trust income is the amount which is assessable income of a trust estate that resulted from a will, codicil or court order varying a will or codicil.

Where income is excepted trust income and it is distributed to minors, those minors are taxed as adults, rather than being taxed at the normal penalty rates that otherwise apply to unearned income.

In October 2019, the draft legislation implementing the 2018 Budget announcement was finally released for consultation.[8]

With the unexplained retrospective effect from 1 July 2019, the new rules were crafted as follows:

> "(2AA) For the purposes of paragraph (2)(a), assessable income of a trust estate is of a kind covered by this subsection if:
>
> (a) the assessable income is derived by the trustee of the trust estate from property; and
>
> (b) the property satisfies any of the following requirements:
>
> (i) the property was transferred to the trustee of the trust estate to benefit the beneficiary from the estate of the deceased person concerned, as a result of the will, codicil, intestacy or order of a court mentioned in paragraph (2)(a);
>
> (ii) the property, in the opinion of the Commissioner, represents accumulations of income or capital from property that satisfies the requirement in subparagraph (i);
>
> (iii) the property, in the opinion of the Commissioner, represents accumulations of income or capital from property that satisfies the requirement in subparagraph (ii), or (because of a previous operation of this subparagraph) the requirement in this subparagraph."

As seems to be increasingly the case, the proposed changes see a simple and discrete tax leakage issue on announcement morph into rules that will have far-reaching implications during the legislative drafting process.

Some of the key initial concerns with the draft legislation are:

- the proposed amendments refer to property which was "transferred to the trustee of the trust estate … from the estate of a deceased person";
- to the extent that the trustee of the testamentary trust borrows money (or indeed assumes the borrowings that the deceased was liable to at the date of death) to acquire assets, it appears that income from the assets acquired partially funded by debt would not qualify for excepted trust income treatment;
- similarly, where distributions are made by the trustee to a beneficiary and they are then lent back to the trustee, it seems unlikely that the re-contributed amounts would qualify for excepted trust income treatment;
- the second and third limbs of the eligibility test in proposed s 102AG(2AA)(b) refer to "the opinion of the Commissioner";
- in a self-assessment tax system, this approach creates significant uncertainty for the taxpayer and in turn tax professionals, and also makes it almost impossible

(at least until substantive case law is developed) for a taxpayer to challenge the Commissioner's opinion where they objectively believe that the Commissioner has formed an incorrect or unjust opinion;

- in an area that already has substantial compliance costs, hardwiring subjective tests into the law guarantees further significant costs to taxpayers and is likely to lead to increased administrative issues for the Commissioner;
- many testamentary trusts will exist for decades and the assets originally received from the deceased estate will inevitably be sold over time so that the trust can re-invest in other assets;
- under the proposed changes, a scenario is created where many trusts will be entirely dependent on the Commissioner forming a favourable opinion under the second and third limbs of the new legislation, despite not having taken any steps which could be considered inappropriate;
- the legislation is focused on "the deceased person concerned", and it is unclear why this restriction is relevant. For example, for most couples who both implement testamentary trusts, it will be the case that they will die at different times and there will often be a desire to transfer assets between testamentary trusts;
- it is clearly the case that the excepted trust income rules should continue to apply in situations where a couple both implement testamentary trusts. To argue otherwise would again see the proposed amendments extend significantly beyond the stated intent of the announced measure and impact taxpayers in a range of circumstances where there is no inappropriate tax benefit received by a beneficiary;
- there is arguably no basis for limiting the range of beneficiaries entitled to access the excepted trust income regime to those contemplated by the testamentary trust as originally drafted. Testamentary trusts can potentially last for well over 100 years from the date they are prepared. The only certainty over this type of time period is that there will be changes to the family unit. The Commissioner already has significant power to manage any inappropriate variations to beneficiary classes (eg via the family trust election regime and the trust resettlement rules);
- by adopting an inclusive test (where income only qualifies for excepted trust income status if it is included within one of the three abovementioned limbs), the legislation creates significant administrative difficulties when attempting to "trace" assets and income across multiple financial years. In contrast, an "exclusive" test (where the default assumption is that the trust income qualifies as excepted trust income) would be significantly more robust. Such an approach could simply be subject to a specific exclusion in relation to income from assets which were inappropriately "injected" into the testamentary trust;
- given the tracing requirements mandated by the proposed new rules, the legislation, if it is to proceed as crafted, should arguably expressly confirm that property transferred from a deceased estate to a testamentary trust and then later from the testamentary trust to any other trust, including an inter vivos trust, continues to access the excepted trust income regime; and
- the legislation does not address how assets that are acquired by a testamentary trust as a consequence of the willmaker's death, but are not directly from the willmaker personally, will be treated. An important example in this regard is whether superannuation death benefit payments and insurance policy payouts to an estate will be considered legitimate capital amounts from which to source excepted trust income.

In the context of the proposed changes, it is timely to revisit PBR 1051238902389 which considers the situation where an inter vivos family discretionary trust was distributing to a testamentary trust.

In contrast to the approach of the draft changes, the ruling sees the ATO adopt a more collaborative approach.

Briefly, to the extent relevant, the factual matrix was as follows:

- a willmaker was the ultimate controller of a family trust;
- the willmaker's estate plan attempted to mandate that the assets of the family trust be sold and the cash distributed directly (and equally) to four testamentary trusts established under the will;
- it was acknowledged by the parties that the directions of the willmaker were an attempted fettering of the trustee's discretion. Therefore, while they could be taken into account, they were not to be binding; and
- the assets of the family trust were sold and the intention was to then have the cash distributed to the testamentary trusts.

When determining that the income of a prescribed person (eg including a minor) as a beneficiary of a testamentary trust, even if sourced from a distribution made by a family trust, is excepted trust income (ie the minor could be taxed at adult rates) of the beneficiary, the ATO confirmed the following:

- following the decision in *The Trustee for the Estate of the late AW Furse No. 5 Will Trust v FCT*,[9] a case which was explained in detail in last year's article, all that is necessary for the assessable income of a trust estate to be excepted trust income is that the assessable income be the assessable income of the trust estate and that the trust estate be as a result of a will;
- thus, any amounts representing a distribution from a family trust to a testamentary trust are "assessable income of a trust estate that resulted from a will", and therefore will be "excepted trust income", unless otherwise excluded;
- again, largely following the analysis in the *Furse* decision, the main exclusions (namely, either that the parties are not dealing at arm's length or the arrangement is one predominately driven by achieving the tax benefit) were held not to be applicable and thus access to the excepted trust income provisions was confirmed;
- while the outcome in this private ruling is a positive one, distributions by family trusts to testamentary trusts will clearly be denied access to the excepted trust income regime if the rules announced are legislated as initially drafted; and
- regardless of whether the announced changes become law, the utility of properly crafted testamentary trusts is

likely to remain a key estate planning tool, given the range of other benefits, for example:

- asset protection;
- limited liability (assuming a corporate trustee is used);
- asset management flexibility; and
- wider CGT and income tax planning.

Family law CGT roll-overs

The decision in *Ellison v Sandini Pty Ltd*[10] provided clarity for tax practitioners who are assisting clients involved in a relationship breakdown. In particular, the split decision of the Full Federal Court reconfirmed the generally accepted historical position in relation to CGT roll-over relief on marriage breakdowns.

While perhaps not directly related to estate planning, given that the majority of family groups endure at least one relationship breakdown, it is an area which specialist estate planning advisers must have a working knowledge of.

Among a range of technical issues, the case explored the requirements to access the CGT roll-over relief contained in Subdiv 126-A ITAA97 for relationship breakdowns.

In unwinding the original court decision, which held that the roll-over relief was available for assets transferred to a family trust controlled by one of the parties, the Full Federal Court confirmed that relief is only available where the asset is being transferred to the spouse personally.

Thankfully, 2019 has not seen any substantive iterations in this particular space. That said, however, it is timely to revisit another aspect in the family law area that is increasingly being used as an estate planning tool, namely, financial agreements.

Financial agreements can be used as an estate planning tool in a number of ways, and in particular in:

- later life relationships (ie where couples have children from previous relationships); and
- situations where parents effectively mandate that, in order for their children to benefit under an estate plan, each child must first enter into a financial agreement with their spouse.

High Court summary

The High Court has given guidance in relation to the manner in which parties to a financial agreement must conduct themselves if they are wanting the agreement to be binding. In particular, the High Court unanimously allowed an appeal from the Full Court of the Family Court of Australia in the case of *Thorne v Kennedy.*[11]

The High Court held that two substantially identical financial agreements, a pre-nuptial agreement and a post-nuptial agreement, made under Pt VIIIA of the *Family Law Act 1975* (Cth) should be set aside.

Mr Kennedy and Ms Thorne (both pseudonyms) met online in 2006.

Ms Thorne, an Eastern European woman then aged 36, was living overseas. She had no substantial assets.

Mr Kennedy, then aged 67 and a divorcee with three adult children, was an Australian property developer with assets worth over $18m.

Shortly after they met online, Mr Kennedy told Ms Thorne that, if they married, "you will have to sign paper. My money is for my children".

Seven months after they met, Ms Thorne moved to Australia to live with Mr Kennedy with the intention of getting married.

About 11 days before their wedding, Mr Kennedy told Ms Thorne that they were going to see solicitors about signing an agreement. He told her that if she did not sign it, the wedding would not go ahead.

An independent solicitor advised Ms Thorne that the agreement was drawn solely to protect Mr Kennedy's interests and that she should not sign it.

Ms Thorne understood the advice to be that the agreement was the worst agreement that the solicitor had ever seen. She relied on Mr Kennedy for all things and believed that she had no choice but to enter the agreement.

On 26 September 2007, four days before their wedding, Ms Thorne and Mr Kennedy signed the agreement. The agreement contained a provision that, within 30 days of signing, another agreement would be entered into in similar terms.

In November 2007, the foreshadowed second agreement was signed. The couple separated in August 2011.

In April 2012, Ms Thorne commenced proceedings in the Federal Circuit Court of Australia seeking orders setting aside both agreements, an adjustment of property order and a lump sum spousal maintenance order. One of the issues before the primary judge was whether the agreements were voidable for duress, undue influence, or unconscionable conduct. The primary judge set aside both agreements for "duress".

Mr Kennedy's representatives appealed to the Full Court of the Family Court, which allowed the appeal. The Full Court concluded that the agreements should not be set aside because of duress, undue influence, or unconscionable conduct.

By grant of special leave, Ms Thorne appealed to the High Court. The High Court unanimously allowed the appeal on the basis that the agreements should be set aside for unconscionable conduct and that the primary judge's reasons were not inadequate.

A majority of the court also held that the agreements should be set aside for undue influence. The majority considered that, although the primary judge described her reasons for setting aside the agreements as being based on "duress", the better characterisation of her findings was that the agreements were set aside for undue influence.

The primary judge's conclusion of undue influence was open on the evidence and it was unnecessary to decide whether the agreements could also have been set aside for duress.

Ms Thorne's application for property adjustment and lump sum maintenance orders remains to be determined by the Federal Circuit Court.

What does the decision mean?

As flagged in the above summary, the key issues undermining the validity of the financial agreement in this matter related to the conduct of the husband and the

existence of unconscionable conduct and (by majority) undue influence.

Unconscionable conduct was summarised as follows:[12]

> "A special disadvantage may also be discerned from the relationship between parties to a transaction; for instance, where there is 'a strong emotional dependence or attachment' … Whichever matters are relevant to a given case, it is not sufficient that they give rise to inequality of bargaining power: a special disadvantage is one that 'seriously affects' the weaker party's ability to safeguard their interests."

Undue influence is said to occur when a party is deprived of "free agency" when entering into an arrangement. In other words, when there is something so strong that the influenced party is under the belief that, while the document is not what they want, they feel compelled to sign it anyway.

The High Court listed the following six factors (noting that they are, however, not exclusive) as relevant when assessing whether there has been undue influence in the context of financial agreements:

- whether the agreement was offered on a basis that it was not subject to negotiation;
- the emotional circumstances in which the agreement was entered, including any explicit or implicit threat to end a marriage or to end an engagement;
- whether there was any time for careful reflection;
- the nature of the parties' relationship;
- the relative financial positions of the parties; and
- the independent advice that was received and whether there was time to reflect on that advice.

Admittedly, with the benefit of hindsight, arguably, the case does not significantly change the position in relation to the effectiveness of financial agreements. In particular, if the arrangements had been put in place earlier in the relationship, or at least not so approximate to the wedding, that would have increased the robustness of the agreement.

Similarly, if steps had been taken to ensure that the independent lawyer was able to endorse the appropriateness of the agreement by way of a collaborative negotiation, it would have almost certainly been the case that the arrangements would have been upheld.

The ongoing saga of Lang Hancock's estate plan

Last year's article had a particular focus on the tax aspects surrounding the vesting of a trust established by Gina Rinehart's father (Lang Hancock) under his estate plan — and the level of influence that the case had on the subsequent ATO trust vesting ruling, TR 2018/6.

Another aspect of the litigation surrounding the trust deed that made it all the way to the High Court in 2019 (see *Rinehart v Hancock Prospecting Pty Ltd*[13]), concerned the ability for parties to ensure the confidentiality of agreements entered into by mandating arbitration in the event of dispute (instead of court proceedings).

In attempting to claim against Gina Rinehart for the alleged mismanagement of trust assets, two of her children commenced court proceedings. To support their argument that they were not obligated to instead proceed to private arbitration, they claimed that their signatures on the original agreements (requiring arbitration to be undertaken, not court proceedings) were as a result of misconduct and undue influence by their mother, among others.

In confirming that the disputes were required to be resolved via arbitration, the court confirmed that:

- while there is historical case law confirming that, whenever arbitration is agreed between parties, it applies to all disputes unless the language of the clause makes it clear that certain questions are intended to be excluded, this is not the position in Australia;
- furthermore, there is no overriding assumption that parties who include an arbitration clause in an agreement are likely to have intended any dispute arising out of the relationship to be decided by arbitration, not court proceedings;
- rather, any arbitration clause should be considered in the context of the overall factual matrix, or in the words of the court, "by reference to the language used by the parties, the surrounding circumstances, and the purposes and objects to be secured by the contract";
- in this case, the evidence overwhelmingly supported a conclusion that confidentiality was a key aspect of the agreement between the parties, and thus arbitration applied to all disputes; and
- specifically, the court confirmed that it was "inconceivable that [any] person would have thought that claims … raising allegations such as undue influence, were not to be the subject of confidential dispute resolution but rather were to be heard and determined publicly, in open court".

Subdivision 328-G and the safe harbour rule

Being a federal election year, the 2019 election campaign will arguably be most remembered for the stark differences in tax policies, and the impact in turn of those policies on the result. In this context, the historical announcement by the then Treasurer (the Hon. JB Hockey, MP) on 12 May 2015 that "new businesses create new jobs. That is why we will … [allow] … business owners to … receive tax relief when restructuring their existing business" is perhaps a timely throwback quote.

The above statement, heralding the introduction of Subdiv 328-G ITAA97, being the small business restructure roll-over relief, has been followed by many (arguably expected) limitations overlaid on what was otherwise pitched as a deliberately generous regime.

However, in recent times, the ATO has been active in providing context to its view of the way in which the rules operate.

In addition to the two ATO law companion guidelines (namely, LCG 2016/2 and LCG 2016/3), a series of private rulings has been published, for example:

- PBR 1051401566911, which relates to the transfer of units in a unit trust from a company to a trust, and confirms no tax consequences (including under Div 7A) due to the application of the Subdiv 328-G roll-over;

- PBR 1051286776633, which relates to the tax-exempt transfer of assets from a company to a wholly owned subsidiary company;
- PBR 1051386393245, which relates to the tax-exempt transferring of a client base of an individual and company to a trust;
- PBR 1051386604629, which relates to the transfer of pre-CGT land from an individual taxpayer to a new discretionary trust and confirms that the pre-CGT status of the land is maintained following the transfer; and
- PBR 1051401067097, which relates to the transfer of shares held by an individual in a company to a newly settled discretionary trust, whereby access to the relief under Subdiv 328-G was denied.

There is now also clarity from the ATO in relation to the application of the "safe harbour rule" in PBR 7920126593966.

Background

Briefly, the factual matrix in PBR 7920126593966 (relevantly) was as follows:

- A, B and C were brothers and, in partnership, owners of a grazing property known as "XYZ", in equal shares as tenants in common;
- XYZ was acquired before September 1985 and is a pre-CGT asset;
- the partnership carried on a grazing business on the XYZ property;
- the aggregated turnover of the partnership between A, B and C, as well as their associates, was under $10m in the relevant financial year;
- it was proposed to transfer the XYZ property and grazing business owned by the partnership into a newly established trust structure (New Trust); and
- a family trust election would be made in favour of A in relation to the New Trust.

The ATO confirmed that the roll-over under s 328-430 ITAA97 was satisfied, allowing the transfer of the pre-CGT property into the New Trust, retaining its pre-CGT status.

"Genuine" test and the safe harbour rule

One key issue to date under Subdiv 328-G ITAA97 that has been the subject of some uncertainty relates to the requirement under s 328-430 that the proposed "transaction is, or is part of, a genuine restructure of an ongoing business". In particular, if, when relying on the safe harbour rule in s 328-435 ITAA97, is it also a requirement that the proposed restructure satisfy the definition of a "genuine restructure".

Relevantly, s 328-435 confirms that, for the purposes of s 328-430(1)(a), a transaction is deemed to be a genuine restructure of an ongoing business if, in the three-year period after the transaction takes effect:

- there is no change in ultimate economic ownership of any of the significant assets of the business that were transferred under the transaction;
- those significant assets continue to be active assets; and
- there is no significant or material use of those significant assets for private purposes.

Thus, on a plain reading of the legislation, it would appear that s 328-430(1)(a) is automatically satisfied if the conditions in s 328-435 are satisfied. Furthermore, the explanatory memorandum (EM) to the Tax Laws Amendment (Small Business Restructure Roll-over) Bill 2016 (which introduced Subdiv 328-G) confirmed that a small business "will be taken to satisfy the requirement" in s 328-430(1)(a) if the abovementioned three conditions are met.

Thus, as explained in the EM, it is only if a small business does not satisfy the requirements of the safe harbour rule that it need demonstrate that the transaction is otherwise a genuine one.

ATO view

The ATO confirms the above conclusions, specifically quoting LCG 2016/3, that, where the safe harbour rule is met:

- it is not necessary to consider whether the arrangement would otherwise be a transaction that is deemed to be a genuine restructure of an ongoing business under s 328-430(1)(a); and
- there is no limit or expansion to what would otherwise be considered a transaction that is a genuine restructure of an ongoing business within the ordinary meaning of the phrase.

Thus, in the factual matrix of PBR 7920126593966, the decision by the taxpayer to rely on the safe harbour rule removed the need to consider any aspects of the arrangement, even those that might have gone to whether it was otherwise a genuine arrangement.

The successful reliance is, however, subject to the taxpayer meeting the three conditions in s 328-435 throughout the three-year period after the transaction takes effect. If this occurs, the requirement under s 328-430(1)(a) is deemed to be satisfied at the time of the transaction.

Ongoing issues

In addition to the potential "claw back" of relief for any failure to meet the three conditions in s 328-435 throughout the three-year period after the transaction takes effect, there are two key aspects that will need to be borne in mind in analogous situations to those set out in PBR 7920126593966.

First, the New Trust (and any trustee company) will show a date of establishment well after 1985. Thus, anyone reviewing the New Trust and its assets may, arguably with justification, conclude that its assets are all post-CGT assets. An error that would result in potentially devastating consequences for the taxpayer, and perhaps in turn the advisers who made the incorrect assumption.

In theory, the prospect of such an oversight should be remote. In practice, we are aware of the identical error being made pursuant to historical roll-overs under Subdiv 122-A ITAA97 (where the company transferee was registered in the 2000s, and yet was in fact a pre-CGT company for tax purposes).

Second, the ruling is expressly stated to be subject to the general anti-avoidance provisions under Pt IVA ITAA36. The manner in which Pt IVA could be said to apply in a situation

where the safe harbour rule is satisfied is perhaps difficult to conceptualise.

Given the number of private ruling applications apparently made in relation to the appropriate interpretation of Subdiv 328-G more generally, arguably, the conservative approach, at least in the short-term, appears to be that a private ruling should be obtained before seeking to rely on Subdiv 328-G.

Conclusion

In modern estate planning, significant complexities from the interaction between the legislation relating to tax, trusts, bankruptcy, family law and superannuation have been omnipresent.

The estate planning space has largely been exempt from radical simultaneous rule overhauls. 2018 was arguably an outlier to this position, at least in recent years. 2019 has shown, however, that many of the most critical aspects of the 2018 changes remain in a state of flux.

With the post-baby boomer intergenerational wealth transfer wave gathering pace, the inertia during 2019 in a number of key areas is disappointing.

Matthew Burgess, CTA
Director
View Legal

Author note

Arguably, the issues with TD 2018/D3 are only partially addressed by the final determination, TD 2019/14, that was released in December 2019. TD 2019/14 does include a second example explaining how the ATO believes a form of resettlement free trust split can be implemented.

Acknowledgment

The assistance of the team at View Legal in the preparation of the article is gratefully acknowledged. Parts of this article are based on material that originally appeared in the *Weekly Tax Bulletin* and state-based seminars presented for The Tax Institute.

References

1 M Burgess, "2018: the biggest year in estate planning in a generation", (2018) 53(6) *Taxation in Australia* 307-313.

2 ATO, "Trust vesting", 11 February 2019. Available at www.ato.gov.au/General/Trusts/Trust-vesting/.

3 [2007] QSC 154.

4 [1998] 1 Qd R 396.

5 (1990) 21 NSWLR 107.

6 [1971] HCA 25.

7 M Burgess, "Testamentary trusts: bespoke planning opportunities", (2014) 48(9) *Taxation in Australia* 492-502. Available at https://matthewburgess.com.au/wp-content/uploads/2019/07/tiStory_Matthew_Burgess_COVER.pdf.

8 Treasury Laws Amendment (Measures for Consultation) Bill 2019: testamentary 5 trusts. Available at www.treasury.gov.au/sites/default/files/2019-09/t398533-exposure_draft-leg-testamentary_trusts-final.pdf.

9 91 ATC 4007.

10 [2018] FCAFC 44.

11 [2017] HCA 49.

12 [2017] HCA 49 at [113].

13 [2019] HCA 13.

A Matter of Trusts

by Laura Spencer, Sladen Legal

Trusts and the franking credits trap: can we fix it?

The Commissioner considers that a beneficiary's interest in the corpus of a unit trust cannot be fixed. How then can beneficiaries access franking credits on franked dividends received by a trust?

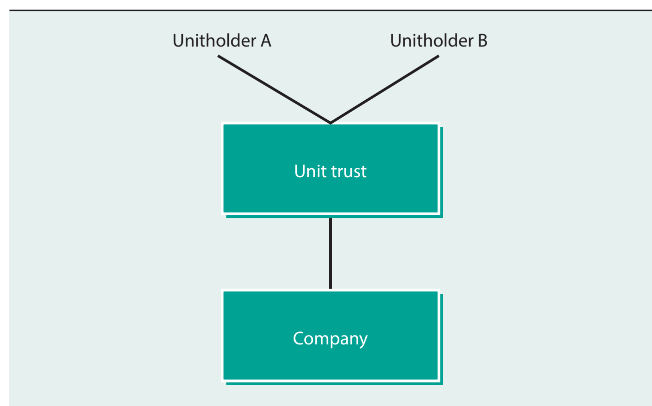
The trap

Diagram 1 illustrates a structure that is sometimes[1] used in the small to medium enterprise (SME) market where multiple family groups wish to participate in a business together. A company operates the business, wholly owned by a unit trust in which the business partners or investors subscribe for units. However, a trap in relation to franking credits, often unknowingly, may arise as a result of this structure.

For illustrative purposes, let's imagine that the unit trust receives a large franked dividend from the company. The trustee of the unit trust appoints income, comprising the franked dividend, to unitholder B. The value of the franking credits places the ultimate individual recipients of the distributions from unitholder B above the small shareholder exemption[2] ($5,000 of franking credits from all sources); therefore, it will not apply.

Unitholder A and unitholder B are both family trusts and are unrelated. How can unitholder B access the franking credits on the franked dividend?

Diagram 1. Example SME business structure



Former s 160APHL(10) ITAA36

Division 1A of Pt IIIAA ITAA36 contains specific rules regarding the ability of beneficiaries to claim franking credits attached to franked dividends received by a trust. This Division was repealed with effect from 1 July 2002. However, it has become the practice of the ATO that the legislation may continue to apply.

It was noted in para 9 of TD 2007/11 that:

> "The very wording of sections 207-145 and 207-150 makes it clear that regard is to be had to the rules in Division 1A in determining whether a person is a qualified person for the purposes of these provisions in respect of a franked distribution, irrespective of whether the distribution is made after 30 June 2002. There is nothing in the relevant extrinsic material to indicate the contrary."

Broadly, under the provisions, it is determined that a taxpayer may only claim franking credits if they are a "qualified person" in relation to the franked dividend. In order to be a qualified person, a taxpayer must satisfy two rules:

1. the related payments rule; and
2. the holding period rule.

The related payments rule requires that the beneficiary (or their associate) does not make a payment that transfers the economic benefit of a dividend to another person.

The holding period rule requires a beneficiary to have held their interest in the shares for a continuous period of not less than 45 days.[3] When calculating the number of days for which a beneficiary continuously held the interest in shares, any days on which the beneficiary acquired or disposed of the interest and the days on which the beneficiary had materially diminished risks of loss or opportunities for gain in respect of the interest, are not taken into account.

Generally, a beneficiary is taken to have materially diminished risks of loss or opportunities for gain on a particular day in respect of an interest in shares if the beneficiary's net position on that day in relation to the interest has less than 30% of the risks and opportunities.

The beneficiary's interest in shares is worked out using the formula noted in former s 160APHL ITAA36. It is beyond the scope of this article to explore this formula in detail, but it is noted that the formula has both a long and short position, and both require the beneficiary to hold a fixed interest in the trust.

Family trust election

Former s 160APHL(10) ITAA36 specifies an additional position in certain circumstances. Broadly, where the trust has not made a family trust election (FTE), a beneficiary of a trust will be taken to have a short position equal to its long position, and a long position equal to so much of the beneficiary's interest in the trust as is a fixed interest.

Therefore, in a simple single-family unit trust utilising a single discretionary trust unitholder, it may be possible for both the unit trust and the discretionary trust unitholder to make FTEs to ensure that they both have the requisite fixed interest as a result of the deeming rules of s 160APHL(10) to access the franking credits.

However, where the trust shareholder is a unitised-type entity with multiple unrelated family investors, as is the case in our

example, it is not possible for the unit trust to make an FTE that nominates a test individual that will cover both family groups.[4]

An election for the unitholder A family would result in unitholder B's family being treated as "outsiders" as defined in s 270-25 of Sch 2F ITAA36. Similarly, an FTE nominating a test individual from unitholder B's family would result in unitholder A's family being treated as "outsiders". A distribution by the trustee of the unit trust to an "outsider" (even where that outsider is the holder of units in the unit trust) would be subject to family trust election tax, ie tax at the rate of 47%.[5]

A fixed interest

A fixed interest in the trust holding is defined in former s 160APHL(11) ITAA36 as:

> "… a vested and indefeasible interest in so much of the corpus of the trust as is comprised by the trust holding."

Beneficiaries having no fixed interest will have a net position of zero (which is less than 30%), and materially diminished risks of loss and opportunities for gain for the entire test period, and therefore cannot satisfy the holding period rule.

The basic requirement for a beneficiary's interest in a trust to be considered a fixed entitlement is that the beneficiary has a vested and indefeasible interest in a share of income of the trust that the trust derives from time to time, or in the capital of the trust. Practically speaking, this means that the interest should not be able to be defeated by the action of one or more persons or by the occurrence of one or more subsequent events.

To determine whether a beneficiary has a vested and indefeasible interest for the purpose of former s 160APHL(11), practitioners have relied on former s 160APHL(13).

Former s 160APHL(13) outlines cases where interests are not defeasible, noting:

> "If:
>
> (a) the trust is a unit trust and the taxpayer holds units in the unit trust; and
>
> (b) the units are redeemable or further units are able to be issued; and
>
> (c) where units in the unit trust are listed for quotation in the official list of an approved stock exchange (within the meaning of section 470) — the units held by the taxpayer will be redeemed, or any further units will be issued, for the price at which other units of the same kind in the unit trust are offered for sale on the approved stock exchange at the time of the redemption or issue; and
>
> (d) where the units are not listed as mentioned in paragraph (c) — the units held by the taxpayer will be redeemed, or any further units will be issued, for a price determined on the basis of the unit trust's net asset value, according to Australian accounting principles, at the time of the redemption or issue;
>
> then the mere fact that the units are redeemable, or that the further units are able to be issued, *does not mean* that the taxpayer's interest, as a unit holder, in so much of the corpus of the trust as is comprised by the trust holding is defeasible." (emphasis added)

In essence, the provision states that, where you have a unit trust, even if the units are redeemable or new units can be issued, provided such a redemption or issue is done in accordance with Australian accounting principles, then it will not affect whether the interest is defeasible. For advisers, this provision provided guidance for developing what could be regarded as "fixed trusts" and thereby solving the potential franking credit trap noted at the start of this article.

However, case law, while not directly in relation to accessing franking credits on franked dividends, has thrown into question the ability to establish a unit trust under which the beneficiaries would be regarded as having a vested and an indefeasible interest under the law and in the eyes of the Commissioner.

Kafataris

The *Kafataris* case[6] deals with the absolute entitlement provisions. These provisions, similar to former s 160APHL(14), require the taxpayer to have both a vested and an indefeasible interest in the asset.

The focus of the court's decision was the trustee's power to sell and vary the investments, notably, shares in a company. The power to sell and vary investments is not an uncommon power and is found in most Australian trust deeds. However, the court found that the existence of this power conflicted with the claim that the beneficiaries had an absolute entitlement to the shares.

In the *Kafataris* decision impact statement,[7] the ATO notes in respect of "absolute entitlement":

> "To be absolutely entitled to an asset as against the trustee, the beneficiary must have both a vested and an indefeasible interest in the asset and be able to demand transfer of the asset by the trustee …
>
> In particular, the presence in the particular deed of a clause that gives the trustee power to sell and vary investments, will be inconsistent with the existence of absolute entitlement …"

Therefore, as the trustee could sell the shares without the unanimous approval of shareholders, it could not be said that the beneficiaries had absolute entitlement to the shares.

Colonial First State Investments

The *Colonial First State Investments* case[8] considered whether the fund was a fixed trust for the purposes of the trust loss provisions under s 272-65 of Sch 2F ITAA36. The court found that the fund was not fixed, as the interest of the unitholders in income and capital of the trust was defeasible.

The court ultimately reached this decision on the basis that the interests of unitholders in income and capital of the trust could be defeated by the unitholders exercising the powers granted to them under s 601GC(1)(a) of the *Corporations Act 2001* (Cth) to modify, replace or repeal the constitution of the fund by special resolution.

The ATO's view on this case is that it confirms the view that very few trusts satisfy the definition of "fixed trust" in s 272-65 of Sch 2F in the absence of the exercise of the Commissioner's discretion.[9] The ATO's position therefore is that a beneficiary's entitlement to income or capital is generally able to be defeated by the exercise of a power in the deed or by a statutory power.

The ATO has previously considered issuing a public ruling about the fixed entitlement test in the trust loss provisions in Sch 2F. The ATO concluded that, even on a purposive and contextual interpretation of the actual words used in the legislation, an interpretative position could not be reached that aligned with industry expectations. The indefeasibility requirement was significant in that respect.

Nevertheless, the caveat in respect of the Commissioner's discretion remains. While very few trusts will be fixed trusts, the Commissioner may exercise his discretion to deem them to be fixed.[8]

PCG 2016/16

In PCG 2016/16, the Commissioner outlines the safe harbour rules. The rules provide a framework for determining when the trustee of a trust is allowed to manage the trust's tax affairs as if the Commissioner had exercised the discretion to treat the beneficiaries as having fixed entitlements to the income and capital of the trust, for the purpose of s 272-5 of Sch 2F ITAA36.

In the absence of the application of the safe harbour rules, PCG 2016/16 outlines when the Commissioner will exercise his discretion (in relation to the Sch 2F provisions) to deem a beneficiary's interest in the income or capital to be vested and indefeasible.

PCG 2016/16 notes that powers which may cause a beneficiary's interest to be defeasible include:

- the power to amend the trust deed;
- the power to issue or redeem units;
- the power to issue units of different classes or to reclassify units;
- the power to classify receipts as being on income or capital account where the units that have been issued do not all have equal rights to receive the income and capital of the trust;
- the power to appoint a beneficiary's interest in the income or capital of the trust to another beneficiary;
- the power to settle or appoint any part of the corpus of the trust to a new trust with different beneficiaries; and
- the power to enforce the forfeiture or cancellation of partly paid units due to the non-payment of a call except where such partly paid units would be void ab initio.

What does this mean for franking credits?

PCG 2016/16 specifically states that it does not apply for the purposes of the holding period rules for franking credits.[10] This also means that the self-assessed safe harbour rules do not apply. Therefore, based on the court's interpretation, most notably in the *Colonial First State Investments* case, and as supported by the ATO's decision impact statement, the Commissioner considers that a beneficiary's interest in the corpus of a unit trust cannot be fixed. How then can beneficiaries access franking credits on franked dividends received by a trust?

With the legislation requiring a fixed interest but the courts and the ATO's administrative position saying that this is not possible, the trap for beneficiaries wishing to access franking credits on franked dividends received by a trust arises.

A remedy for this can be identified when we consider former s 160APHL(14) ITAA36. This provision contains a discretion to treat an interest to be vested and indefeasible, similar to that in relation to trust losses in s 272-5(3) of Sch 2F ITAA36. Section 160APHL(14) states:

> "**Commissioner may determine an interest to be vested and indefeasible.**
>
> If:
>
> (a) the taxpayer has an interest in so much of the corpus of the trust as is comprised by the trust holding; and
>
> (b) apart from this subsection, the interest would not be a vested or indefeasible interest; and
>
> (c) the Commissioner considers that the interest should be treated as being vested and indefeasible, having regard to:
>
> (i) the circumstances in which the interest is capable of not vesting or the defeasance can happen; and
>
> (ii) the likelihood of the interest not vesting or the defeasance happening; and
>
> (iii) the nature of the trust; and
>
> (iv) any other matter the Commissioner thinks relevant;
>
> the Commissioner may determine that the interest is to be taken to be vested and indefeasible"

A number of industry bodies made a submission in respect of the draft form of PCG 2016/6, noting that it would be efficient if PCG 2016/6 also dealt with former s 160APHL(14).

The submission noted that the wording of the discretion in former s 160APHL(14) is very similar to the Commissioner's discretion under s 272-5(3). It is also identified and accepted that it may be difficult to exercise the discretion where the relevant class has no right to capital. However, there was no reason why the Commissioner should not exercise his discretion under former s 160APHL(14) in circumstances where all beneficiaries have a consistent proportionate entitlement to dividends and capital gains from the shares in a trust and those entitlements are effectively not discretionary.

Despite the submission, the final form of PCG 2016/6 explicitly addresses former s 160APHL(14) and confirms that PCG 2016/6 does not apply to that provision.

Conclusion

In order to access franking credits on franked dividends distributed through a unit trust, the unitholder must have a vested and defeasible interest in the corpus of the trust. However, case law has stated that unitholders cannot have such a fixed interest. The ATO's administrative position confirms this and notes that very few trusts will satisfy the definition of a fixed trust.

The Commissioner has the power to deem there to be a fixed interest for the purposes of accessing the franking credits on franked dividends as per former s 160APHL(14). However, there is no formal guidance on when or how this will apply, and importantly, there is no safe harbour rule to self-assess the discretion.

Taxpayers therefore need to obtain the exercise of the Commissioner's discretion to deem there to be a fixed interest. The process for obtaining that exercise of discretion

is to seek a private binding ruling from the Commissioner. Practically, the application for a private binding ruling should consider the issues outlined in PCG 2016/16 regarding the trust loss provisions.

Without the exercise of this discretion, a taxpayer is not entitled to access franking credits on franked dividends distributed through the unit trust. When considering whether a trust can be fixed, the Commissioner's discretion will ensure that franking credit claims are correct and can prevent lengthy audit and legal fees should the ATO investigate franking credit claims made by taxpayers in their returns. Trusts and franking credit trap — can we fix it? The Commissioner can.

Laura Spencer
Senior Associate
Sladen Legal

Acknowledgment

The author acknowledges the contributions by Daniel Smedley, Principal at Sladen Legal, in the preparation of this article.

References

1 This type of structure may be used for various reasons, ranging from financing arrangements, to regulation by the trust law versus corporations law and flow-through of multiple investments made by the unit trust, to industry specific or beneficiary specific requirements.

2 S 207-157(4) and (5) of the *Income Tax Assessment Act 1997* (Cth); former s 160APHT of the *Income Tax Assessment Act 1936* (Cth) (ITAA36).

3 Ninety days for preference shares.

4 Those individuals who will be regarded as the family of a "test individual" are outlined in s 272-95, Sch 2F ITAA36.

5 Pursuant to Div 271, Sch 2F ITAA36.

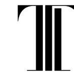
6 *Kafataris v DCT* [2008] FCA 1454.

7 Decision impact statement, *Kafataris v DCT*, 24 December 2008.

8 *Colonial First State Investments Ltd v FCT* [2011] FCA 16.

9 Decision impact statement, *Colonial First State Investments Ltd v FCT*, 30 June 2011.

10 PCG 2016/16, para 4.



THE TAX INSTITUTE

2020 WA Estate & Succession Planning Intensive

Help your clients prepare for the challenges of the future

Returning for its second year, this one-and-a-half-day program will give delegates an in-depth understanding of the key issues facing legal and accounting practitioners, when advising on estate and succession planning.

- Stellar line up of tax experts
- Single day registration options
- Specifically designed for practitioners in the area of estate & succession planning

Early bird prices close on 7 February

25–26 February 2020
The Melbourne Hotel Perth
9.75 CPD hours

Register now
taxinstitute.com.au/estate20

0178WA_02/20

Superannuation

by Daniel Butler, CTA, DBA Lawyers

When SMSF advice is unlawful

This article examines what advice SMSF advisers can provide without "stepping over the line", especially when providing taxation, financial product or legal advice.

Overview

This article examines what advice SMSF advisers can (and cannot) provide without "stepping over the line", especially when providing taxation, financial product or legal advice which they may not be permitted to provide.

For example, an adviser providing legal advice or services (eg preparing an SMSF deed update, a binding death benefit nomination (BDBN) or a deed of change of trustee) exposes themselves and their firm to significant risk and legal claims, especially if their professional indemnity insurance does not cover such activity. Moreover, an adviser providing financial product or tax advice can similarly be subject to significant liability and penalties.

This article also provides some guidance on practical solutions to minimise risk and adopt best practice.

Can an adviser provide advice on superannuation law matters?

It may appear surprising to many SMSF advisers that, unless they are a qualified and registered lawyer, they are generally prohibited from advising on superannuation law matters that impact a person's rights and obligations (as this constitutes a legal service) unless they are a registered lawyer who is authorised to provide legal advice for a fee. In view of that, are there any relevant carve-outs or exceptions under the law for advisers to provide *Superannuation Industry (Supervision) Act 1993* (Cth) (SISA) advice?

Possible carve-out for advisers providing advice on Commonwealth taxation law

There may be a potential argument for advisers to provide advice on Commonwealth "taxation law" (as defined below) if they are a registered tax practitioner with the Tax Practitioners Board (TPB) as they may be able to rely on the "carve-out" under the *Tax Agent Services Act 2009* (Cth) (TASA). This Act gives "registered tax agents" a right to provide "tax agent services" (as defined in s 90-5 TASA) as any service:

> "(a) that relates to:
>
> (i) ascertaining liabilities, obligations or entitlements of an entity that arise, or could arise, under a taxation law; or
>
> (ii) advising an entity about liabilities, obligations or entitlements of the entity or another entity that arise, or could arise, under a taxation law; or
>
> (iii) representing an entity in their dealings with the Commissioner; and
>
> (b) that is provided in circumstances where the entity can reasonably be expected to rely on the service for either or both of the following purposes:
>
> (i) to satisfy liabilities or obligations that arise, or could arise, under a taxation law;
>
> (ii) to claim entitlements that arise, or could arise, under a taxation law."

The term "taxation law" is defined in s 995-1 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97) to mean:

> "(a) an Act of which the Commissioner has the general administration (including a part of an Act to the extent to which the Commissioner has the general administration of the Act); or
>
> (b) legislative instruments made under such an Act (including such a part of an Act); or
>
> (c) the *Tax Agent Services Act 2009* or regulations made under that Act."

Note that an adviser who is registered with the TPB under the TASA may provide advice on Commonwealth taxation law. This carve-out does not, however, cover state taxes such as stamp duty, payroll tax, land tax and the wide array of other state taxes. Thus, an adviser providing advice on stamp duty, payroll tax or land tax for a fee without being a registered lawyer would be at risk of being convicted under the *Legal Profession Uniform Law Application Act 2014* (Vic) (LP Act) and subjected to a penalty of $41,305 or imprisonment for two years, or both. Similar legislation applies in other jurisdictions.

Furthermore, in any negligence action or similar claim against an adviser providing legal services where any loss or damage was suffered, that adviser is likely be tested against the standard of a reasonably competent legal practitioner providing a similar service. Moreover, and to add "salt to these wounds", such an unqualified adviser is likely to have disqualified themselves under their professional indemnity insurance cover and will be responsible for any loss or damage that was suffered. It is important to note here that an action in negligence can also be made directly to an adviser, even if they are employed on behalf of a company with insufficient assets. Thus, advisers need to mindful of their personal exposure as some of their employers may be happy to put their adviser–employee "necks on the line".

Possible carve-out for tax agents providing advice on SISA matters

It is clear that a tax agent's service (such as providing advice on Commonwealth taxation law) may be provided by a tax agent who is registered with the TPB (without needing to be a lawyer). This opens up the question of how broad a range

of services does "taxation law" cover? In particular, this definition (refer to the definition above) includes:

> "… a part of an Act to the extent to which the Commissioner has the general administration of the Act …"

Fortunately, the ATO, as the compliance regulator for SMSFs, administers certain parts of the SISA. Thus, it is arguable that an adviser may be able to provide certain advice in their role as a registered tax agent in relation to SISA matters.

The ATO has specific regulatory supervisory powers under the SISA that relate to SMSFs. In particular, the SISA confers powers on the relevant "regulator" in respect of relevant Parts or sections of the legislation. Section 6 SISA sets out the SISA powers for the various regulators. The regulators for non-SMSFs are the Australian Prudential Regulation Authority (APRA) and the Australian Investment and Securities Commission (ASIC). Specific powers are also conferred on APRA and ASIC under s 6 SISA.

The Commissioner of Taxation's powers and functions are specified at s 6(1)(e), (ea), (f), (fa) and (g), and (2AA) to (2AC) SISA. Of those provisions, s 6(1)(e) is the most relevant:

> "(e) the Commissioner of Taxation has the general administration of the following [SISA] provisions to the extent that they relate to self managed superannuation funds:
>
> (ia) Division 2 of Part 3B;
>
> (i) Parts 4, 5, 7 (other than section 68A) and 8;
>
> (ii) Part 12 (other than section 105);
>
> (iii) Parts 13 and 14;
>
> (iv) Part 15;
>
> (v) Division 2 of Part 16 and section 128P;
>
> (vi) Part 17 (other than section 140);
>
> (vii) Parts 20, 21 and 24;
>
> (viii) Divisions 2, 3, 4 and 5 of Part 25A;"

The above means that advisers who are providing advice on taxation law as a registered tax agent need to be careful to check that they are only advising in respect of the SISA provisions in relation to which the ATO has relevant power. If a tax agent is advising on parts of the SISA that fall outside the specific SISA powers referred to above, eg advice in relation to a large APRA superannuation fund, they will likely be providing legal advice that will expose them to the usual risks outlined in this article if they are not a qualified lawyer.

For example, a registered tax agent may, under the above analysis, provide advice to an SMSF trustee on what acquisitions of assets are permitted under s 66 SISA (which falls under Pt 7 SISA) because, if this provision is contravened, the SMSF may be rendered non-complying and subject to a hefty tax liability and related penalties. You will note in this example that I have linked the (SISA) advice that is being provided with a tax outcome to minimise the risk of it constituting legal advice.

To explain myself further on this point, let's say that the registered tax agent merely stated to the SMSF trustee that it could not acquire a residential property from a member because the maximum penalty under s 66 SISA is one year's jail. This advice, not being linked to a tax outcome, could constitute legal advice which must be provided by a lawyer.

However, in the prior s 66 example, linking the s 66 advice to a tax outcome (ie a non-complying fund is taxed at 45% etc) provides the tax agent with an argument that they were not providing legal advice but were advising on a "taxation law" (which includes parts of the SISA that the ATO has the power of administration over).

Naturally, a written disclaimer along the following lines should also be provided by such an adviser to the client:

> The adviser is not qualified nor registered as a lawyer and if you require legal advice you should consult a lawyer. Please let me know if you require a referral to a lawyer.

Where in doubt, it is worthwhile adding this disclaimer to any written or verbal communication (with a follow-up email confirming this) if any advice is provided which may be in the nature of legal advice — even if the advice covered is within the specific parts of the SISA which the ATO administers.

Further, if you are not a lawyer, you should at least recommend that each client have any legal document impacting their legal rights and obligations reviewed by a lawyer.

Australian financial services licence regime

Accountants and other SMSF advisers who are not covered by an Australian financial services licence (AFSL) are not permitted to provide financial product advice or related financial services under the *Corporations Act 2001* (Cth).

While some commentators argue that the preparation of an investment strategy is not a financial product requiring a licensed adviser, an adviser who is not covered by a licence would be placing themselves at substantial legal risk of contravening the *Corporations Act 2001* and of potential exposure to damages and other claims by simply providing an investment strategy, especially if this proved to be unsatisfactory.

For example, a non-licensed adviser supplying an investment strategy covering investments that lost substantial value may be at risk in relation to an SMSF trustee that suffers any loss and damages from the fund's poor investment performance. While the adviser may argue that the investment strategy template was merely provided to satisfy the SISA and the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (SISR) criteria, and was not intended to be relied on as a "real" investment strategy, that adviser will be tested against the level of care and skill that a reasonably competent licensed professional would provide when preparing investment strategies (such as appropriate fact-finding and disclosures of the service offering etc).

A licensed (AFSL) adviser should typically run through the following steps in relation to preparing an investment strategy for a client:

– agree to their relevant terms of engagement and scope, and provide their financial services guide;
– undertake an extensive fact-finding exercise;
– undertake risk-profiling of the client based on their goals and level of risks etc;
– provide a statement of advice;
– provide an investment strategy based on the above; and
– ensure that each step above is appropriately documented/recorded.

In addition to contravening the *Corporations Act 2001* and not being covered by their professional indemnity insurance, a non-licensed adviser who merely provides an investment strategy template without going through the above process would be measured to the standard of a reasonably competent professional adviser with an appropriate licence under the *Corporations Act 2001*.

The recent SMSF auditor negligence case, *Ryan Wealth Holdings Pty Ltd v Baumgartner*,[1] highlights how advisers can easily be liable for any shortcomings in an SMSF's investment strategy. Broadly, in this case, the SMSF auditor had an "indirect" responsibility for checking the SMSF investment strategy for SISA/SISR and financial statement purposes, and the auditor was held primarily liable for the investment losses suffered.

Similarly, as noted in the above example, a non-licensed adviser simply providing an investment strategy template where the SMSF trustee suffers a material loss could potentially be liable for any consequential loss or damages suffered. Moreover, as lawyers often point out, there is always the risk of a vexatious litigant!

Moreover, assume that the template investment strategy also covered the requirement regarding the consideration of insurance in reg 4.09(2)(e) SISR and that the non-licensed adviser wanted the client to also be covered from a SISA/SISR viewpoint. Thus, the template investment strategy may include wording such as:

> "… the trustees have considered insurance cover on each member and have resolved not to implement any cover."

Now assume that one of the members, who happens to be the main "breadwinner" of the family, dies without any insurance. The non-licensed adviser could be liable for substantial damages on the basis that such an investment strategy was a recommendation not to implement insurance and that recommendation has subsequently proved to be inappropriate due to the death of the SMSF member. This is where the investment strategy involves financial product advice under the *Corporations Act 2001*. Such an adviser may be potentially liable in, among other things, negligence to the SMSF member or anyone else who may suffer due to there being no or inappropriate insurance in place.

An adviser must generally be licensed to provide a recommendation in relation to insurance. A non-licensed adviser can provide limited factual advice on the general types of insurance available to manage risk without making any recommendation, where a recommendation can include seeking to influence a decision in relation to a financial product.

Thus, SMSF advisers need to understand their limits and understand that contravening the *Corporations Act 2001* can result in significant liability and penalties.

Prohibition regarding "engaging in legal practice"

Each jurisdiction in Australia prohibits non-lawyers from engaging in legal practice or marketing services as being legal services when they are provided by an unqualified practitioner.

In Victoria, for example, s 10(1) of Sch 1 to the *Legal Profession Uniform Law Application Act 2014* (Vic) (LP Act) provides that:

> "An entity must not engage in legal practice in this jurisdiction, unless it is a qualified entity.
>
> Penalty: 250 penalty units or imprisonment for 2 years, or both."

The penalty of 250 penalty units (based on the 1 July 2019 penalty unit in Victoria of $165.22 per unit) equates to a fine of $41,305. This can be imposed in addition to a two-year prison sentence. Despite the various law institutes and societies around Australia not being active at policing who provides legal services, these penalties are not something to readily ignore.

Further it is worthwhile noting that an "entity" is defined to include an individual, an incorporated body and a partnership. Accordingly, if you are, for example, an adviser, this prohibition applies, regardless of how your business is structured.

This then raises the question of what it means to "engage in legal practice". Section 6(1) of Sch 1 LP Act provides that to "engage in legal practice" includes to practise law or to provide legal services.

There is some difference from jurisdiction to jurisdiction in Australia on what constitutes "engage in legal practice" and there is no "clear line" of demarcation where "practising law" begins and ends and where the "provision of legal services" begins and ends. However, where an adviser is preparing a document that affects an entity's legal rights or obligations, they are likely to be providing legal services.

Moreover, if an entity provides advice in a context where the receiver of that information has reason to consider it is backed with relevant expertise and qualifications, then that is another factor in determining whether legal services were provided (eg if the document or service was one that would normally be provided by a lawyer).

As you would appreciate, it is a simple fact that each profession has its limits. Indeed, the various codes of professional and ethical behaviour of numerous professional accounting and financial planning bodies preclude their members, for good reason, from providing legal services. Obviously, no professional body would want its members to contravene the law and expose its members to significant risk.

One further major risk that many advisers may not realise is that their professional indemnity cover is likely to exclude claims where the adviser or any of their staff contravenes the law or acts outside the bounds of their "licence" (assuming they have AFSLs or restrictions under their licensing arrangements with their relevant AFSL holder).

For example, an SMSF adviser providing legal advice or services (such as preparing an SMSF deed update, a BDBN, a reversionary pension nomination or a deed of change of trustee) exposes themselves and their firm to significant risk and legal claims, especially if their professional indemnity insurance does not cover such activity.

I know that many SMSF advisers would not like to hear this truthful account of the law, especially as many document suppliers misrepresent the fact that their documents are signed-off or in some other manner approved by a lawyer.

However, each of these typical documents, eg an SMSF deed update, a BDBN, a reversionary pension nomination or a deed of change of trustee, if prepared by a non-qualified lawyer, involves the provision of legal services with the consequent liability and penalties that are outlined above. Of course, you can disclaim that you are not providing legal services but ultimately the adviser will be accountable if any legal challenge arises. Such disputes are increasing, especially in relation to death benefit disputes.

Summary of who can provide advice

Table 1 summarises who can advise and on what.

Table 1. Summary of who can advise and on what

Type of advice	Who can provide
Legal advice	A lawyer who has a current practising certificate in accordance with the relevant state or territory legal profession legislation (a registered lawyer)
Taxation advice: Commonwealth	A registered tax agent with the TPB under the TASA (a tax agent) A registered lawyer
Taxation advice: state or territory	A registered lawyer
SISA advice	A tax agent — provided the advice falls within the specified limits of s 6 SISA A registered lawyer
Other superannuation law advice	A registered lawyer
Financial product advice	An adviser with an appropriate class of authority under an AFSL in accordance with the *Corporations Act 2001*

As noted above, each profession has its limits and SMSF advisers need to be aware of what they can and cannot do and when they may be assuming too much risk. They should then "team up" with a range of other providers who are suitably qualified and competent to provide the services in a professional manner that is in each client's best interests.

Conclusion

Advisers need to be aware of what they can and cannot advise on. Every adviser should aim to deliver the best advice and documents by being aligned with a quality and appropriately qualified adviser network. If you are not wanting to achieve best practice, then make sure you are informed of the risks, as what may appear to be less costly and more profitable now may readily change when the first legal dispute or claim arises.

Daniel Butler, CTA
Director
DBA Lawyers

Reference

1 [2018] NSWSC 1502.

Tax Cases

by Michael Norbury, CTA, Norbury Lawyers

Pavihi – the helpful bank teller

What was the appropriate level of penalty for an unlicensed individual who promoted and assisted with the implementation of superannuation early release schemes?

FCT v Pavihi[1] concerns contraventions of s 68B of the *Superannuation Industry (Supervision) Act 1993* (Cth) (SISA). Section 68B deals with promoting the illegal early release of funds from superannuation accounts. In particular, *Pavihi* dealt with the appropriate level of penalty for a contravention of the SISA.

Facts

Kalangalupe Pavihi was employed by Westpac Banking Corporation as a credit card customer service operator. There was, however, no suggestion that any of her activities the subject of this case occurred with the involvement, or knowledge, or ostensible authority of Westpac. Pavihi undertook her promotion of the schemes in a private capacity. At no time was she a registered tax agent, the holder of an Australian financial services licence, or an authorised representative of an Australian financial services licensee.[2]

Pavihi promoted at least 22 schemes which had common traits. She cooperated with the Commissioner and an agreed statement of facts was before the court.

The trustees of the 22 superannuation funds had worked in a range of businesses, trades and professions, including nursing, as a carer, a quality auditor, a credit analyst, a concreter, a warehouse supervisor, a truck driver, a mechanic, a commercial cleaner and a metal fabricator. Some of the trustees were unemployed. None of the trustees had previously acted as a trustee of an SMSF. In each instance, the trustees had accumulated moneys in superannuation funds, such as an industry fund, that were regulated superannuation funds and supervised by the Australian Prudential Regulation Authority.

The accumulated moneys were either rolled over or intended to be rolled over into an SMSF that Pavihi assisted the trustees to establish. In most cases, the trustees of the SMSFs then released the funds otherwise than in accordance with the payment standards contained in the SISA, and the funds were used for a number of purposes, including the payment of everyday expenses, travel, renovations, medical expenses, gifts and paying down debts.[3]

The schemes involved the following:[4]

- Pavihi discussed the establishment of a SMSF with one or more of the intended trustees of the proposed SMSF for the purpose of the intended trustees accessing or gaining control over their superannuation funds;
- Pavihi obtained the personal details of the intended trustees and used those details to complete an online application form on the website of ESuperfund Pty Ltd, a business that provided services in relation to SMSFs, including the provision and lodgment of documentation required to set up an SMSF;
- Pavihi received pre-populated documents for the establishment of the SMSF, which had been prepared by ESuperfund following its receipt of the online application;
- Pavihi handed or otherwise provided the documents, or at least signature pages for those documents, to the intended trustees for them to sign;
- Pavihi obtained the signed documents or signature pages from the intended trustees and lodged them with ESuperfund to enable it to complete the establishment of the SMSF as a self-managed superannuation fund within the meaning of ss 17A and 17B SISA and a regulated superannuation fund within the meaning of s 19 SISA; and
- Pavihi provided to ESuperfund, as required, further information necessary to complete the establishment of the SMSF.

Pavihi did not advise the proposed trustees of the possible consequences of paying moneys from a superannuation fund otherwise than in accordance with a lawful condition of release permitted by the payment standards prescribed under s 31(1) SISA. The court noted that the potential consequences were very significant, and included the following:[5]

- dissipation of accumulated superannuation benefits that had been saved for retirement;
- inclusion of the amount of the superannuation benefits in their assessable income;
- imposition of interest and administrative penalties;
- disqualification as a trustee of an SMSF;
- exposure to civil penalties of up to 2,000 penalty units; and
- exposure to imprisonment for up to five years, although counsel for the applicant disclaimed any suggestion that there was any real possibility that the trustees the subject of this proceeding might face criminal sanctions.

Pavihi usually charged a fee for her services that ranged from $600 to $7,000. She did not declare the fees as assessable income. In two instances, the trustees made loans to Pavihi from moneys that were transferred out of their SMSF.[6]

Pavihi admitted the contraventions, which spanned the period between September 2016 and August 2017. Having regard to the amount of a penalty unit prescribed by s 4AA of the *Crimes Act 1914* (Cth), the parties agreed that the maximum penalty for each contravention was $360,000.[7]

Parties' position

The joint position of the parties was that the court should:[8]

- make declarations of contravention pursuant to s 196(2) SISA;
- pursuant to s 196(3) SISA, make orders for penalties against Pavihi in the total sum of $220,000; and
- pursuant to s 315 SISA, prohibit Pavihi for a period of seven years from inducing, advising, assisting or facilitating any person to establish an SMSF, rolling money over into an SMSF, or making payments from an SMSF.

Court's consideration

Agreed remedies

In *Commonwealth v Director, Fair Work Building Industry Inspectorate*,[9] the court held that, in civil penalty proceedings, a court is not precluded from receiving and, if appropriate, accepting agreed submissions as to civil penalties. The court endorsed the practice that had been followed in relation to civil penalty proceedings in *NW Frozen Foods Pty Ltd v ACCC*[10] and *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd.*[11]

French CJ, Kiefel, Bell, Nettle and Gordon JJ held that there was an important public policy involved in promoting predictability of outcome in civil penalty proceedings, and that the practice of receiving and, if appropriate, accepting agreed penalty submissions increases the predictability of outcome for regulators and wrongdoers. Their Honours observed that such predictability of outcome encourages the acknowledgment of contraventions, which, in turn, assists in avoiding lengthy and complex litigation and thus tends to free the courts to deal with other matters.

Their Honours also stated that, when considering an agreed civil penalty submission, the court was not bound by any figure suggested by the parties, but the court asks itself "whether their proposal can be accepted as fixing an *appropriate* amount" (citing *NW Frozen Foods* at p 291). For that purpose, the court must be satisfied that the submitted penalty is appropriate.[12]

In the present case, the agreement of the parties was to be regarded as a desirable outcome. This case was illustrative of some of the benefits of encouraging parties to civil penalty proceedings to reach agreed positions. The circumstances of Pavihi were difficult, and somewhat complex. By her admissions, Pavihi spared the Commissioner the time and resources that would have been necessary to prove each of the 22 contraventions. Further, considerable court time was saved by the presentation of the statement of agreed facts, and the joint submissions. In these special circumstances, the court gave considerable weight to the agreement reached by the parties when assessing whether the relief that was sought was appropriate. The court also recognised that, in the unusual circumstances of the case, there was likely to be a broad range of reasonable views as to the appropriate orders, including as to monetary penalties.[13]

Declarations

Having regard to Pavihi's admissions, the court was satisfied of the 22 contraventions by Pavihi of s 68B(1) SISA. Being so satisfied, s 196(2) SISA required that declarations be made by the court. Even without that mandate, the court found that there would be sound arguments favouring the making of declarations, as they record formally the findings of contravention, and may serve important law enforcement purposes, and there was thereby a public interest in making declarations in these enforcement proceedings on the application of a statutory regulator.[14]

The court agreed to make declarations substantially in the form submitted by the parties.[15]

Injunctions

The findings that Pavihi engaged in conduct that constituted a contravention of the SISA engages the court's power to grant an injunction under s 315 in accordance with the very broad terms of s 315(2). The parties agreed on the terms of the injunctions. The court considered that, in the circumstances, the granting of the injunctions was appropriate.[16]

Penalties

The parties jointly submitted that a penalty of $220,000 was appropriate. However, the court considered several factors.[17]

General deterrence

The court noted that the purpose of the imposition of civil penalties was deterrence.[18] The court held that Pavihi's contraventions should attract penalties which acted as a strong deterrent to others for a number of reasons.[19]

First, the adverse consequences for the immediate participants in the schemes were serious.[20]

Second, the superannuation regime is at the heart of the national economy: it is of critical significance to the Australian economy and to the wellbeing of Australians. The conduct of Pavihi encouraged the trustees to take short-term advantage of their retirement savings. Such conduct tended to undermine confidence in the value of the compulsory superannuation system.[21]

Third, the nature, variety and number of superannuation schemes, particularly SMSFs, was such that it is not possible for the establishment and administration of each fund to be scrutinised or audited.[22]

Fourth, non-compliant superannuation schemes impose compliance costs on the regulators, and therefore on the whole community.[23]

Specific deterrence

The court found that considerations of general deterrence were much more significant than specific deterrence. Pavihi had ceased undertaking the promotion of schemes, had made full admissions, had shown appropriate contrition, and had consented to the granting of injunctions. The court accepted that no penalty greater than that necessary to secure general deterrence was necessary.[24]

Course of conduct

Under s 196 SISA, the liability for a penalty attached to each contravention. There was no provision by which conduct may be aggregated for the purposes of making findings of contravention. Thus, each of the 22 contraventions potentially attracted the maximum penalty.[25] However, the court held

that it was necessary to determine whether the conduct giving rise to each breach was factually related, before determining penalty.[26]

The parties submitted that it was appropriate to group the contraventions relating to each of the 11 SMSFs into a single course of conduct, with the consequence that the 22 admitted contraventions would be grouped into 11 courses of conduct. The parties also agreed that it was appropriate to allocate penalties by reference to the 11 courses of conduct.[27]

The court also held that, in an appropriate case, the court may impose a single penalty for multiple contraventions where that course is agreed or accepted as being appropriate by the parties. It may be appropriate, for instance, where:[27]

- the precise number of contraventions cannot be ascertained;
- the number of contraventions is so large that the fixing of separate penalties is not feasible; or
- there is a large number of minor infringements.

Other factors

Nature and extent of conduct. Over a period of about 11 months, Pavihi played a central role in encouraging 22 trustees to roll over their superannuation benefits into an SMSF so that moneys could be transferred out of the funds in circumstances that were not permitted by the SISA.[28]

Relevant circumstances, including deliberateness. Pavihi understood the basic and central requirements that made it unlawful for the trustees to have early access to their superannuation benefits outside the payment standards.

Pavihi, despite being aware of the legal obligations of trustees of SMSFs, and of the consequences of illegal early release of preserved benefits, failed to advise the intended trustees of these things. The court held that these circumstances indicated a consciousness of breach which warranted significant penalties.[29]

In addition to the 22 contraventions, Pavihi had assisted a total of 68 trustees or intended trustees in the establishment or proposed establishment of some 35 SMSFs. No allegation of contraventions of s 68B SISA in respect of the balance was made.[30]

Pavihi took steps to conceal her involvement in the establishment of the SMSFs, including by using different email addresses, by using the participants' names when communicating with ESuperfund, and by failing to disclose the fees which she earned as assessable income for taxation purposes.[31]

Loss or damage caused. The court found that significant detriment, both financial and non-financial, had occurred, and that there had been an undermining of the broader public interest in the superannuation regeime.[32]

Benefits and potential benefits. Pavihi charged the trustees fees in most cases in order to assist or facilitate the establishment of the SMSFs to achieve the early release of funds. Pavihi was, in addition, lent moneys twice from funds that were transferred from an SMSF.[33]

Prior similar conduct. Pavihi had not previously been found by a court to have engaged in any similar conduct, or any other wrongdoing more generally.[34]

The personal circumstances of Pavihi. Pavihi was an unemployed single mother living in rented accommodation with significant health issues. The court found that it was very likely that Pavihi would never have the capacity to pay the penalties that were to be imposed. Pavihi proposed to petition for bankruptcy. However, the penalties would not be provable in a bankruptcy, and a discharge from bankruptcy would not extinguish her liability for the penalties. Pavihi would remain liable to processes of execution for a period of 15 years.[35]

The Commissioner offered, as a result of Pavihi's circumstances, an undertaking with respect to any enforcement action that might be taken after six years from the date of the penalty to the effect that it would seek leave of the court in light of any changes to Pavihi's financial circumstances.[36]

The court held that, in spite of Pavihi's personal circumstances, the penalties imposed must remain at a level which is sufficient to give effect to the object of general deterrence and which give appropriate recognition to the harm that the respondent had caused.[37]

Cooperation. The Commissioner submitted that Pavihi's level of cooperation had been at the highest level. The court held that Pavihi's cooperation was a very significant matter to take into account when considering an appropriate penalty.[38]

Appropriate penalty

The court had regard to the deliberate nature of Pavihi's conduct and the very significant harm that she caused, or was liable to cause, to vulnerable individuals, and concluded that Pavihi's contraventions were serious.[39]

The court accepted the parties' joint submission that the total penalty that they proposed was at the very lowest end of the range. However, given the other circumstances, including Pavihi's high level of cooperation, her difficult circumstances, and the public resources that were spared by the parties' agreement, the court was persuaded that *one* appropriate response was to accept the joint submissions of the parties that there should be declarations, an injunction, and penalties totalling $220,000.[40]

Conclusion

When determining penalties, "general deterrence" seems to have been uppermost in the court's mind. From the court's reasons, it is not apparent when determining penalties that the court had regard to the fact that Pavihi was neither a holder of an AFSL, nor an authorised representative of such a holder, nor a registered tax agent, and she admitted tax fraud. Further, the court imposed a penalty which the parties regarded as light, yet was beyond anything Pavihi was likely to be able to pay at any time in the future.

This approach of the court can be contrasted with the common approach of courts in criminal matters, where often a court is concerned not to impose a fine at a level which the person convicted cannot pay. Perhaps the answer lies in the fact that an unpaid fine can lead to a term of imprisonment,

which is not the case in a civil penalty of the type applied to Pavihi.

Michael Norbury, CTA
Principal
Norbury Lawyers

References

1 *FCT v Pavihi* [2019] FCA 2056.
2 *Pavihi* at [4].
3 *Pavihi* at [5].
4 *Pavihi* at [6].
5 *Pavihi* at [7].
6 *Pavihi* at [8].
7 *Pavihi* at [20].
8 *Pavihi* at [29].
9 [2015] HCA 46.
10 [1996] FCA 1134.
11 [2004] FCAFC 72.
12 *Pavihi* at [30].
13 *Pavihi* at [31].
14 *Pavihi* at [32].
15 *Pavihi* at [33].
16 *Pavihi* at [34].
17 *Pavihi* at [35].
18 *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46 at [55], citing *Trade Practices Commission v CSR Ltd* [1990] FCA 762.
19 *Pavihi* at [37].
20 *Pavihi* at [38].
21 *Pavihi* at [40].
22 *Pavihi* at [41].
23 *Pavihi* at [42].
24 *Pavihi* at [43].
25 *Pavihi* at [44].
26 *Pavihi* at [45].
27 *Pavihi* at [46].
28 *Pavihi* at [50].
29 *Pavihi* at [51].
30 *Pavihi* at [52].
31 *Pavihi* at [53].
32 *Pavihi* at [54].
33 *Pavihi* at [55].
34 *Pavihi* at [56].
35 *Pavihi* at [57].
36 *Pavihi* at [58].
37 *Pavihi* at [59].
38 *Pavihi* at [60].
39 *Pavihi* at [61].
40 *Pavihi* at [62].

Alternative Assets Insights

by Vanessa Crosland and
Teya Stoyanova, PwC

Significant global entities

Draft legislation expanding the definition of a "significant global entity" makes more taxpayers subject to the Australian multinational tax avoidance rules and increased penalties for non-compliance.

Background

A significant global entity (SGE) is a concept that was introduced by the *Tax Laws Amendment (Combating Multinational Tax Avoidance) Act 2015*. Under the currently enacted definition, an SGE is, broadly, an entity which has annual global income of $1b or more, or is part of a group of entities consolidated for accounting purposes where the total income of all of the members of the group (as shown in the latest financial statements that are prepared in accordance with accounting standards) is $1b or more.[1] An entity can also be classified as an SGE if the Commissioner makes a determination and gives notice that the entity is an SGE.[2]

Consequently, under the existing law, where a group is not consolidated for accounting purposes, despite the group having income of $1b or more, the group would not qualify as an SGE unless the global parent entity itself had annual global income of $1b or more in its own right or the Commissioner made a determination.

Currently, to the extent that an entity is an SGE, the following additional tax measures apply:

- the country-by-country (CbC) transfer pricing reporting obligations;
- the requirement to lodge general purpose financial statements (GPFSs) with the ATO (if not already lodged with Australian Securities and Investments Commission;
- the multinational anti-avoidance law;
- the diverted profits tax; and
- significantly increased penalties (eg for late lodgment, false and misleading statements, transfer pricing and general anti-avoidance schemes).

To address the fact that certain groups that are not required to be consolidated for accounting purposes may be excluded from being an SGE, the government announced in the 2018-19 federal Budget that, for income years commencing on or after 1 July 2018, it was going to extend the definition of an SGE beyond groups headed by listed companies and by private companies required to prepare GPFSs. The definition was going to be broadened to include members of large multinational groups headed by private companies, trusts and partnerships. It was also announced that it would include members of groups headed by investment entities.

Proposed amendments – in detail

The measures extending the definition of an SGE were previously included in a Bill before parliament that lapsed with the 2019 federal election. While there have been some minor changes to the proposals since those included in the previous Bill, the amendments are substantially the same in terms of both timing and effect. The revised draft legislation extending the definition of an SGE, the Treasury Laws Amendment (Measures for Consultation) Bill 2019: significant global entities (exposure draft), was published on 13 November 2019. The consultation process has now been completed (submissions to the current consultation could be made up until 11 December 2019).

In line with the announcements in the 2018-19 federal Budget, the draft legislation extends the definition of an SGE to include members of large business groups headed by private companies, trusts, partnerships, investment entities and individuals, which is intended to ensure that the Australian multinational tax avoidance rules will apply to all relevant entities.

Due to the expanded definition of an SGE, an SGE as defined under Australian domestic legislation would include entities which would not be included in the entities required to complete CbC reporting under action 13 of the base erosion profit shifting (BEPS) action plan. Consequently, the draft legislation amends the CbC reporting requirements in Subdiv 815-E ITAA97 to apply to only a subset of SGEs, referred to as country-by-country reporting entities (CBCREs).[3]

A summary of which Australian multinational tax avoidance rules will apply to which type of entity under the draft legislation is shown in Table 1.

Expanded SGE definition

The SGE definition is expanded to include the concept of a "notional listed company group", which is defined in the draft legislation as a group of entities that would be required to be consolidated as a single group for accounting purposes if an assumption was made that a member of that group was a listed company, and if exceptions to accounting requirements to consolidate, including materiality rules, were disregarded.[4] The Commissioner's ability to issue a determination that a

Table 1. SGE versus CBCRE

Type of entity	Applicable measures
SGE	– Multinational anti-avoidance law – Diverted profits tax – Increased penalties
CBCRE	– CbC reporting requirements – GPFSs

taxpayer is an SGE remains unaffected by the expanded SGE definition.[5]

Relevantly, entities that may not currently be classified as SGEs due to either being an investment entity or being controlled by an investment entity that relies on the investment entity exemption for accounting purposes may be caught as part of a notional listed company group and consequently classified as SGEs.

The types of taxpayers that currently rely on the investment entity exemption that may be caught include:

- Australian or foreign superfunds;
- Australian investment trusts;
- foreign investment funds; and
- private equity investments (eg a limited partnership).

The expanded SGE definition (similar to the existing one) relies on the concept of "control" (under "accounting principles", or, if they do not apply, under "commercially accepted principles relating to accounting") for the purposes of determining which entities are to be consolidated as a single group for accounting purposes.[6]

As such, where the investment vehicle has various portfolio investments or in the case of 50:50 joint venture scenarios, careful consideration will need to be given as to which investments should be consolidated as part of the notional listed company group for the purposes of determining the SGE status of the entities.

Effectively, under the proposed amendments to the SGE definition, entities that are members of a notional listed company group should be treated in the same way as entities that are members of a group of entities that are required to be consolidated for accounting purposes as one entity.

The draft legislation also amends the interaction between "global financial statements" and "annual global income" to ensure that it is the annual global income of the notional listed company group that is used when determining the income of the entity that may also be part of a group of entities that is actually required to be consolidated for accounting purposes as a single group.[7]

CBCRE

Under the draft legislation, an entity is a CBCRE if, broadly, they would be an SGE if the notional listed company group rules took into account the exceptions to consolidation other than the materiality rule and did not include individuals or investment entities.[8]

In summary, the following taxpayers that are caught in the expanded SGE definition may also be classified as CBCREs and therefore be subject to CbC reporting and GPFS requirements:

- Australian or foreign resident private companies; and
- small Australian resident entities that are not included in the parent entity consolidated accounts due to materiality (determined by the group itself).

Consequently, under the proposed draft legislation, not all SGEs will be subject to the CbC reporting requirements. This is intended to ensure that the domestic Australian rules in relation to CbC reporting are closely aligned with OECD recommendations.

Application date and transitional provisions

The proposed changes will apply for income years commencing on or after 1 July 2018.[9] This means that taxpayers with an income year ending 30 June 2019 and tax lodgment requirements in early 2020 will be caught by the proposed changes, if enacted.

Those entities that will be CBCREs will also need to lodge CbC reports with the ATO under Subdiv 815-E and, if they are corporate tax entities, may need to lodge GPFSs with the ATO from as early as the 2018-19 income year.

It is noted that, as the law is not yet enacted, taxpayers can prepare and lodge their 2019 income year tax returns based on the currently enacted law that does not include the proposed amendments. Alternatively, while the ATO has yet to release its administrative approach to these amendments, as a general rule, a taxpayer can, if they wish, anticipate the amendments and prepare their tax return in accordance with the proposals. The transitional measure with respect to penalties as set out in the exposure draft should ensure that at least the increased SGE penalties do not apply in respect of an income year that starts before 1 July 2020 for an affected entity that first became subject to the SGE rules only because of the proposed amendments.[10]

The takeaway

The expansion of those entities that could qualify as an SGE will significantly increase the number of multinational entities that are subject to Australia's existing reporting obligations and anti-avoidance and integrity rules. The broadened definition of an SGE may result in foreign and Australian investment funds, foreign and Australian pension funds, trusts, limited partnerships and other inbound investment vehicles being classified as SGEs for tax purposes.

Each Australian entity will need to assess the impact of the expanded SGE definition for the purposes of filing their 30 June 2019 income tax returns and beyond.

Following the completion of the consultation process, these measures are expected to be introduced into parliament, and enacted some time in 2020.

Vanessa Crosland
Partner
PwC

Teya Stoyanova
Manager
PwC

References

1 S 960-555 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97).
2 S 960-555(3) ITAA97.
3 S 815-355(1)(a) exposure draft.
4 Ss 960-555(2A) and 960-575 exposure draft.
5 S 960-555(2A)(ii) exposure draft.
6 S 960-575(3) exposure draft.
7 S 960-565(3) exposure draft.
8 S 815-380 exposure draft.
9 Item 19(1) exposure draft.
10 Item 19(3) and (4) exposure draft.

Successful Succession

by Katerina Peiros, ATI, Hartwell Legal

Family law asset protection of a testamentary trust

In a rare recent decision, the Family Court has reviewed the asset protection that can be offered by a testamentary trust in a financial settlement.

One of the most coveted advantages of testamentary trusts (TTs) is the asset protection that they may offer to a beneficiary who is going through a financial settlement with their former spouse or de facto partner (the ex).

The goal of asset protection via TTs is, of course, to create something which will financially advantage the intended beneficiary, but put it out of reach of their ex.

According to existing authorities, for undeniable asset protection, the TT must not be controlled by or be a "puppet"[1] of the intended beneficiary, and the intended beneficiary must have no say in who benefits from the TT and when. This, of course, flies in the face of the typical parental intention to provide an enduring, significant and reliable financial benefit to offspring.

These authorities strongly suggest that even minimum involvement by the intended beneficiary in the decision-making of the TT can strip the TT of asset protection. The more autonomy the beneficiary has with respect to the TT, the less asset protection they will be allowed by the Family Court.

Property or financial resource

Designation of a TT as "property" by the Family Court is asset protection denied. Designation as a "financial resource" is partial asset protection.

In very broad terms, the property of a party to a marriage or a de facto relationship (relationship) is divisible between the couple in a financial settlement under the *Family Law Act 1975* (Cth) (FLA75).

A financial resource of a party[2] is taken into account by the court when calculating that party's entitlement to the relationship asset pool, but the court has no power to make orders adjusting financial interests against a financial resource. This may mean that a party with a financial resource receives less from the asset pool than what they would have if they did not have the financial resource, but the adjustment is less than the value of the financial resource.

If the asset is neither property nor financial resource, the asset is disregarded in the financial settlement.

Family Court examination of TTs

There are innumerable cases examining how inter vivos trusts should be designated, but very few cases on TTs in this context. Counterintuitively, TT cases follow the same rules as those for inter vivos trusts, disregarding the fact that TTs have come to a party via the death of a relative who, in all likelihood, had asset protection in mind when they set up the will in this way and who intended to provide for that party (and probably not for the ex).

For example, in *Ogden & Ogden*,[3] the wife was not afforded protection in circumstances where a trust had come to the wife and her four siblings from their late grandmother. The wife, her siblings, their spouses and children were all discretionary beneficiaries. The wife and her siblings had equal rights in control of the trust, each being an appointor and a director of the corporate trustee. The corporate trustee made decisions by a majority of directors. To this point, the wife did not have control of the trust. However, the trust was capable of being divided into five portions, and each sibling was the appointor of a portion. This gave the wife the power to segregate one portion from the rest, make herself sole trustee of that portion, and make distributions to herself and her husband. Despite the elaborate effort and set-up by the grandmother, the court held that the wife had effective control of her portion and concluded that 20% of the trust was the property of the wife.

Asset protection is denied where the intended beneficiary directly or indirectly controls the decisions of the trustee (or can replace the trustee) or has the power to influence distributions to the couple.

Given that most willmakers want their beneficiary to have a degree of autonomy and self-governance, in most of the existing TT cases, the ex was successful in piercing the TT's asset protection. Uniquely, in *Bernard & Bernard*,[4] asset protection was preserved for the husband.

Bernard gives valuable guidance about the features that a TT should have to maintain asset protection.

Why asset protection is difficult in TTs

Asset protection is difficult to achieve for TTs because:

- inheritances do form part of the matrimonial pool of assets (as do other assets which do not result from the efforts of the couple), and are generally divisible between the parties;
- trusts that are in actual or de facto or "puppet-like" control of a party and were established or maintained for the benefit of the immediate family are seen as the property of the couple.

  It is only natural that, when a TT comes into existence, the beneficiary will make decisions about the investments and distributions for the overall benefit of the family, and often involve their spouse or partner in those decisions or make distributions to them and their children.

  This may happen in a straightforward way when the beneficiary is also trustee and the beneficiary forgets to do formal trustee resolutions, or it may be more complex where the beneficiary's uncle or aunt may be the director

of a corporate trustee, but they do what the beneficiary tells them to do and, for all intents and purposes, the TT is treated as the beneficiary's "money" or "inheritance", and the sanctity of the TT is disrespected or ignored.

Courts closely examine the nature and extent of control that the party has over the trust, that is, whether it is by being trustee or a director of a corporate trustee,[5] by holding the power to appoint a new trustee,[6] or by the existing trustee being a "puppet" of that party and the party can influence or effect a distribution to themselves or the ex;[7] and

– the Family Court is tasked with identifying assets for the property pool and is virtually omnipotent in doing so and giving effect to orders over those assets in a property settlement.

That is why *Bernard* is so remarkable in preserving asset protection for the husband.

The Bernard decision

In *Bernard*, the husband and wife split up after 27 years of marriage. Their two children were in their early 20s.

Three years before the marriage broke up, the husband's father died, leaving roughly a $3.8m estate. The will created two discretionary TTs, one named after the husband and one named after the husband's sister. The estate assets were shared equally by the two TTs.

TT structure

The husband was the primary beneficiary of the TT named after him, and his wife and children were general beneficiaries.

A person referred to in the judgment as "Mr P" was the appointor of this TT; Mr P filed an affidavit in the proceeding but nothing more is known about him or his evidence.

The sister was the trustee.

The other TT was in mirror image terms — the sister was the primary beneficiary of the TT, her family were general beneficiaries, Mr P was the appointor, and the husband was the trustee.

The purpose of the TTs was to provide income and capital for the advancement in life of the primary beneficiaries or their children, grandchildren or great grandchildren.[8]

The trust terms of the TTs appeared quite conventional, including the trustee's wide powers about distributions of income and capital and choice of beneficiaries.

The two TTs operated a partnership running a business and developing a property. From 2015 (the year the marriage ended), all of the trust income was invested in the development and no distributions were made to any beneficiary in either TT. This was documented for each TT via a valid trustee resolution which was enduring for future years until completion of the development. The husband was employed in the business as a manager with an annual salary of $85,000 plus superannuation.

Wife's assertions

The wife attacked the husband's TT because its asset base far exceeded the matrimonial pool. The matter was heard at two instances.

The wife's position was that, even though the husband ostensibly did not control the TT in any legal way (ie by being appointor or trustee), he did so in reality because the two TTs were mirror image and the husband and sister was each trustee of the other's TT.

Moreover, the wife said that the TTs were partners in the partnership, and as partners, they "each have the same rights, obligations and duties as each other and towards each other. Thus, [the court] can find that the assets of the [husband's TT] are in reality his, that he exercises control over the assets in [that TT]".[9]

Essentially, the wife argued that the legal structuring was a "sham", and in reality, the husband had control of the assets of the TT and could cause a distribution of income or capital to himself, the wife or their children. She contended that this "control meant the assets of the [TT] were effectively his and therefore matrimonial property"[10] under the FLA75, which would entitle her to a share as part of the financial settlement. The sister was a party to the proceeding to enable the court to make orders against her as trustee.

The wife also argued that she, herself, had rights as beneficiary of the husband's TT and that right had a value. The court acknowledged that this was correct, but observed that all she had was a right to due consideration and a right to due administration of the TT, but these are extremely difficult to value, especially when there is no present entitlement to income or capital.

Appeal findings

The wife's claim that the husband had control of the TT was not made out on the facts.

The husband was able to prove that the sister acted unimpeachably as trustee. She admirably discharged her fiduciary duties, including keeping scrupulously accurate and up-to-date records, meticulously recording all trust dealings, holding meetings, and filing tax returns.

There was no blurring of the lines between what the husband and sister did as trustees and beneficiaries in each TT or business and partnership: "The evidence is that they have faithfully carried out their late father's testamentary wishes to the letter."[11]

The court was satisfied that, unlike in *Dewell*,[12] the husband never acted as if the assets of the trust were his own[13] or that he had some entitlement to the assets or some right to benefit from the TT,[6] or purported to exercise any control over them.[14]

The sister conducted her trusteeship in a way that acknowledged that the husband was only one of many beneficiaries of the TT;[15] she could not appoint all of the assets of the TT to the husband or the wife alone as this would be a significant breach of her fiduciary obligations to the other beneficiaries of the TT.

Although the two TTs had mirror decisions, the court said that there was nothing two-faced, improper or ostensible about this. The sister managed the husband's TT at arm's length and her decisions were commercial and easily explainable. Having analysed the nature of the powers in the will,[16] the court concluded that the sister was not a "puppet" of the husband and was not acting at his bidding.

As such, the assets of the TT were not designated as property of the husband and the court could make no order against the sister as trustee for the purpose of making a payment from the TT to the wife.

The four little miracles of Bernard

It is common for solicitors to prepare wills where siblings are appointed trustees of "each other's" TTs. This is one of the tricks in our bag when advising about asset protection for intended beneficiaries.

This is not the uniqueness of *Bernard.*

Bernard is entirely unique in the discipline that the husband and his sister maintained over several years (and will now have to maintain well into the future) in their management of the TTs, partnership and business.

The uniqueness is four-fold.

First, after their father died, his children did not tear down the intended structure and usurp autonomy.

Second, the husband and his sister had rare trust and respect for each other — enough to be able to work together.

Third, the husband and his sister followed the terms of the TTs, respected the sanctity and individuality of the TTs, and did not blur the lines between their personal assets and those of each TT. This happens almost always and often unintentionally. How many beneficiaries pay for personal expenses from their TT cheque book (which they carry in their bag) and then allow their accountant to create a resolution at the end of the financial year to cover all of the spending?

Fourth, early on, the husband and his sister took, and faithfully followed, excellent professional advice from their accountants and solicitors. This has paid off for the husband.

These factors led to an impressive outcome where, even though the husband and the sister are clearly tied at the hip and are beholden to each other, their paperwork impeccably proves otherwise.

Lessons for estate planners and clients

For TT asset protection to be preserved, the following must occur:

- there must be contemporaneous evidence that the intended beneficiary does not have actual, de facto or shadow control of the TT, and the intended beneficiary is not operating through a "puppet" in relation to managing the TT or distributions of income or capital. If the TT was not drafted this way by the willmaker, these changes can be made by the intended beneficiary later;
- income and/or capital distributions must be to a range of beneficiaries (not just the intended beneficiary) following proper, due and genuine consideration of the circumstances of each beneficiary and the TT, and this must be validly recorded prior to the end of each financial year and before distributions are made;
- decisions must be made for proper purpose and after proper consideration of all of the issues by the trustee discharging the fiduciary obligations; and
- the sanctity and independence of the TT must be respected every single day, that is, there must be no blurring of the lines between trusteeship and beneficiaries, or between personal and TT assets and interests. All dealings must be at arm's length and validly recorded. The spouses or partners of beneficiaries cannot be involved in decision-making or go around with the TT cheque book with pre-signed cheques.

A lot of professional assistance and personal discipline is required by the intended beneficiary for all of these to occur.

Assistance and alternatives

For a willmaker to deny autonomy to a loved one, or for a beneficiary to give it up, is difficult. To assist the intended beneficiary to stay true to the scheme or provide alternatives to willmakers when preparing their wills, the following should be considered:

- replicate the *Bernard* structure and diligently follow the steps that the husband and sister took in the management of the TTs;
- pool assets into one TT and appoint all of the intended beneficiaries as trustees of the pool. Thereby, each person has some control but not all of it;
- if there is a sole child or if the children must have individual TTs, consider appointing the child together with another person (trustworthy, sensible, of a "non-rubber stamping" nature and with the child's best interests at heart) as a co-trustee and appointor, again to dilute control;
- appoint an independent trustee and appointor, such as a trustee company or a professional trustee, and provide a detailed memorandum of wishes and instructions as to how the TT is intended to operate. The instructions could be that family law asset protection is of the highest importance and, for example, that no distributions are ever to be made to the spouse or partner or the intended beneficiary as soon as there are proceedings under the FLA75. Independent controllers are highly unlikely to diverge from the path set out by those appointing them;
- appoint a corporate appointor or protector to veto distributions of income and capital and to remove the trustee if it acts against the original purpose or if the intended beneficiary's relationship breaks down. This would have the effect of depriving the intended beneficiary of ultimate control while still allowing the day-to-day management of the TT;
- exclude the child and their spouse as beneficiaries of the TT without the right to reinstate if the relationship breaks down;
- where there are grandchildren, consider skipping a generation, that is, exclude both the child and their spouse as beneficiaries. Although limiting for the child personally, it frees up a lot of their personal income if they do not have to pay any expenses on behalf of their own children as these are all met by the TT;
- create a life interest rather than a TT for the child, with the grandchildren being remaindermen. While protecting the capital of the TT for the bloodline, the income of the life interest would be property or financial resource, and

would affect how much of the property pool the child would receive;

- make the child a beneficiary of the TT after they reach the age of retirement or once the separation statistic is low; and
- take regular expert accounting and legal advice about the decisions that the clients make in the will preparation and TT operation. For the beneficiary, this will assist them in maintaining the TT as its own legal personality without meshing it with the beneficiary's own TT.

It is acknowledged that these principles are restrictive to the beneficiary. The willmaker and the beneficiary may agree to forego the possible asset protection in favour of flexibility and autonomy of the beneficiary controlling their own finances and fate. They may focus on the other positives of the TTs, such as income-splitting, asset protection against business creditors, and the preservation of assets for the bloodline in the event of the intended beneficiary's death.

Katerina Peiros, ATI
Incapacity, Wills and Estates Lawyer
Accredited Specialist – Wills & Estates (Vic)
Hartwell Legal

References

1 *Kennon v Spry* [2008] HCA 56.
2 *Kelly and Kelly (No. 2)* [1981] FamCA 78; *Essex and Essex* [2009] FamCAFC 236.
3 [2010] FMCAfam 865.
4 [2019] FamCA 421.
5 *In the marriage of Goodwin* [1990] FamCA 147.
6 *Davidson and Davidson* (1991) FLC ¶92-197.
7 *Harris and Harris* [1991] FamCA 124.
8 *Bernard & Bernard* [2019] FamCA 421 at [31]-[33].
9 Ibid at [51].
10 Ibid at [73].
11 Ibid at [82].
12 *Harris & Dewell* [2018] FamCAFC 94.
13 *Ashton and Ashton* [1986] FamCA 20.
14 *Bernard & Bernard* [2019] FamCA 421 at [69]-[70].
15 Ibid at [68].
16 *Kelly and Kelly (No. 2)* [1981] FamCA 78; *Stein and Stein* (1986) FLC ¶92-804; *Harris and Harris* [1991] FamCA 124; *JEL and DDF* [2001] FamCA 1353.

Events Calendar

February 2020

STATE / EVENT	DATE	CPD
National		
Financial Services Taxation Conference	5/02/20	14
2020 WA Estate & Succession Planning Intensive	25/02/20	9.75
New South Wales		
Morning Tax Club — Sydney	4/02/20	1.5
Morning Tax Club — Parramatta	6/02/20	1.5
Queensland		
Young Tax Professionals — Brisbane	5/02/20	1.5
Young Tax Professionals — Toowoomba	26/02/20	1.5
South Australia		
2020 SA Tax Briefing	25/02/20	1.5
Tax Roundtable — New Developments in R&D	26/02/20	2
Land Tax Reform — Optimising the Outcomes	27/02/20	1
Victoria		
Navigating the New World of Tax in 2020	18/02/20	1
Tax & Family Law Intensive	25/02/20	6.25
Breakfast Club — Melbourne	27/02/20	1.5
Breakfast Club — Geelong	28/02/20	1.5
Western Australia		
2020 Rottnest Tax Retreat	7/02/20	4

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

Cumulative Index

The following cumulative index is for volume 54, issues (1) to (7). Listed below are the pages for each issue:

Vol 54(1): pages 1 to 52
Vol 54(2): pages 53 to 104
Vol 54(3): pages 105 to 160
Vol 54(4): pages 161 to 228
Vol 54(5): pages 229 to 284
Vol 54(6): pages 285 to 344
Vol 54(7): pages 345 to 410

A

ABN
failure to quote ... 118, 119
reforms ... 188, 191, 192
Accommodation
supply of, GST ... 350, 351
Accountants
common law privilege ... 20
Active asset test
small business CGT concessions ... 241, 242, 353–355
Adjacent land
CGT main residence exemption ... 8–10
Adjusted Div 6 percentage ... 138, 139
Administration
Commissioner's remedial power ... 359–363
IGTO review, deceased estates ... 290
tax compensation claims ... 289
Administration trusts
aggregating land interests (SA) ... 256
Administrative Appeals Tribunal
Small Business Taxation Division ... 137
Administrative review
judicial review distinction ... 303
Advocate-General of Taxation
need for ... 34, 35, 38
Advocates
Federal Court ... 268–270
Affordable housing measures
downsizer contributions ... 211–214
foreign investment amendments ... 289, 290
Age pension
downsizer contribution to superannuation ... 212
Ageing Australians
redundancy payments ... 233
tax regime and ... 372
Aggregated dutiable transactions
land tax (SA) ... 254–260
sale of hotel and land ... 45–47
Aggregation principle
land tax (SA) ... 255
Allied healthcare industry
payroll tax ... 248–251
Alternative assets
arm's length debt test ... 218–220
cross-border financing ... 148–150
non-concessional MIT income ... 99, 100
Amalgamated loan
Div 7A, relieving discretion ... 7
Amended assessments
derivation of income ... 7
excessive, onus of proof ... 111, 112
income splitting ... 168
interposed entity provisions ... 111
tax disputes, burden of proof ... 84
Anshun estoppel ... 270
Anti-avoidance rule
family trusts ... 109, 289
unearned income of minors ... 238, 240
Anti-money laundering ... 191
Appointors
discretionary trust, powers ... 263, 264
Appropriation powers
deceased estates ... 317
Arm's length conditions
debt/equity rules ... 110, 148, 149
Arm's length debt test ... 218–220
Assessable income
from property, unearned income of minors ... 239
land held for purpose of producing ... 113
trusts, franked distributions ... 138–141
whether proceeds of crime ... 58, 59
Assessments — see **Amended assessments; Default assessments**
Asset protection
testamentary trusts ... 297, 394–397
Assets
used for carrying on a business ... 353–355
AusIndustry
R&D disputes ... 127–130
Australia
Israel–Australia DTA ... 233
physical presence in, deductible gift recipients ... 350
residency tests
– permanent place of abode ... 6, 7, 90, 302–306
– trusts ... 90, 91
UK–Australia DTA ... 291, 292
US–Australia DTA ... 169
Australian Charities and Not-for-profits Commission ... 80
Australian corporate tax entities
land acquisition ... 204
Australian Electoral Commission ... 77
Australian financial services licence ... 214, 265, 385, 388
Australian Public Service
Tax Institute submission to review ... 108
Australian residents
or non-residents ... 302–306
Australian Securities and Investments Commission
remedial powers ... 361
Australian Small Business and Family Enterprise Ombudsman ... 137, 289
Australian Stock Exchange
junior exploration companies, tax losses ... 174–177
Australian tax residents
trust ... 90, 91
Australian Taxation Office
arm's length debt test guidelines ... 218–220
Black Economy Taskforce ... 181
cross-border financing ... 148–150
electronic invoicing ... 109, 192, 289
in-house facilitation ... 135, 136
legal professional privilege ... 4
mobile strike teams ... 119, 191
non-concessional MIT income ... 99, 100
R&D disputes, resolving ... 129, 130
residency, views on ... 304
safe harbour rule ... 378
SMSFs, supervisory powers ... 385
special leave to appeal ... 302–306
statutory notices ... 319
superannuation funds, large ... 196–201
tax disputes ... 31–39
– reliability of evidence ... 319–322
tax gaps ... 182
Tax Institute submissions to ... 4, 108
tax law administration ... 162
Tax Practitioners Board, independence from ... 232
test case litigation program ... 136
Australian Treasury
black economy measures, consultation ... 190, 191
corporate residency rules ... 166
Tax Institute submissions to ... 108, 287, 288

B

Baby boomers
tax regime and ... 372
wealth transfer ... 307
Backpacker tax
Australia–UK DTA ... 291, 292
Base erosion and profit shifting
digital services tax ... 366
Israel–Australia DTA ... 233
Beneficial ownership
transparency ... 190
Binding death benefit nomination ... 41–44, 384, 386, 387
Binding financial agreements ... 376
Black economy measures
ABN reforms ... 188, 191, 192
cash payment limit ... 190, 191
contractors ... 192
cost to community ... 182
description of black economy ... 182
e-invoicing ... 192
legislation summary ... 193
non-compliant payments ... 183
sharing/gig economy ... 191, 192
single touch payroll system ... 189, 190
summary and status ... 194
tax culture change ... 181
tax gaps ... 182
taxable payments reporting system ... 187–189
taxpayer burden ... 118, 119
Black Economy Taskforce ... 181–183
Black-hole expenses
deductions ... 12
penalty interest ... 5
Board of Taxation review
CGT roll-overs ... 349
corporate residency rules ... 166
Borrowings
downsizer contributions ... 214
Budget — see **Federal Budget**
Building and construction industry
taxable payments annual report ... 118, 187
Buildings
whether different to dwellings ... 205
Burden of proof — see **Onus of proof**
Business continuity test ... 5
Business register ... 190

C

Calumny ... 273
Candidates
political
– deductibility of gifts to ... 76–80
– deductibility of outlays ... 80–82
Capital assets
employee labour costs ... 349, 350
Capital gains
assessable income from property, minors ... 239
Australian trusts, foreign beneficiaries ... 323, 324
foreign income tax offset ... 168, 169, 291
foreign residents ... 166, 167
Capital gains tax — see also **CGT roll-over relief; Small business CGT concessions**
deceased estates ... 309, 310
early stage innovation companies ... 66
event A1 ... 116, 239
event C2 ... 315, 316
event D1 ... 239
event D2 ... 116
event D4 ... 116
event E1 ... 315
event E5 ... 315, 316
main residence exemption
– adjacent land ... 8–10
– disposal of dwelling by discretionary trust ... 59, 60
– downsizer contributions ... 212, 213
– dwelling acquired from deceased estate ... 58
– pre-CGT dwellings ... 151, 152
residency of trusts ... 90, 91
roll-over provisions, review ... 349
trusts avoiding, restructure roll-over ... 290
Capital or revenue expenditure
gaming machine entitlements ... 292, 293, 328–331
medical practices ... 351, 352
Capital proceeds
downsizer contributions ... 214
Carrying on a business
companies claiming concessions ... 11–13
holding land ... 100
land used for ... 353–355
vacant land deductions ... 113, 115, 295, 296
Cash payment limits
black economy measures ... 190, 191
Central management and control
trusts, residency of ... 90, 91
CGT roll-over relief
Board of Taxation review ... 349
market value ratios ... 252, 253
relationship breakdown ... 376, 377
special rules re asset ownership ... 293
trusts avoiding tax ... 290
trusts exploiting ... 290
Circular trust distributions ... 289
Cleaning services
taxable payments reporting system ... 57, 187, 188

Client legal privilege
professional advisers 20–24
Closely held trusts 289
Collectable debts
IGTO reviews 290
Commercial agreement
share purchase, VAT 61–65
Commercial debt forgiveness.........233
Commissioner of Taxation
business continuity test 5
discretion
– franking credits, accessing 380–383
– main residence disposal period 151, 152
disputes, settling.........................31–39
general administration powers..........57
legal professional privilege............4, 21
penalty interest....................................5
property decision tool, GST................6
relieving discretion, Div 7A amalgamated loan.............................7
remedial power 359–363
residential rental property investments 73
special leave to appeal, residence test....................... 302–306
statutory remedial power 162
tax disputes with, onus of proof..84–88
taxable payments reporting system 57
Common reporting standard 191
Companies
carrying on a business................11–13
concessions
– holding companies..................... 12
– inactive, with retained profits 11
– investing available funds 12
– investment companies 12
– leasing activities 12
– property investment companies................................. 12
– share investment companies 12
tax disputes, burden of proof..84–88
Compensation claims
small business 289
Compensation payments
large superannuation funds............200
Compliance — see **Tax compliance**
Concessional loans..................109, 289
Concessions — see also **Small business CGT concessions**
accountants 20–24
companies carrying on a business 11–13
Conduct of claims
share purchase, VAT.........................62
Confidentiality — see **Legal professional privilege**
Conflicts of interest
SMSF executors..........................41–44
Connected with Australia rules 235
Consolidated groups
reporting obligations....................... 188
Construction industry
taxable payments annual report.................................... 118, 187
Consumer-facing multinationals......................... 365, 368
Continuity of ownership test
ASX listed junior exploration companies.............................174–177
Contract for sale
share purchase agreement, VAT 61–65
Contractors
black economy measures.......................188, 189, 192
Contracts
relevant, payroll tax.................248–250
Core R&D activities.......................... 125
Corporate groups
aggregating land interests (SA) 259, 260
Corporate income tax
tax bases..288
Corporate limited partnerships
large superannuation funds 199
Corporate residency rules
Board of Taxation review 166
Corporate tax
global minimum tax rate proposal 369, 370
multinational corporations 365–371
Corporate tax entity defined...........204
Corporations
tax disputes, burden of proof 84–88
tax gaps 182
Cost base
CGT assets, deductibility........290, 291
real property, deceased estate.................................... 310, 311
Country-by-country reporting entities 392, 393
Courier services
taxable payments reporting system 57, 187, 188
Covenants
arm's length debt test 219
Credit ratings
arm's length debt test 219
Credit reporting bureaus
tax debt disclosures 109, 164, 192, 289
Crime
proceeds of, assessable income......................................58, 59
Cross-border financing
ATO guidance 148–150
Cross-staple arrangements
non-concessional MIT income....................................99, 100

D

Data collection
black economy measures........118, 119
R&D disputes 130
taxable payments annual report..... 118
Data reporting
large superannuation funds 197
De minimus threshold......................208
Debt deductions...................... 149, 150
Debt/equity rules
arm's length conditions.................. 110
transfer pricing rule interaction............................. 148, 149
Debt forgiveness.............................233
Debts — see also **Tax debts**
disclosure to credit bureaus 109, 164, 192
Deceased estates
CGT
– dwelling acquired from...............58
– main residence exemption....10, 151, 152, 312–314
– real property.....................309, 310
deeds of arrangement 316, 317
income tax 309
joint tenants.................... 308, 311, 312
life interests 314–316
protected information of, disclosure 361
real property issues 307–317
remainder interests 314–316
small business CGT concessions 312
SMSFs, executor conflicts of interest...................................... 41–44
stamp duty 312, 316
tax administration, IGTO review......290
tax concessions to minors, testamentary trust income 349, 374
testamentary trusts......................... 312
unearned income of minors...................................238–240
Deductible gift recipients
"in Australia" condition...................350
Deductions
black economy measures................118, 119, 183–186
CGT assets, cost base 290, 291
employee labour costs........... 349, 350
entity start-up costs......................... 12
foreign currency losses........... 170–173
payments to doctors..............351, 352
penalty interest...................................5
political candidates
– gifts/donations to 76–80
– outlays 80–82
prepaid expenses 12
vacant land..........73, 74, 109, 113–116, 164, 203–208, 289, 294–296
work expenses................................291
Deeds of arrangement
deceased estates................... 316, 317
Defamation...............................235, 236
Default assessments
tax disputes, burden of proof 84–88
trust income 110
Defective administration
compensation claims.....................289
Dental practices
payroll tax...............................248–251
Departure prohibition orders..........270
Derivation of income
amended assessments......................7
Developed land
sale of, margin scheme....................59
Digital services tax 366, 370
Digitalisation of tax...........56, 191, 192
Digitalised multinational corporations........................... 365, 366
Director penalty notices 185, 189, 190
Directors
phoenixing offences....................... 109
Disaster Recovery Funding Arrangements 349
Disclosure
tax debt information............109, 164, 192, 289
Discount capital gain concessions
special rules re asset ownership 293
Discretionary trusts — see also **Family trusts**
aggregating land interests (SA).......................................255–259
appointors, powers............... 263, 264
CGT small business reliefs..... 353–355
non-resident beneficiaries 323, 324
powers of trustees 271–274
reform.....................................297, 298
Dispute resolution — see **Tax disputes**
Diverted profits taxes
new rules..366
Division 7A
amalgamated loan 7
UPE sub-trust arrangements............58
year of loan 111
Division 50 in Australia condition...350
Documentation
evidence, reliability..................319–322
Domicile
resident of Australia 6, 7
test of 90, 302, 303, 305, 306
Donations
to political candidates, deductibility 76–82
Double tax agreements
Israel–Australia...............................233
UK–Australia...........................291, 292
US–Australia 169
Downsizer contributions 211–214
Duress 376
Dutiable transactions
aggregation of assets 45–47
Dwellings
CGT main residence exemption...................................8, 10
substantial and permanent structures 203–208

E

E-invoicing 109, 192, 289
Early refund scheme
VAT, Peru...61
Early release schemes
superannuation 388–391
Early stage innovation companies
tax incentives 66–68, 166
Early stage test..................................66
Education direction
superannuation guarantee rules.......93
Elections
deductibility
– gifts/donations to political candidates............................76–80
– political candidate outlays 80–82
Electoral expenditure 81, 82
Electronic invoicing 109, 192
Employee labour costs
deductibility............................ 349, 350
Employee share trusts............234, 235
Employees
guide for work expenses.............57, 58
superannuation guarantee................92
work expense deductions...............291
Employer obligations
single touch payroll system 184, 189, 190
– salary sacrifice integrity measures................................. 109
– superannuation guarantee 92–94
Employment
derivation of income............................7
Enduring power of attorney
SMSFs...43, 44
Equity derivatives
taxation, superannuation funds 198, 199
Estate planning — see **Succession and estate planning**
Estoppel by conduct/convention
ATO tax disputes.........................31, 39
Event-based reporting
large superannuation funds............196
Evidence
foreign currency loans 171, 172
margin scheme 59
ownership of residence...............95–97
R&D tax incentives 128, 129, 132, 133
share farming agreement........ 144–146
tax disputes
– with Commissioners.............84–88
– reliability 319–322

Excepted trust income
tax concessions for minors......349, 374–376
Exceptional circumstances
vacant land deductions......294, 295
Excluded trusts
aggregating land interests (SA)......255
Exemptions
CGT main residence
– adjacent land......8–10
– pre-CGT dwellings......151, 152
land tax, primary production land......144
Expenditure
capital or income, medical practices......351, 352
Division 50 in Australia condition......350
Expense test
early stage innovation companies......166
Exploration companies
ASX listed, tax losses......174–177

F

Facilities, use and trust model
payroll tax, medical practices......248, 250
Family law
asset protection......394–397
CGT roll-overs......376, 377
Family trust election......380
Family trusts — see also **Discretionary trusts**
anti-avoidance rule......109, 289
disputes......271–274
distributions to testamentary trusts......375
residential rental property investments......73, 74
Farmers
redundancy payments......233
Farming
land tax (Vic)......144–146
Federal Budget 2018-19......73, 201, 238
discretionary trust reform......297, 298
significant global entities definition......392, 393
testamentary trusts......349, 374
vacant land deductions......294
Federal Budget 2019-20......56, 201
Federal Budget 2020-21......288
Federal Court
tax agents, assistance at hearings......268–270
Federal election 2019......56
gifts/donations to candidates......76–80
timetable......78
Financial agreements
estate planning......376, 377
Financial product
SMSF investment strategies......265, 266
Financial risk
arm's length debt test......219
Financial services advice
downsizer contributions......214
Financial settlements
family law asset protection......394–397
Fit and proper person test
tax agents......111
Fixed interest in trust holding......381
Fixed trusts
aggregating land interests (SA)......255–257
Foreign controlled consolidated groups
multinational tax avoidance......110
Foreign currency loans......170–173
Foreign exchange gains and losses
taxation, superannuation funds......199
Foreign income tax offsets
capital gains......168, 169, 291
taxation, superannuation funds......199
Foreign investments
CGT amendments......289, 290
large superannuation funds......199
Foreign residents — see **Non-residents**
CGT withholding
– Commissioner's remedial power......360, 361
Foreign source income
Australian trusts......90
non-resident beneficiaries, source concept......167
penalty interest......5
Foreign vendors
withholding tax, property sales......109
Forgiveness of debts......233
Forgiveness of loans......170, 171
France
digital services tax......370
Franked distributions
received by trustee of trust......138–141
Franking credits
accessing through unit trusts......380–383
Fraud
conviction quashed......58, 59
on a power......264
Fringe benefits tax
Uber, proposed exemption......230

G

Gaming machine entitlements
capital or revenue expenditure......292, 293, 328–331
General administration powers
Commissioner of Taxation......57
General interest charge
tax dispute re remission......31–39
General purpose financial statements......392, 393
Gifts
to political candidates, deductibility......76–80
Gig economy reporting......191, 192
Globalisation
digitalisation of tax......56
minimum tax rate proposal......369, 370
Going concern value
and goodwill......29
Goods and services tax
hotel bookings in Australia, offshore sales......110
intangibles......235
property decision tool......6
supply of accommodation......350, 351
tax bases......288
tax reform......348
taxable payments annual report......118
Uber tax issues......230
Goodwill
gaming machine entitlements......329–331
valuation......27–30
Government tenders......190
Graduality regime
VAT discount, Peru......62
Grandfathered assets
residential rental property investments......75

H

Harmonisation of tax
multinational corporations......365–371
Healthcare industry
payroll tax......248–251
Henry review......288, 348
High wealth individuals......182
Highly visible mobile strike teams......119, 191
Holding companies......12
Holding costs
land......204
Holding deposits
residential rental property investments......74
Hotel and land sale
aggregated dutiable transactions......45–47
Hotel bookings in Australia
multinational tax avoidance......110
Hotel industry
gaming machine entitlements......292, 293, 328–331
Housing affordability measures
downsizer contributions......211–214
foreign investment amendments......289, 290

I

Illegal economy......182
"In Australia" condition
deductible gift recipients......350
In-house assets
SMSF investment via......142, 209, 210
In-house facilitation
ATO......135, 136
In specie contributions
downsizer contributions......214
Inactive companies
with retained profits......11
Income of trust estate
franked distributions......138–141
Income or capital expenditure
medical practices......351, 352
Income splitting
amended assessment......168
unearned income of minors......238–240
Income tax
deceased estates......309
tax bases......288
Income tax gaps
ATO identification of......182
Indemnified VAT receivable
tax indemnities, Peru......62–64
Independent candidates
political, deductibility of gifts......77–79
Indirect tax zone
GST......235
Individual taxpayers
whether residents of Australia......302–306
Informal economy......182
Information disclosure
protected information......235, 236
tax debts......109, 164, 192
Information-gathering
common reporting standard......191
evidence for tax disputes......319–322
legal professional privilege......22, 23
tax debt disclosures......109, 164, 192
Information technology services
taxable payments reporting system......57, 187–189
Inheritances — see **Succession and estate planning**
Innovation
Israel's knowledge-based economy......233
Innovation and Science Australia
R&D disputes......124
Innovation test
tax incentives......66
Inspector-General of Taxation
collectable debt levels......290
tax debt disclosures......164, 192
tax profession report......54
Inspector-General of Taxation and Taxation Ombudsman
deceased estate administration......290
Instant asset write-off
medium businesses......13
small business entities......12, 13
Insurance
SMSF investment strategies......265, 266
Intangibles
GST......235
Integrity measures
government procurement......190
non-concessional MIT income......99, 100
superannuation guarantee......93, 289
tax avoidance......109
testamentary trusts......297, 298
unearned income of minors......238–240
vacant land deduction changes......113, 203, 204, 289, 294
Intellectual property
and goodwill, valuation......29
Intergenerational wealth transfer
tax regime and......372
Interlocutory application
McKenzie friend......268–270
International tax agreements — see **Double tax agreements**
Interposed companies
market value ratios, CGT roll-over relief......252, 253
Interposed entity provisions
Div 7A loan......111
Investigation services
taxable payments reporting system......57, 187, 188
Investment
SMSF strategies......265, 266
start-up companies, tax incentives......66–68
taxation, superannuation funds......198, 199
unit trusts, SMSFs investing via......142, 143, 209, 210
Israel
Australia–Israel DTA......233
Issue estoppel......270

J

Joint appointors of trusts......264
Joint tenants
deceased estates......308, 311, 312
Judicial review
administrative review distinction......303
Junior exploration companies
ASX listed, losses......174–177
Justified trust program
large superannuation funds......197

L

Labour costs
employees, deductibility......349, 350
Labour underpayments......191
Land — see also **Vacant land**
active asset test......353–355
property development measures......203–208
savings/building funded by loan......206
used for carrying on a business......353–355
used in business rather than enterprise......207

vacant, deduction amendments......73, 74, 109, 113–116, 162, 203–208

Land banking.................................... 113

Land contract
aggregated dutiable transactions...............................45–47

Land rich ratio
goodwill valuation 27–30

Land tax
aggregation changes (SA).......254–260
primary production land (Vic)....................................... 144–146

Landowners
land tax (SA)............................254, 256

Lease, hire or license
vacant land............................. 295, 296

Leased residential properties
negative gearing..........................73–75

Leasing activities
companies 12

Legal advice privilege........................21

Legal personal representatives
deceased estates, property................................ 308, 309

Legal professional privilege
ATO requirements 4
claiming...22
Commissioner's powers 21
professional advisers 20
tax disputes 21
waiver..22

Legislative instruments
Commissioner's remedial power 360, 361

Life interests
deceased estates....................314–316

Litigation privilege 21

Loan agreements
penalty interest....................................5

Loans — see also **Debt/equity rules**
concessional...........................109, 289
Div 7A...7, 111
foreign currency...................... 170–173

Loss recoupment rules.................... 174

Losses
ASX listed junior exploration companies.............................174–177
foreign currency, deductibility........................... 170–173
vacant land deductions................... 116

Luxury car tax........................... 110, 233

M

Main residence
downsizer contribution.............211–214

Main residence CGT exemption
adjacent land 8–10
deceased estates.................... 312–314
disposal of dwelling
– discretionary trust 59, 60
– from deceased estate 58
downsizer contributions.......... 212, 213
foreign investment amendments 289, 290
ownership of residence...............95–97
pre-CGT dwellings 151, 152
tax dispute, evidence............. 320–322

Managed investment trusts
non-concessional income.........99, 100
residential rental property investments 74

Margin scheme
sale of developed land......................59

Market value
definition..252
goodwill.......................................27–30
ratios, CGT roll-over relief 252, 253

Market value discounts...........252, 253

Marriage breakdown — see **Relationship breakdown**

Maximum net asset value test........352

McKenzie friend 268–270

Meal allowances
overtime, reasonable amounts 110

Medical practices
capital or income expenditure 351, 352
payroll tax................................248–251

Medium businesses
instant asset write-off 13

Member Profile
Joshua Cardwell 19
Leanne Connor 180
Rhys Cormick..................................246
Amanda Donald 357
Jacquii Reeves 122
Kyriacos Savvas..............................301
Paul Sokolowski................................72

Minimum interests rule
ASX listed junior exploration companies.................................... 177

Minors
testamentary trusts 238–240, 349, 374

Mobile strike teams.................. 119, 191

Money laundering 191

Multinational corporations
consumer-facing 365, 368
corporate tax, harmonisation........................365–371
digitalised.............................. 365, 366
minimum tax rate proposal 369, 370
significant global entities definition................................392, 393

Multinational tax avoidance
foreign controlled consolidated groups 110
hotel bookings in Australia............. 110
luxury cars, refurbished 110
thin capitalisation 110

Multiple entry consolidated groups
reporting obligations....................... 188

N

National Innovation and Science Agenda...66

Negative gearing
restrictions 73–75

Negligible test
Commissioner's remedial power 360, 361

New residential premises
available for rent............................... 74

New South Wales
aggregated dutiable transactions...............................45–47

New taxing right
rules for multinationals....................366

New Zealand
tax debt disclosures 164

Non-arm's length income
superannuation 233, 234, 325, 326

Non-compliant payments
deductions 183–186

Non-concessional MIT income
ATO guidance 99, 100

Non-geared unit trusts
SMSF investment via 142, 143

Non-resident beneficiaries
capital gains............................166, 167
– discretionary trusts 323, 324
source concept.............................. 167

Non-residents
capital gains............................166, 167
investments, CGT amendments 289, 290

permanent place of abode 302–306
source concept....................... 167, 324

Not inconsistent test
Commissioner's remedial power 360

O

OECD
multinational taxation harmonisation plan................365–371

Older Australians
redundancy payments 233

One hundred-and-eighty-three-day test 291, 292, 302, 305

One hundred-point innovation test 66

Onus of proof
excessive assessment 111, 112
margin scheme 59
share farming agreement................ 145
tax disputes with Commissioner 84–88

Optometrist practices
payroll tax................................248–251

Ordinary time earnings
superannuation guarantee..........92, 93

Oslo manual
principles-based innovation test...67

Overtime meal allowances
reasonable amounts 110

Ownership
ASX listed junior exploration companies.............................174–177

Ownership interest
CGT main residence exemption.................... 59, 60, 95–97

P

Parliament elections — see **Elections**

Parliamentary scrutiny
Commissioner's remedial power 360

Partnerships
personal services income.............. 167
residential rental property investments 74
tax avoidance.................................109

"Payable" defined 63, 64

PAYG withholding
employer obligations....... 118, 119, 190
voluntary disclosure................184, 185

Payroll tax
medical practices....................248–251

Penalties
foreign currency loans 171, 173
phoenixing offences........................109
significant global entities 189, 392, 393
superannuation early release schemes............................... 388–391
superannuation guarantee rules.......93
tax scheme promoters, R&D incentives 130–132

Penalty interest
loan agreements 5

Pension tax bonus
large superannuation funds 199, 200

Permanent place of abode
whether resident of Australia.................. 6, 7, 90, 302–306

Personal income tax cuts 348

Personal marginal tax brackets 56

Personal services income
black economy measures............... 191
results test........................167, 215–217

unrelated clients test..........................167, 168, 215–217

Peru
tax indemnities, VAT....................61–65

Phoenixing 109, 181, 182

Place of abode — see **Permanent place of abode**

Political candidates
deductibility of gifts to.................76–80
deductibility of outlays 80–82

Pre-nuptial agreements..................376

Prepaid expenses
deductions, small business entities 12

Primary producers
Disaster Recovery Funding Arrangements...............................349

Primary production land
land tax (Vic) 144–146
vacant land deduction exclusion 295, 296

Principles-based innovation test 67, 68

Private companies
market value ratios, CGT roll-over relief.......................................252, 253
UPE sub-trust arrangements............58

Privilege — see **Legal professional privilege**

Probate
deceased estates.................. 308, 309

Professional conduct
tax professionals............................232

Professional development
Tax Institute members 3

Professional indemnity insurance..384

Professional services
taxable payments reporting system 188, 189

Promoters of tax exploitation schemes
R&D disputes 130–132

Property
assessable income from, minors....239

Property decision tool
GST 6

Property development
deceased estate, income tax 309
substantial and permanent structures 203–208

Property investment
companies carrying on a business 12
non-residents, CGT amendments 289, 290

Property investment companies 12

Property sales
foreign vendors, withholding tax.....109

Property settlement
ownership of residence...............95–97

Protected information.............235, 236

Public interest
legal professional privilege................20
tax agent registration, cancellation 6

Public policy
statutory officer decisions, reliance on.......................................37

Public trading trust 352

Public unit trusts
residential rental property investments 74

R

Rates of tax
land tax (SA)....................................261
reform...348

R&D
innovation test ... 66
tax incentive disputes ... 124–133

Real property
deceased estates ... 307–317

Reasonable amounts
travel and overtime meal allowances ... 110

Reasonable care
foreign currency loans ... 171, 172

Reasonable test
Commissioner's remedial power ... 360

Reconstruction arrangements
transfer pricing ... 332–334

Record-keeping
highly visible mobile strike teams ... 119
modernisation ... 190
R&D tax incentives ... 128, 129, 132
transfer pricing ... 235
vacant land deductions ... 295

Redundancy payments ... 233

Reforms
Henry review ... 348
land tax, aggregation changes (SA) ... 254–260

Related corporations
aggregating land interests (SA) ... 255, 259

Related entities ... 208

Related party financing
cross-border debt ... 148–150

Related party test
residential rental property investments ... 74

Related party transfers
downsizer contributions ... 213, 214

Related unit trusts
SMSF investment via ... 142, 209, 210

Relating to holding land ... 114

Relationship breakdown
CGT roll-overs ... 376, 377
family law asset protection ... 394–397
ownership of residence ... 95–97

Relevant contracts
medical practices, payroll tax ... 248–250

Relieving discretion
Div 7A amalgamated loan ... 7

Remainder interests
deceased estates ... 314–316

Remedial power of Commissioner ... 359–363

Renovation
residential rental property, unoccupied ... 75

Rent from land investment
concessional MIT income ... 100

Rental properties
residential
– negative gearing ... 73–75
– non-commercial losses ... 207

Reporting obligations
black economy measures ... 119, 187–189
courier, cleaning and other services ... 57, 187–189
downsizer contribution ... 212
margin scheme ... 59
sharing economy ... 190
significant global entities ... 392

Res judicata ... 270

Residence — see **Main residence CGT exemption**

Residence tests
individuals ... 302–306

Residency
backpacker test case ... 291, 292
corporations, Board of Taxation review ... 166
of individuals ... 302–306
of trusts, central management and control ... 90, 91

Resident of Australia
permanent place of abode ... 6, 7, 90, 302–306
trusts ... 90, 91

Residential premises
deduction of holding costs ... 207
supply of accommodation, GST ... 350, 351
vacant land deduction ... 115, 116, 294, 295

Residential rental properties
negative gearing ... 73–75
non-commercial losses ... 207

Restructure roll-overs
safe harbour rule ... 377–379
trusts avoiding CGT ... 290

Results test
personal services income ... 167, 215–217

Retrospectivity
tax legislation ... 162

Return of capital
arm's length debt test ... 219

Revenue or capital expenditure
gaming machine entitlements ... 292, 293, 328–331
medical practices ... 351, 352

Road freight services
taxable payments reporting system ... 57, 187, 188

Roll-over relief — see **CGT roll-over relief**

Royal Commission
superannuation funds ... 200

Rural Fire Service volunteers ... 349

S

Safe harbour rule
arm's length debt test guidelines ... 218, 219
main residence exemption, deceased estates ... 151, 152
small business restructure relief ... 377–379

Salary and wages
compulsory payment to bank account ... 190
derivation of income ... 7
ordinary time earnings, relationship with ... 92, 93

Salary sacrifice
integrity measures ... 109
superannuation guarantee charge ... 289

Sale of land and business
aggregated dutiable transactions ... 45–47

Sale of shares
small business CGT concessions ... 241–243

Same business test ... 5
ASX listed junior exploration companies ... 174

Same share same interest rule
ASX listed junior exploration companies ... 176

Savings provisions
ASX listed junior exploration companies ... 177

Security services
taxable payments reporting system ... 57, 187, 188

Self-managed superannuation funds
advisers giving unlawful advice ... 384–387
downsizer contributions ... 211–214
executor conflicts of interest ... 41–44
investing via unit trusts ... 142, 143, 209, 210
investment strategies ... 265, 266
non-arm's length income ... 234, 325, 326
residential rental property investments ... 73, 74

Separation of powers
Commissioner's remedial power ... 362

Sham transactions
conviction quashed ... 58, 59
political gifts/donations ... 80

Share farming agreement
primary production land ... 144–146

Share investment companies ... 12

Shareholders
market value ratios, CGT roll-over relief ... 252, 253

Shares
market value ratios, CGT roll-over relief ... 252, 253
maximum net asset value test ... 352
purchase of, Peruvian copper mine ... 61–65
sale, small business CGT concessions ... 241–243

Sharing economy reporting ... 190–192

Significant global entities
expanding definition ... 392, 393
penalties, TPRS breach ... 189

Similar business test
ASX listed junior exploration companies ... 174

Simplified record-keeping ... 235

Single touch payroll
employer obligations ... 93, 119, 189, 190

Small business CGT concessions
active asset test ... 353–355
deceased estates ... 312
partnerships ... 109
sale of shares in businesses ... 241–243
vacant land ... 289

Small business entities
instant asset write-off ... 12, 13
tax concessions ... 12, 13

Small business entity turnover test ... 241

Small business restructures
Commissioner's remedial power ... 361
safe harbour rule ... 377–379

Small Business Taxation Division
Administrative Appeals Tribunal ... 137

Small businesses
Disaster Recovery Funding Arrangements ... 374
sale of shares, CGT concessions ... 241–243
STP transitional relief ... 190
tax compensation claims ... 289
tax gaps ... 182

Source concept
non-resident beneficiaries ... 167, 324
residency of trust ... 90, 91

South Australia
land tax, aggregation changes ... 254–260

Stamp duty
deceased estates ... 312, 316

SMSFs, investment via unit trusts ... 143

Stapled structures
non-concessional MIT income ... 99, 100

Start-up companies
R&D tax incentive disputes ... 124–133
tax incentives ... 66–68

Statutory notices ... 319

Stay of proceedings
tax agent registration, cancellation ... 6

Streaming of franked distributions ... 140

Structured arrangements
taxation, superannuation funds ... 198

Sub-trust arrangements
Div 7A, UPEs ... 58

Subjective intention
primary production land ... 144–146

Substantial and permanent structures ... 114, 203–208, 294, 295

Substantial continuity of ownership
ASX listed junior exploration companies ... 175, 176

Substantive permanent building/structure ... 74

Succession and estate planning
appointors of trusts, powers ... 263, 264
discretionary trust powers ... 271–274
excepted trust income ... 374–376
family law
– asset protection ... 394–397
– CGT roll-overs ... 376, 377
main residence exemption, pre-CGT dwellings ... 151, 152
real property issues ... 307–317
safe harbour rule ... 377–379
SMSFs, executor conflicts of interest ... 41–44
testamentary trusts ... 297, 298, 312
trust splitting ... 373, 374
trust vesting ... 372, 373

Successor fund transfers
large superannuation funds ... 196, 197

Superannuation
downsizer contributions ... 211–214
early release schemes ... 388–391
large fund issues ... 196–201
non-arm's length income ... 233, 234, 325, 326
salary sacrifice integrity measures ... 109
Tax Institute submission ... 108

Superannuation death benefits
SMSFs, executor conflicts of interest ... 41–44

Superannuation funds
event-based reporting ... 196
justified trust program ... 197
Royal Commission ... 200
successor fund transfers ... 196, 197
tax risk management ... 197, 198
taxation of investments ... 198, 199
third-party data ... 197, 198

Superannuation guarantee
charge ... 183, 189
employer obligations ... 92–94
salary sacrifice contributions ... 289
single touch payroll ... 93, 119

Supply of accommodation
GST ... 350, 351

Supporting R&D activities ... 125

Surveillance services
taxable payments reporting system ... 57, 187, 188

T

Tax administration — see **Administration**

Tax advisers
SMSF investment strategies ... 265, 266
superannuation advice ... 384
trusted adviser status ... 347

Tax Agent Program ... 179, 244, 245

Tax agent services ... 384
definition ... 23
independent review ... 55, 56

Tax agents
Federal Court hearing, assistance ... 268–270
fit and proper person test ... 111
provision of legal advice ... 23
registration cancellation ... 6
registration requirements ... 2

Tax avoidance
integrity measures ... 109

Tax Avoidance Taskforce ... 109

Tax brackets
personal marginal ... 56

Tax compensation claims
small business ... 289

Tax compliance
black economy measures ... 118, 119, 181–192
large superannuation funds ... 199, 200

Tax concessions
minors, testamentary trust income ... 349, 374
partnerships ... 109
sale of shares in businesses ... 241–243
small business entities ... 12, 13

Tax consolidated groups
reporting obligations ... 188

Tax credits
VAT, Peru ... 62

Tax debts
disclosures to credit reporting bureaus ... 109, 164, 192, 289
Federal Court, tax agent as advocate ... 268–270
general interest charge ... 31–39

Tax disputes
ATO
– in-house facilitation ... 135, 136
– reliability of evidence ... 319–322
Commissioners of Taxation
– onus of proof ... 84–88
– settling ... 31–39
general interest charge ... 31–39
legal professional privilege ... 21
R&D tax incentives ... 124–133
Small Business Taxation Division ... 137
transfer pricing ... 332–334, 367

Tax exemptions
Disaster Recovery Funding Arrangements ... 349
"in Australia" condition ... 350

Tax gaps
ATO identification of ... 182

Tax incentives
early stage innovation companies ... 66–68, 166
R&D ... 124–133

Tax indemnities
VAT, Peru ... 61–65

Tax integrity rules
corporate residency ... 166

Tax losses — see **Losses**

Tax offences
conviction quashed ... 58, 59

Tax offsets
early stage innovation companies ... 66, 67
foreign income ... 168, 169, 199
franked distributions received by trustee ... 138–141

Tax policy development
Tax Institute submission to review ... 108

Tax Practitioners Board ... 2, 6, 111, 384
ATO, independence from ... 232
CPD compliance ... 3
independent review ... 54, 56, 190
review ... 163, 232
Tax Institute submission to ... 232

Tax professionals ... 20
accountants' concession ... 22
administrative and judicial review distinction ... 303
CPD compliance ... 3
definition ... 54
legal professional privilege ... 20
professional conduct ... 232
proposed reforms to regulation ... 232
qualifications and experience ... 232
tax agent services regime review ... 54, 56

Tax residence — see **Resident of Australia**

Tax risk ... 162
large superannuation funds ... 197, 198

Taxable payments reporting system
annual report ... 118, 188
black economy measures ... 187
Commissioner's power to exempt entities ... 57
courier, cleaning and other services ... 57, 187–189
definition of service ... 188

Taxable wages
medical practices ... 248–251

Taxation law defined ... 384

Taxation Ombudsman — see **Inspector-General of Taxation**

Temporary residents
capital gains ... 166

Ten per cent test
ASX listed junior exploration companies ... 176

Tenants in common
deceased estates, property ... 308

Test case litigation program ... 136

Testamentary trusts
asset protection ... 394–397
deceased estate assets transferred to ... 312
family trusts distributing to ... 375
minors ... 238–240, 349, 374
reforms ... 297, 298

The Tax Institute
2019 Corporate Tax Adviser of the Year Award
– Joshua Cardwell ... 16
ATL001 CTA1 Foundations Dux Award, study period 1, 2019
– Caitlin McKenna ... 120
ATL001 CTA1 Foundations Dux Award, study period 2, 2018
– Ross Heard ... 14
ATL002 Commercial Law 1 Dux Award, study period 2, 2018
– Antonio Marandola ... 15
ATL002 Commercial Law 1 Dux Award, study period 3, 2018
– Michael Mangion ... 69
ATL002 Commercial Law 1 and ATL006 Commercial Law 3 Dux Award, study period 1, 2019
– Daniel Vucetic ... 245
ATL003 CTA2A Advanced Dux Award, study period 1, 2019
– Jason Hawe ... 120, 121
ATL003 CTA2A Advanced Dux Award, study period 2, 2018
– Georgiena Ryan ... 16
ATL003 CTA2A Advanced Dux Award, study period 3, 2018
– Jenna Podolczak ... 69
ATL004 CTA2B Advanced Dux Award, study period 1, 2018
– Nicola Bird ... 14
ATL004 CTA2B Advanced Dux Award, study period 2, 2018
– Gabriele Lanzara ... 244
ATL004 CTA2B Advanced Dux Award, study period 3, 2018
– Adéle Coetzee ... 70
ATL004 CTA2B Advanced Dux Award, study period 2, 2019
– Uphar Chhabra ... 299
ATL005 Commercial Law 2 and ATL006 Commercial Law 3 Dux Award, study period 1, 2019
– Hannah Edwards ... 244, 245
ATL005 Commercial Law 2 Dux Award, study period 3, 2018
– Zhien (Marco) Zhou ... 70
ATL009 Corporate Tax Dux Award, study period 2, 2019
– Chris Harris ... 299
change at the Institute ... 3
CPD compliance ... 3
member portal ... 107
members, importance of participation ... 2, 230
membership benefits ... 356
mentoring program ... 230
professional development ... 3
submissions
– Australian Treasury ... 287, 288, 348
– FBT exemption to Uber rides ... 230
– federal Budget 2020-21 ... 288
– to ATO ... 4, 108
– to review of Australian Public Service ... 108
– to Senate Economics Legislation Commission ... 164
– to Tax Practitioners Board ... 54, 56, 232
Tax Adviser of the Year Awards 2020 ... 107
Tax Agent Program ... 179, 244, 245
Tax Policy and Advocacy team ... 3, 55, 163, 230, 287
Tax Summit 2020 ... 230, 231, 286, 287, 346, 347
volunteers ... 107, 346
women in tax ... 230, 231, 287, 356

Thin capitalisation
arm's length debt test guidelines ... 218–220
debt deduction, meaning ... 149, 150
multinational tax avoidance ... 110

Third-party data
large superannuation funds ... 197, 198

Time limit
vacant land deductions ... 295

Tourism operators
redundancy payments ... 233

Tracing rules
ASX listed junior exploration companies ... 175, 177

Transfer pricing
arm's length debt test ... 218
debt/equity rule interaction ... 110, 148, 149
disputes ... 367
record-keeping ... 235
tax disputes ... 332–334
taxation harmonisation plan ... 365–371

Transparency
beneficial ownership ... 190

Travel allowances
reasonable amounts ... 110

Trust beneficiaries
franked distributions received by ... 138–141

Trust deeds
appointors ... 263, 264
public trading trust ... 352

Trust estates
unearned income of minors ... 238

Trust income
default assessments ... 110
versus net income ... 138
unearned income of minors ... 238–240

Trust splitting
estate planning ... 373, 374

Trust vesting
estate planning ... 372, 373, 377

Trustees
foreign currency loans ... 170–173
power to appoint themselves ... 263, 264
powers of ... 271–274

Trusts — see also **Discretionary trusts; Family trusts; Unit trusts**
aggregating land interests (SA) ... 255–259
anti-avoidance rule ... 289
CGT avoidance, restructure roll-over ... 290
deceased estates, property ... 308
foreign resident capital gains ... 166, 167
franked distributions received by trustee ... 138–141
non-resident beneficiaries ... 167
public trading trust ... 352
residency rules ... 90, 91
residential rental property investments ... 73, 74

Turnover threshold test
taxable payments reporting system ... 57

U

Uber tax issues ... 230

Unconscionable conduct ... 273, 376, 377

Undue influence ... 376, 377

Unearned income of minors ... 238–240, 349

Unit trust scheme ... 256, 257

Unit trusts
accessing franking credits in ... 380–383
aggregating land interests (SA) ... 255–257
residency ... 91
residential rental property investments ... 74
SMSFs investing via ... 142, 143, 209, 210

United Kingdom
Australia–UK DTA ... 291, 292

United States
Australia–US DTA ... 169
digital services tax levied on US corporations ... 370

Unlawful advice
SMSF advisers ... 384–387

Unpaid present entitlements
Div 7A sub-trust arrangements ... 58

Unrecorded economy ... 182

Unrelated clients test
personal services income....167, 168, 215–217
Unreported economy....182
Usual place of abode....302–306

V

Vacancy
involuntary evacuation/significant damage....205
pre-sale....206
significant renovation/expansion phase....205
Vacancy periods
residential rental properties....75
Vacant land deductions
amendments....109, 113, 162, 203, 289, 294
carrying on a business....113, 115, 295, 296
exceptional circumstances....294, 295
primary production land....295, 296
residential premises....115, 116, 294, 295
residential rental properties....73–75
substantial and permanent structures....114, 203–208, 294, 295
Valuation
goodwill....27–30
shares, CGT roll-over relief....252, 253
Value-added tax
purchase of shares, Peruvian copper mine....61–65
Victoria
gaming machine entitlements....292, 293, 328–331
primary production land, “subjective intention”....144–146
Voluntary disclosure
PAYG withholding....184, 185

W

Wages
taxable, medical practices....248–251
Warranties
VAT, Peru....64
Wealth transfer
baby boomers....307
post-baby boomers....372
Wills
estate planning structuring....375
testamentary trusts....312, 394–397
Withholding tax
foreign vendor property sales....109
non-concessional MIT income....99, 100
PAYG....118, 119, 184, 185
Work expenses
deductions....291
Work expenses guide
employees....57, 58
Working holiday tax
Australia–UK DTA....291, 292

Legislation

A New Tax System (Goods and Services Tax) Act 1999....115, 207
Div 85....235
s 9-25(5)(a)....235
s 9-25(5)(b)....235
s 9-25(5)(c)....235
s 9-30(3)....351
s 38-250(1)(b)(i)....351
s 40-65(1)....351
Acts Interpretation Act 1901....363
Administrative Decisions (Judicial Review) Act 1977....84
s 5(1)(c)....32
s 5(1)(d)....32
s 13(1)....36
Australian Charities and Not-for-profits Commission Act 2012....80
Broadcasting Services Act 1992
Sch 2....83
Commonwealth Electoral Act 1918....78, 80
s 4....77, 82
s 125....83
s 152....78
s 152(e)....78
s 154....78
s 155....78
s 156....78
s 157....78
s 158....78
s 159....78
s 175....78
s 176....78
s 287AB....82
s 309....81, 82
Commonwealth of Australia Constitution Act 1900
s 5....78
s 12....83
s 28....78, 83
s 32....78
s 44....77
Corporations Act 2001....11, 175, 214, 265, 385–387
s 9....88, 89
s 268....88
s 286....89
s 601GC(1)(a)....381
s 763A(1)....266
s 763B....266
s 763C....266
s 766A(1)....266
s 766B....266
s 766B(1)....266
s 766C....266
s 1305....84, 86–88, 171
s 1305(1)....86
Crimes Act 1914
s 4AA....388
Criminal Code Act 1995....111
Currency (Restrictions on the Use of Cash) Bill 2019....191, 193, 195
Duties Act 1997 (NSW)
s 21....46, 47
s 21(1)....45, 47
s 25....45–47
s 25(1)....45
s 25(3)....46
s 27....45–47
s 27(1)....45
s 32....47
s 32(1)....47
Evidence Act 1995
s 4(1)....24
s 69....89
s 69(3)....87
s 69(3)(a)....89
s 117....25
s 118 to 126....20
Excise Tariff Amendment (Collecting Tobacco Duties at Manufacture) Bill 2018....193
Fair Work (Registered Organisations) Act 2009....80
Family Law Act 1975....394–396
Pt VIIIA....376
Federal Court Act 1976
s 23....269
s 478....268
Finance Act 2008 (UK)
Sch 36....26
Gambling Regulation Act 2003 (Vic)....292, 328
Income Tax and Social Services Contributions Assessment Act 1936
s 51(1)....329
Income Tax Laws Amendment Act 1980....238
Income Tax Rates Act 1986....238
s 13....298
s 23....12
Income Tax (Transitional Provisions) Act 1997
s 118-195....313
s 128-15....310
Industry Research and Development Act 1986....124
s 4....131
s 27A....125
s 29A....67
Inspector-General of Taxation Act 2003....164
Internal Revenue Code 1986 (US)
s 7525....26
ITAA36
Pt III
– Div 1A....198
– Div 3B....170
– Div 13....148
Pt IIIAA
– Div 1A....380
Pt IVA....80, 213, 290, 298, 378
Div 3B....172
Div 6....138–140, 167, 324
Div 6AA....238–240, 297, 374
Div 6AAA....349
Div 6C....100, 352
Div 6E....138, 140, 323
Div 7A....7, 111, 377
Div 13....332, 333
Subdiv 115-C....167
s 6....90
s 6(1)....6, 90, 239, 302–305
s 23AH....149
s 44....111
s 67....150
s 74....81
s 74(1)....81
s 95....91, 141, 323
s 95(2)....90, 91
s 95AAA....141
s 97....88, 140, 141
s 97(1)(a)....139
s 98....141, 167
s 98(3)....166
s 98A(2)....166, 167
s 99....141, 324
s 99A....140, 141, 324
s 99B....110
s 99D....324
s 100....141
s 102....373
s 102AA(1)....239, 297
s 102AA(2AA)(b)....239
s 102AA(4)....239, 240
s 102AE....238
s 102AG....238, 239
s 102AG(1)....238, 297
s 102AG(2)....238
s 102AG(2)(a)....238–240, 297, 298
s 102AG(2)(a)(i)....374
s 102AG(2)(e)....238
s 102AG(2AA)....239, 297
s 102AG(2AA)(a)....239
s 102AG(2AA)(b)....240, 374
s 102AG(4)....238, 240
s 102AG(5)....238
s 102AG(8)....238
s 102P....74
s 102UW(b)....140
s 102UW(b)(ii)....141
s 102UW(b)(iii)....141
s 102UX(2)....141
s 102UX(3)....141
s 102UX(4)....141
s 102UY(2)....141
s 102UY(4)....140
s 102UY(4)(b)....140
s 109D....111
s 109E....7
s 109N....58
s 109Q....7
s 109Q(2)....7
s 160APHL(10)....380
s 160APHL(11)....381
s 160APHL(13)....381
s 160APHL(14)....381, 382
s 160APHT....383
s 166....85, 111, 112
s 167....88, 111, 112
s 177EA....198
s 222APE....35
s 263....21
s 264....21
s 273....325
s 318....74, 207
Sch 2F....382
– Div 271....383
– s 272-5....382
– s 272-5(3)....363, 382
– s 272-65....381
– s 272-95....383
ITAA97
Pt 2-42....215
Pt 3-90....177
Div 25....80
Div 35....73, 207
Div 40....361
Div 43....296
Div 106....97
Div 114....213
Div 115....213
Div 128....309, 310, 312, 315, 316, 373
Div 149....373
Div 152....74, 241, 242
Div 165....175
Div 166....174, 175, 362
Div 207....138, 141
Div 328....12
Div 355....131
Div 770....169, 291
Div 775....172, 173
Div 815....149
Div 855....91, 324
Div 974....110, 359
Subdiv 30-DA....78–81
Subdiv 50-A....79, 80
Subdiv 115-C....323, 324
Subdiv 118-B....212, 310, 321, 322
Subdiv 122-A....378
Subdiv 126-A....376
Subdiv 126-G....290
Subdiv 165-D....175
Subdiv 166-B....175
Subdiv 207-B....138–140, 323
Subdiv 328-G....361, 372, 377–379
Subdiv 768-R....304
Subdiv 815-A....332, 333
Subdiv 815-B....110, 148, 149
Subdiv 815-E....392, 393
Subdiv 855-A....166
Subdiv 900-B....110
s 6-5(2)....58, 59, 91
s 6-5(3)....91
s 6-10(4)....91
s 6-10(5)....91
s 6-15(2)....79
s 8-1....5, 87, 88, 113, 116, 166, 170, 172, 291, 328, 349, 351
s 20-30....207
s 25-25....5, 75, 150

s 25-30 5
s 25-60 ....81, 82
s 25-90 5
s 26-22 ....76, 77, 79
s 26-22(3) 77
s 26-102 ....113, 114, 203, 204, 206–208, 294, 295
s 26-102(1) 115, 116, 206, 207
s 26-102(1)(a) 206
s 26-102(1)(b) 115, 205, 206
s 26-102(2) 115, 208, 296
s 26-102(3) 115
s 26-102(4) 115, 116, 205, 206, 294
s 26-102(5) 113, 294
s 26-102(5)(a) 203, 204
s 26-102(6) 294, 295
s 26-102(6)(b) 295
s 26-102(6)(c) 295
s 26-102(6)(d) 295
s 26-102(7) 295
s 26-102(8) 295
s 26-102(8)(c) 296
s 26-102(8)(d) 296
s 26-102(9) 296
s 26-105 183
s 26-105(1) 73, 75, 194
s 26-105(1)(a) 75
s 26-105(1)(b) 75
s 26-105(1)(b)(i) 194
s 26-105(1)(b)(ii) 195
s 26-105(2) 73, 74, 195
s 26-105(3) 73, 194, 195
s 26-105(3)(b) 75
s 26-105(4) 74, 195
s 26-105(5) 195
s 26-105(6) 195
s 26-105(7) 195
s 26-105(8) 195
s 30-242 ....78, 79
s 30-242(1) 79
s 30-242(1)(c) 79
s 30-244 79
s 35-55 ....73, 207, 208
s 35-55(1)(b)(ii) 73, 207
s 40-180 309
s 40-190(2)(b) 5
s 40-880 ....5, 12, 329, 331
s 40-880(2) 331
s 40-880(6) 331
s 50-1 79
s 50-47 80
s 70-105 ....309, 310
s 70-105(6) 309
s 86-15(1) 167
s 86-15(3) 167
s 87-15 215
s 87-15(2) 167, 215
s 87-18(3) 167
s 87-20 215
s 87-20(1)(b) 168, 215–217
s 87-20(2) 168, 216, 217
s 102-5 ....213, 239
s 104-10 97
s 104-170 91
s 104-170(2) 91
s 104-170(3) 91
s 104-170(4) 91
s 106-1 97
s 106-50 97
s 108-5 355
s 108-5(2)(a) 355
s 108-70(2) 206
s 108-75(3) 206
s 110-25(4) 204
s 110-45(2) 290
s 112-20 ....213, 315
s 112-35 ....290, 291
s 115-25(1) 312
s 115-30(1) 312
s 115-215(3) 166, 323
s 115-220 ....166, 167
s 115-222 ....167, 324
s 116-20 213
s 116-30 213
s 118-20 213
s 118-110(1) 97
s 118-115 8
s 118-115(1)(a) 204
s 118-120 ....8, 9, 153
s 118-120(1) 8
s 118-120(2) 8, 9
s 118-120(5) 8
s 118-120(6) 8
s 118-145 ....213, 314
s 118-150 10
s 118-150(4) 10
s 118-165 8
s 118-185 213
s 118-190(1) 314
s 118-190(3) 314
s 118-195 ....58, 151, 152, 213, 312, 313
s 118-195(1) 153
s 118-200 58
s 128-10 ....310, 315, 316
s 128-15(2) 310
s 128-15(3) 310, 316
s 128-15(4) 310, 311
s 128-20(1) 315
s 128-20(1)(d) 317
s 128-20(1)(a) to (d) 316
s 128-50(2) 311
s 128-50(3) 311
s 128-50(4) 311
s 130-85(4) 234
s 152-10(2) 242
s 152-35 ....206, 242
s 152-40 353
s 152-40(1) 355
s 152-40(1)(a) 353
s 152-80(1) 312
s 202-5 141
s 207-5(3) 141
s 207-5(4) 141
s 207-35 141
s 207-35(1) 141
s 207-35(2) 138
s 207-35(3) 139
s 207-35(3)(d) 138, 141
s 207-35(4) 138
s 207-35(4)(b)(ii) 139
s 207-35(5) 139
s 207-35(6) 139
s 207-37 139
s 207-37(1) 141
s 207-37(2) 141
s 207-37(3) 139
s 207-45 140
s 207-45(a) 141
s 207-50(3) 139
s 207-50(3)(a) 139
s 207-50(3)(b) 139
s 207-55 ....139, 141
s 207-55(2) 141
s 207-55(3) 139, 141
s 207-55(4) 139
s 207-55(4)(a) 139
s 207-55(4)(b)(i) 141
s 207-57(2) 141
s 207-58(1) 140, 141
s 207-157(4) 383
s 207-157(5) 383
s 245-40(e) 233
s 276-90 198
s 292-102 212
s 292-102(3) 213
s 295-550 ....233, 234, 325
s 295-550(1)(b) 325
s 295-550(1)(c) 325
s 328-125 115
s 328-130 115
s 328-430 378
s 328-430(1)(a) 378
s 328-435 378
s 355-25 125
s 355-25(1) 126, 127
s 355-25(1)(a) 126, 127
s 355-25(1)(b) 126, 127
s 355-25(2) 133
s 355-25(2)(f) 127
s 355-30 ....125, 133
s 355-30(1) 125
s 355-30(2)(c) 125
s 355-205(1) 125, 133
s 360-15 68
s 360-40 166
s 360-40(1)(a) to (d) 68
s 360-40(1)(a)(ii) 166
s 360-40(1)(b) 166
s 360-40(1)(e) 68
s 360-45(1) 68
s 360-50(4) 68
s 360-50(5) 68
s 615-20(2) 252, 253
s 768-915(1) 166
s 770-75 291
s 770-75(4)(a)(i) 291
s 770-75(4)(a)(ii) 291
s 815-110(1) 110
s 815-115 ....110, 148
s 815-115(2) 110
s 815-125 110
s 815-130 148
s 815-145 ....148, 149
s 815-355(1)(a) 393
s 815-380 393
s 820-40(1)(a) 5
s 820-40(1)(a)(i) 150
s 820-40(1)(a)(ii) 150
s 820-40(1)(a)(iii) 148
s 855-10 ....166, 323
s 855-10(1) 323
s 855-40 ....91, 166, 167, 323
s 855-50(1) 91
s 855-50(4) 91
s 960-100 134
s 960-115 ....116, 203, 296
s 960-555 393
s 960-555(2A) 393
s 960-555(2A)(ii) 393
s 960-555(3) 393
s 960-565(3) 393
s 960-575 393
s 960-575(3) 393
s 974-160(1) 141
s 974-160(2) 141
s 995-1 ....77, 80, 141, 185, 239, 384
s 995-1(1) 296

Judiciary Act 1903
s 35A 37
s 39B 84
s 79 24
s 80 88
s 398 268

Land Tax Act 1936 (SA) 254
s 2(1) 261, 262
s 4(1) 261
s 4(2) 261
s 4(3) 261
s 5 261
s 5(10)(a) 261
s 5(10)(g) 261
s 5AA 262
s 7(2) 261
s 9 261
s 9(6) 262
s 9(7) 262
s 12 261
s 12(1) 261
s 12(2) 261
s 13 261
s 13(3)(a) 261
s 13(3)(b) 261
s 13(6) 262
s 13A(1) 262
s 13A(2) 261
s 13A(3) 261, 262
s 13A(6) 262
s 13A(7)(c)(ii) 262
s 13A(7)(d) 258
s 13A(9) 262
s 13H 261
s 13I 261
s 13J(1)(b) 262
s 13J(1)(c) 260
s 13J(1)(c)(ii) 262
s 13K(2) 262
s 14 260

Land Tax Act 2005 (Vic)
s 66 144
s 66(c) 144
s 68 ....144, 145

Land Tax (Miscellaneous) Amendment Bill 2019 (SA) 254–256, 258–262

Legal Profession Uniform Law Application Act 2014 (Vic) 384
Sch 1
– s 10(1) 386

New Business Tax System (Taxation of Financial Arrangements) Bill (No. 1) 2003 172

New Business Tax System (Thin Capitalisation) Bill 2001 149

Payroll Tax Act 2007 (Vic)
s 32 249
s 32(1) 249
s 32(2) 251
s 35 250
s 35(1) 249

Stamp Act 1921 (WA)
Pt IIIBA
– Div 3B 27

Superannuation Guarantee (Administration) Act 1992 92
Pt 7 93
s 6(1) 92
s 12 92
s 12(3) 92

Superannuation Industry (Supervision) Act 1993 ....70, 142, 265, 384
Pt 7 385
s 6 385
s 6(1)(e) 385
s 6(1)(ea) 385
s 6(1)(f) 385
s 6(1)(fa) 385
s 6(1)(g) 385
s 6(2AA) to (2AC) 385
s 17A 388
s 17B 388
s 31(1) 388
s 66 ....142, 214, 385
s 68B 388, 390
s 68B(1) 389
s 82 210
s 83 210
s 196 389
s 196(2) 389
s 196(3) 389
s 315 389
s 315(2) 389

Superannuation Industry (Supervision) Regulations 1994 ....142, 265, 385
reg 4.09(2)(e) 265, 386
reg 7.04 214
reg 13.22C 209, 210
reg 13.22D 209, 210

Tax Administration Act 1994 (NZ)
s 20B to 20G 26

Tax Agent Services Act 2009 ....54, 82, 111, 190, 232, 384
Div 30 26
s 20-5(1)(a) 6
s 30-35(1)(b) 111
s 90-5 .... 23, 26, 384
Tax Agent Services Regulations 2009 232
Sch 1 24
Sch 2 24
Tax and Superannuation Laws Amendment (2016 Measures No. 2) Act 2017 .... 359, 363
Sch 1 364
Tax and Superannuation Laws Amendment (debt and equity scheme integrity rules) Bill 363
Tax Laws Amendment (2008 Measures No. 1) Bill 2008 76
Tax Laws Amendment (2011 Measures No. 5) Act 2011 323
Tax Laws Amendment (2011 Measures No. 5) Bill 2011 141
Tax Laws Amendment (Combating Multinational Tax Avoidance) Act 2015 392
Tax Laws Amendment (Loss Recoupment Rules and Other Measures) Bill 2005
Sch 1 174
Tax Laws Amendment (Political Contributions and Gifts) Bill 2008 82
Tax Laws Amendment (Political Contributions and Gifts) Bill 2010 ....76, 82
Tax Laws Amendment (Research and Development) Bill 2010 ....133, 134
Tax Laws Amendment (Small Business Restructure Roll-over) Bill 2016 378
Tax Laws Amendment (Tax Incentives for Innovation) Bill 2016 66
Taxation Administration Act 1953 .... 93, 183, 269
Pt IVC 84–86, 270, 320
s 8AAG 32
s 14ZZK 84
s 14ZZK(b)(i) 24
s 14ZZO 84, 322
s 14ZZO(b)(i) 24
Sch 1
– Div 268 189
– Div 269 184
– Div 290 26
– Div 353 ....24, 25
– Div 370 359
– Subdiv 290-C 134
– Subdiv 290-D 134
– Subdiv 396-B 57
– s 12-35 ....183, 184
– s 12-40 183
– s 12-47 183
– s 12-60 183
– s 12-190 183
– s 14-5 ....183, 184
– s 14-15 194
– s 16-25 ....184, 195
– s 16-25(1) 186, 194
– s 16-25(2) 195
– s 16-30 184
– s 16-70 184
– s 16-150 ....184, 186, 194
– s 26-105 184–186
– s 26-105(1) 186
– s 26-105(1)(a)(ii) 186
– s 26-105(1)(b)(i) 186
– s 26-105(2) 186
– s 26-105(7) 184–186
– s 26-105(8) 184–186
– s 265-90(1) 93
– s 284-75(1) 172, 322
– s 284-75(2) 171
– s 284-75(5) 171, 172
– s 284-90 ....171, 172
– s 284-90(1) 171
– s 284-225 185
– s 288-25 296
– s 290-50(1) 130
– s 290-60 130
– s 290-65 ....130, 131
– s 353-10 ....21, 322
– s 353-15 ....21, 322
– s 353-25 322
– s 355-50(2) 236
– s 355-72(1) 164
– s 370-5 360
– s 370-5(1)(a) 363
– s 370-5(1)(b) 363
– s 370-5(1)(b)(i) 363
– s 370-5(1)(b)(ii) 363
– s 370-5(1)(c) 363
– s 370-5(4) 363
– s 370-5(5) 363
– s 370-15 364
– s 370-20 364
– s 384-10(1) 93
– s 389-5 ....184, 186, 194
– s 389-20 ....184, 190
– s 396-55 187
– s 396-70(4) 187
Taxation Administration Act 1996 (NSW)
s 88 88
Taxation Administration Act 1996 (SA)
s 85 88
Taxation Administration Act 1997 (Tas)
s 81 88
Taxation Administration Act 1997 (Vic)
s 98 88
Taxation Administration Act 2001 (Qld)
s 66 88
Taxation Administration Act 2003 (WA)
s 37 88
Taxation Administration Regulations 1976
reg 64 195
Taxation Administration Regulations 2017
reg 70 187
Taxation Administration (Tax Debt Information Disclosure) Declaration 2019 164
Trade Practices Act 1974
s 155 36
Treasury Laws Amendment (2018 Measures No. 4) Act 2019 ....189, 193
Treasury Laws Amendment (2018 Superannuation Measures No. 1) Act 2019 ....233, 325
Sch 2 325
Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2018 325
Treasury Laws Amendment (2019 Measures No. 2) Bill 2019 233
Treasury Laws Amendment (2019 Measures No. 3) Bill 2019 .... 349, 362, 364
Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Act 2019 ....289, 294
Sch 3 294
Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019 ....109, 164, 193, 195
Sch 3 ....113, 203, 205, 207, 208
Treasury Laws Amendment (Black Economy Taskforce Measures No. 1) Act 2018 .... 187, 193
Treasury Laws Amendment (Black Economy Taskforce Measures No. 2) Act 2018 .... 187, 194, 195
Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 ....109, 189, 193
Treasury Laws Amendment (International Tax Agreements) Bill 2019 233
Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax in Australia and Other Measures) Act 2019 99
Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax in Australia and Other Measures) Bill 2018 99
Treasury Laws Amendment (Making Sure Multinationals Pay Their Fair Share of Tax in Australia and Other Measures) Bill 2019 110
Treasury Laws Amendment (Measures for a later sitting) Bill 2018 ....73, 74
Treasury Laws Amendment (Measures for a later sitting) Bill 2019 ....213, 230
Treasury Laws Amendment (Measures for Consultation) Bill 2019 .... 298, 379, 392
Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures) Bill 2019 289
Treasury Legislation Amendment (Repeal Day) Act 2015 25
Treasury Legislation Amendment (Repeal Day) Bill 2014 25

Rulings and other materials

Australian Taxation Office
CRP 2017/1 ....360, 363, 364
CRP 2017/2 ....361, 364
CRP 2020/1 361
GSTD 2002/3 188
GSTR 2001/4 200
GSTR 2019/D2 235
ID 2003/589 233
ID 2007/60 324
IT 2650 ....302, 304–306
LCG 2016/2 377
LCG 2016/3 .... 377, 378
LCR 2015/1 100
LCR 2017/D6 5
LCR 2018/8 .... 187, 188
LCR 2018/9 212
LCR 2018/D8 .... 187, 188
LCR 2018/D10 201
LCR 2019/1 5
LCR 2019/4 ....188, 195
LCR 2019/4EC 195
LCR 2019/D2 ....99, 100
LCR 2019/D3 .... 233, 325, 326
MT 2012/3 185
PBR 76868 324
PBR 1012191260298 373
PBR 1051238902389 375
PBR 1051286776633 378
PBR 1051386393245 378
PBR 1051386604629 378
PBR 1051401067097 378
PBR 1051401566911 377
PBR 7920126593966 378
PCG 2016/6 199
PCG 2016/16 .... 382, 383
PCG 2017/2 235
PCG 2017/13 58
PCG 2019/5 ....58, 151–153, 314
PCG 2019/5EC 153
PCG 2019/D2 ....199, 200
PCG 2019/D3 218–220
PCG 2019/D6 ....234, 326
PS LA 2003/12 312
PS LA 2007/11 364
PS LA 2009/4 57
PS LA 2010/4 58
PS LA 2011/27 162
SGR 2005/1 92
SGR 2009/2 92
SMSFR 2009/3 210
TA 2015/3 ....133, 134
TA 2017/1 99
TA 2017/2 ....133, 134
TA 2017/3 ....133, 134
TA 2017/4 ....133, 134
TA 2017/5 ....133, 134
TA 2018/1 198
TA 2019/2 290
TD 1999/67 9
TD 1999/68 ....8, 9
TD 1999/83 91
TD 2000/15 9
TD 2004/3 315
TD 2007/11 380
TD 2017/23 ....323, 324
TD 2017/24 ....323, 324
TD 2018/D3 ....373, 374
TD 2019/7 324
TD 2019/10 .... 110, 148, 150
TD 2019/11 110
TD 2019/12 148–150
TD 2019/14 379
TD 2019/D5 166
TD 2019/D6 .... 166, 167, 323, 324
TD 2019/D7 .... 167, 323, 324
TD 2019/D8 ....234, 235
TD 2019/D9 233
TD 2019/D10 291
TD 2019/D11 290
TPRS 2019/1 ....57, 187, 195
TR 93/8 172
TR 95/35 200
TR 98/17 ....302, 304–306
TR 1999/10 83
TR 2003/1 ....218, 219
TR 2006/14 317
TR 2007/1 148
TR 2010/1 200
TR 2014/7 199
TR 2017/D10 372
TR 2018/5 91
TR 2018/6 ....372, 377
TR 2019/1 .... 11, 13
TR 2019/2 5
TR 2019/6 350
TR 2019/D2 ....218, 219
TR 2019/D4 291
TR 2019/D6 349
Department of Justice (WA)
Legal Profession Conduct Rules 2010 26
Double tax agreements
Australia–UK
– art 25 292
Australia–US
– art 22(2) 169
Federal Register of Legislation
Federal Court Rules 2011
– r 30.23(g) 268
Revenue NSW
Revenue Ruling LT 003v2 262
Tax Practitioners Board
Code of Professional Conduct 111

Cases

12 Years Juice Foods Australia Pty Ltd v FCT [2015] FCA 741 ....21, 24, 25

A
Adamas v O'Connor (2011) 282 ALR 302 24
Addy v FCT [2019] FCA 1768 ....291, 304, 306
AGC (Investments) Ltd v FCT (1991) 21 ATR 1379 40
Allen v FCT [2011] FCAFC 118 172
Allied Pastoral Holdings Pty Ltd v FCT [1983] 1 NSWLR 1 89
Amede's case: International Indigenous Football Foundation Australia Pty Ltd; FCT v [2018] FCA 528 131
Applegate; FCT v (1979) 38 FLR 1 ....303, 304
Applegate v FCT [1978] 1 NSWLR 126 304
Archibald Howie Pty Ltd v Commr of Stamp Duties (NSW) [2005] HCA 3 47
Ariss and FCT [2019] AATA 2958 168
Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd (No. 4) [2014] FCA 796 ....22, 24
Ashton and Ashton [1986] FamCA 20 397
Attorney-General (NT) v Kearney (1985) 158 CLR 500 25
Attorney-General (NT) v Maurice (1986) 161 CLR 475 ....24, 25
Augustus v Permanent Trustee Co (Canberra) Ltd [1971] HCA 25 373
Aurora Developments Pty Ltd v FCT (No. 2) [2011] FCA 1090 173
Australia and New Zealand Savings Bank Ltd; FCT v (1994) 1 81 CLR 466 88
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 37
Australian Competition and Consumer Commission v Air New Zealand Ltd (No. 1) (2012) 207 FCR 448 89
Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (1998) 81 FCR 526 24
Australian Securities and Investments Commission v Rich [2005] NSWSC 417 89
Australian Workers' Union v BlueScope Steel (AIS) Pty Ltd [2018] FCA 80 92
AWB Ltd v Cole (2006) 152 FCR 382 25
AWB Ltd v Cole (No. 5) [2006] FCA 1234 24

B
Baba v Sheehan [2019] NSWSC 1281 263
Baker v Campbell [1983] HCA 39 ....20, 25, 26
Bamford; FCT v [2010] HCA 10 323
Barnes v FCT [2007] FCAFC 88 25
Bellinz v FCT (1998) 39 ATR 198 40
Bernard & Bernard [2019] FamCA 421 394–397
Bosanac v FCT [2019] FCAFC 116 ....111, 112
BP Australia Ltd v FCT [1965] UKPCHCA 2 ....329, 330
Brassey v Chalmers [1852] EngR 995 264
Brine v Carter [2015] SASC 205 ....41, 42
Burgess v Burgess [2018] WASC 279 41–43
Burton v FCT [2019] FCAFC 141 169
Bywater Investments Ltd v FCT; Hua Wang Bank Berhad v FCT [2016] HCA 45 ....90, 236

C
Cameco Corporation v The Queen [2018] TCC 195 ....333, 371
Cameron Brae Pty Ltd v FCT [2007] FCAFC 135 172
Cameron v FCT [2012] FCAFC 76 215
Campbell and FCT [2019] AATA 2043 110
Campbell v TL Clacher No. 2 Pty Ltd [2019] QSC 218 271–274
Caratti v The Queen [2000] WASCA 279 89
Carter v Northmore Hale Davy & Leake [1995] HCA 33 24
Case H33, 76 ATC 285 81
Cassaniti; FCT v [2018] FCAFC 212 84–88
Castagna v R; Agius v R [2019] NSWCCA 114 58
Cavill Hotels Pty Ltd, Re [1998] 1 Qd R 396 372
CBA Investments Ltd v Northern Star Ltd [2002] NSWCA 94 65
CDPV Pty Ltd v Commr of State Revenue [2017] VSCA 89 144–146
CDPV Pty Ltd v Commr of State Revenue (Vic) (2016) 103 ATR 385 88
Chevron Australia Holdings Pty Ltd v FCT [2017] FCAFC 62 332
Chevron Australia Holdings Pty Ltd v FCT (No. 4) [2015] FCA 1092 ....85, 89
Chief Commissioner of State Revenue (NSW) v Dick Smith Electronics Holdings Pty Ltd [2005] HCA 3 47
Chief Commissioner of State Revenue (NSW) v Metricon Qld Pty Ltd [2017] NSWCA 11 145
Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd (2003) 216 CLR 161 88
Citibank Ltd; FCT v (1989) 20 ATR 292 ....21, 25
Citylink Melbourne Ltd; FCT v [2006] HCA 35 329
Clements, Dunne & Bell Pty Ltd v Commr of Australian Federal Police (2001) 48 ATR 650 ....22, 25
Collier v Hicks [1831] EngR 686 268
Colonial First State Investments Ltd v FCT [2011] FCA 16 ....381, 382
Commissioner of Australian Federal Police v Propend Finance Pty Ltd (1997) 188 CLR 501 ....24, 25
Commissioner of State Revenue v Placer Dome Inc [2018] HCA 59 27–30
Commissioner of State Revenue v The Optical Superstore Pty Ltd [2018] VSC 524 251
Commissioner of State Revenue v The Optical Superstore Pty Ltd [2019] VSCA 197 248–251
Commonwealth v Director, Fair Work Building Industry Inspectorate [2015] HCA 46 ....389, 391
Construction, Forestry, Mining and Energy Union v Port Kembla Coal Terminal Ltd [2015] FCA 282 ....21, 25
Coombes (No. 2); FCT v (1999) 92 FCR 240 21
Coshott v FCT [2015] FCAFC 71 296
Council of the City of Newcastle v Royal Newcastle Hospital [1957] HCA 15 354
Currie v Dempsey (1967) 69 SR (NSW) 116 88

D
Dalco; FCT v (1990) 168 CLR 614 84
Damjanovic v Maley [2002] NSWCA 230 269
Daniels Corporation International Pty Ltd v ACCC [2002] HCA 49 ....24, 25
Davidson and Davidson (1991) FLC ¶92-197 397
Davis Investments Pty Ltd v Commr of Stamp Duties (NSW) (1958) 100 CLR 392 47
Deloitte Touche Tohmatsu v DCT (1998) 40 ATR 435 25
Dempsey and FCT [2014] AATA 335 305
Dickinson v Minister of Pensions [1953] 1 QB 228 88
Donoghue; FCT v [2015] FCAFC 183 25
Douglass v FCT [2019] FCA 1246 ....167, 195

E
Eichmann; FCT v [2019] FCA 2155 353–355
Eichmann and FCT [2019] AATA 162 353
Ellison v Sandini Pty Ltd [2018] FCAFC 44 376
Energy Resources of Australia Ltd; FCT v [1996] HCA 10 172
Engineering Manager and FCT [2014] AATA 969 305
Ensham Resources Pty Ltd v AIOI Insurance Co Ltd (2012) 209 FCR 1 25
Essex and Essex [2009] FamCAFC 236 397
Esso Australia Resources Ltd v FCT (1999) 201 CLR 49 ....20, 21, 24, 25

F
First Master Capital Pty Ltd v Chief Commr of State Revenue [2019] NSWCATAD 35 45–47
Flegg and FCT [2007] AATA 1336 81
Fortunatow v FCT [2019] FCA 1247 ....167, 195, 215
Freelance Global Ltd v Chief Commr of State Revenue [2014] NSWSC 127 249
Fundy Settlement v Canada [2012] 1 SCR 520 90

G
George v FCT (1952) 86 CLR 183 ....84, 88
Glencore Investment Pty Ltd v FCT [2019] FCA 1432 ....332–334, 371
Glengallan Investments Pty Ltd v Arthur Andersen [2001] QCA 115 25
Gonciarz v Bienias [2019] WASC 104 41–44
Gould and Tax Practitioners Board [2019] AATA 1056 6
Grant v Downs [1976] HCA 63 ....20, 24, 25
Greenhatch; FCT v [2012] FCAFC 84 240
Grofam Pty Ltd v Australia and New Zealand Banking Group Ltd (1993) 43 FCR 408 25
Guest v FCT [2007] FCA 193 89
Guss v DCT [2006] FCAFC 88 ....35–37, 40

H
Handsley and FCT [2019] AATA 917 6
Harding; FCT v [2019] HCA Trans 191 ....302, 305
Harding v FCT [2018] FCA 837 303
Harding v FCT [2019] FCAFC 29 ....90, 302–304
Haritos v FCT [2015] FCAFC 92 85
Harris and Harris [1991] FamCA 124 397
Harris & Dewell [2018] FamCAFC 94 395
Hart v FCT [2019] FCAFC 179 293
Healius Ltd v FCT [2019] FCA 2011 351
Hii v FCT [2019] FCA 1589 268–270
Hii v FCT [2019] HCATrans 97 268–270
Hodge v Griffiths [1940] Ch 260 317
Howard and FCT [2019] AATA 1910 111
Hua Wang Bank Berhad v FCT [2014] FCA 1392 6

I
ICAC v Cunneen (2015) 256 CLR 1 40
ICM Agriculture Pty Ltd v The Commonwealth [2009] HCA 51 329
In the marriage of Goodwin [1990] FamCA 147 397
International Indigenous Football Foundation Australia Pty Ltd; FCT v [2018] FCA 528 ....131, 132

J
JEL and DDF [2001] FamCA 1353 397
Jenkins v Ellett [2007] QSC 154 372
JMA Accounting Pty Ltd v Carmody 2004 ATC 4916 25
John v FCT [1989] HCA 5 290
Jones v Dunkel [1959] HCA 8 ....86, 96
Jordan, Commissioner of Taxation v Second Commr of Taxation [2019] FCA 1602 235

K
Kafataris v DCT [2008] FCA 1454 381
Karger v Paul [1984] VR 161 271
Kearns v Hill (1990) 21 NSWLR 107 372
Kelly and Kelly (No. 2) [1981] FamCA 78 397
Kennedy v Wallace [2004] FCAFC 337 25
Kennon v Spry [2008] HCA 56 397
Koitaki Para Rubber Estates Ltd v FCT (1941) 64 CLR 241 91
Krok v FCT [2015] FCA 51 22

L
Leda Manorstead Pty Ltd v Chief Commr of State Revenue (NSW) [2010] NSWSC 867 147
Lemongrove Services Pty Ltd v Rilroll Pty Ltd [2019] NSWCA 174 320
Linfox Transport (Aust) Pty Ltd v Arthur Yates & Co Ltd [2003] NSWSC 876 89
Londonderry's Settlement, Re [1965] Ch 918 274
Ludekens; FCT v [2013] FCAFC 100 131

M
Ma; FCT v (1992) 37 FCR 225 85
Mann v Carnell (1999) 201 CLR 1 25
Mansell v Mansell [1732] EngR 187 264
Marsella, Re; Marsella v Wareham (No. 2) [2019] VSC 65 ....43, 274
Mayor of Wellington v Mayor of Lower Hutt [1904] AC 773 9
McIntosh v McIntosh [2014] QSC 99 ....41, 42
McKenzie v McKenzie [1971] P 33 268
Melbourne Apartment Project Pty Ltd (as Trustee for Melbourne Apartment Project) v FCT [2019] FCA 2118 350
Mercanti v Mercanti [2015] WASC 297 263
Mercanti v Mercanti [2016] WASCA 206 274
Messenger Press Pty Ltd; FCT v [2013] FCAFC 77 ....172, 173
Miley; FCT v [2017] FCA 1396 253
Miley and FCT [2019] AATA 5540 352
Minera Las Bambas SA v Glencore Queensland Ltd [2018] EWHC 1658 61–65
Minera Las Bambas SA v Glencore Queensland Ltd [2019] EWCA Civ 972 61–65

Mingos v FCT [2019] FCA 834 .... 59, 95–97, 320–322
Minister for Immigration and Multicultural and Indigenous Affairs v SGLB (2004) 78 ALD 224 25
Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd [2004] FCAFC 72 389
Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority (2002) 4 VR 332 25
Montevento Holdings Pty Ltd v Scaffidi [2012] HCA 48 264
Montifiore v Browne [1858] EngR 1053 264
Moreton Resources Ltd, Re and Innovation and Science Australia [2018] AATA 3378 .... 124, 126–128
Moreton Resources Ltd v Innovation and Science Australia VID1291/2018 126–128
Morton v Chief Adjudication Officer [1988] IRLR 444 63
Murry; FCT v [1998] HCA 42 27–30

N
Narumon Pty Ltd, Re [2018] QSC 185 43
NW Frozen Foods Pty Ltd v ACCC [1996] FCA 1134 389

O
Oceanic Life Ltd v Chief Commr of Stamp Duties (NSW) [1999] NSWCA 416 114
Ogden & Ogden [2010] FMCAfam 865 394
On Call Interpreters and Translators Agency Pty Ltd v FCT (No. 3) [2011] FCA 366 92
ONE.TEL Ltd v DCT [2000] FCA 270 22
Optical Superstore Pty Ltd v Commr of State Revenue (Review and Regulation) [2018] VCAT 169 248–251
O'Toole v Scott [1965] AC 939 268

P
Pavihi; FCT v [2019] FCA 2056 388
Pintarich v DCT [2017] FCA 944 31–39
Pintarich v DCT [2018] FCAFC 79 31–39
Pintarich v DCT [2018] HCASL 322 31
Placer Dome case: Commr of State Revenue v Placer Dome Inc [2018] HCA 59 27–30
Pollitt v R [1992] HCA 35 319
Potts v Miller [1940] HCA 453 171
Pratt Holdings Pty Ltd v FCT [2004] FCAFC 122 .... 21, 24
Pratt Holdings Pty Ltd v FCT [2005] FCA 1247 .... 24, 25
Price v FCT [2019] FCA 543 .... 84, 87
Prudential case: R (on the application of Prudential plc) v Special Commr of Income Tax [2013] UKSC 1 .... 23, 26

Q
Quality Publications Australia Pty Ltd v FCT [2009] FCA 1293 25

R
R (on the application of Prudential plc) v Special Commr of Income Tax [2013] UKSC 1 .... 23, 26
Ramsden v FCT [2004] FCA 632 317
RBPK and Innovation and Science Australia [2018] AATA 1404 133
RCI Pty Ltd v FCT (2009) 76 ATR 591 25
Republic of Nauru v WET040 [No. 2] [2018] HCA 60 171

Ricegrowers Co-operative Mills Ltd v Bannerman and Trade Practices Commission (1981) 38 ALR 535 .... 35, 36
Rigoli and FCT [2015] AATA 169 89
Rigoli v FCT [2016] FCAFC 38 85
Rinehart v Hancock Prospecting Pty Ltd [2019] HCA 13 377
Rio Tinto Ltd; FCT v (2006) 63 ATR 79 25
Ronpibon Tin NL and Tongkah Compound NL v FCT [1949] HCA 15 133
Roszkiewicz and FCT [2019] AATA 931 7
Rus and FCT [2018] AATA 1854 354
Ryan Wealth Holdings Pty Ltd v Baumgartner [2018] NSWSC 1502 .... 265, 386

S
Scaffidi v Montevento Holdings Pty Ltd [2011] WASCA 146 264
Scott , Re and ASIC [2009] AATA 798 6
SDRQ and FCT [2019] AATA 2003 320–322
Semunigus v Minister for Immigration and Multicultural Affairs [1999] FCA 422 .... 35, 37, 38
Semunigus v Minister for Immigration and Multicultural Affairs (2000) 96 FCR 533 35
Sharpcan Pty Ltd; FCT v [2019] HCA 36 .... 292, 328–331
Shin Kobe Maru v Empire Shipping Co Inc (1994) 181 CLR 404 40
Shmuel and Tax Practitioners Board [2019] AATA 2168 111
Sinclair and FCT [2010] AATA 902 23
Skeats' Settlement, Re (1889) 42 Ch D 522 264
Slater Holdings Ltd; FCT v [1984] HCA 78 171
Smorgon v FCT (1979) 9 ATR 483 25
SNF (Australia) Pty Ltd v FCT [2010] FCA 635 333
Sole Luna Pty Ltd as Trustee for the PA Wade No. 2 Settlement Trust v FCT [2019] FCA 1195 170
Spencer v Commonwealth [1907] HCA 82 252
Steele v FCT [1999] HCA 7 73
Stein and Stein (1986) FLC ¶92-804 397
Stewart v FCT [2010] FCA 402 25
Stockton v FCT [2019] FCA 1679 .... 292, 304, 306

T
Thomas; FCT v [2018] HCA 31 .... 88, 141
Thomas v FCT [2015] FCA 968 141
Thorne v Kennedy [2017] HCA 49 376
Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union [1979] FCA 85 114
Tooheys Ltd v Commr of Stamp Duties (NSW) [1961] HCA 35 114
Trade Practices Commission v CSR Ltd [1990] FCA 762 391
Trani v Trani [2018] VSC 274 274
Trustee for the Estate of the late AW Furse No. 5 Will Trust v FCT 91 ATC 4007 375
Trustee for the Michael Hayes Family Trust; FCT v [2019] FCAFC 226 352
Trustee for the Seabreeze Estate Unit Trust and FCT [2019] AATA 1395 59

U
Ultimate Vision Inventions Pty Ltd and Innovation and Science Australia [2019] AATA 1633 .... 129, 133

Union-Fidelity Trustee Co of Australia Ltd v FCT [1969] HCA 36 173

V
VCJN and FCT [2019] AATA 968 7
Visy Industries Holdings Pty Ltd v ACCC [2007] FCAFC 147 25

W
Wade; FCT v (1951) 84 CLR 105 40
Walstern v FCT [2003] FCA 1428 172
Walton v R [1989] HCA 9 319
Waterford v Commonwealth [1987] HCA 25 .... 24, 25
White Industries Australia Ltd v FCT (2007) 160 FCR 298 25
Wilcox; FCT v 1982 ATC 4411 81
Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq) (No. 5) [2011] FCA 245 25
Wood v Capita Insurance Services Ltd [2017] AC 1173 63
WR Carpenter Holdings Pty Ltd v FCT [2008] HCA 33 333

Authors

A

Alfonsi, N
Issues for large superannuation funds 196

Ananda, A
Tax Counsel's Report
– Legal professional privilege under fire? 4
– Tax debt disclosure 164
– Trade-offs and the federal Budget 288

Ashworth, C
Deceased estates, real property and real issues 307

B

Backhaus, S
Superannuation
– Executors, SMSFs and conflicts of duty 41

Baghdasarayan, E
Alternative Assets Insights
– PCG 2019/D3: a way forward on the ALDT 218

Banister, P
The black economy measures: how they affect you and your clients 181

Bell, K
In-house facilitation, test cases and the AAT Small Business Division 135

Bembrick, P
Mid Market Focus
– Think you're selling shares in a small business? Guess again 241
– When is a company carrying on a business? 11

Bevan, C
Difficulties in settling disputes with the Commissioner of Taxation 31

Blissenden, M
Residence tests for individuals: impact of the Harding decision 302

Brandon, G
Mid Market Focus
– ASX listed junior exploration companies and tax losses: part 1 174

Brydges, N
A Matter of Trusts
– Residency of a trust, "don't get it wrong" 90

Burgess, M
Tax and estate planning in 2020: what has changed? 372

Burnett, C
International tax: "pillars" of strength or ruins in the making? 365

Burns, A
Mid Market Focus
– Black economy measures increase taxpayers' compliance 118

Butler, D
Superannuation
– Downsizer contributions: basics, tips and traps 211
– Executors, SMSFs and conflicts of duty 41
– Is the SG system in need of an urgent overhaul? 92
– NALI warning: LCR 2019/D3 325
– SMSF investment strategies: are they a financial product? 265
– SMSFs investing via unit trusts 142
– When SMSF advice is unlawful 384

C

Calokerinos, W
Reliability of evidence in tax disputes 319

Campbell, S
A Matter of Trusts
– TD 2019/D6 and TD 2019/D7: (further) unintended consequences? 323

Cardwell, J
Member Profile 19

Caredes, S
Tax Counsel's Report
– Guidance for tax and superannuation laws 108
– Is the turbulence over? 56

Castelyn, D
Privilege or concession: the modern tax adviser's challenge 20

Cheah, W
Alternative Assets Insights
– ATO guidance on non-concessional MIT income 99

Chu, H
Assessing market value ratios for roll-over relief provisions 252
The Placer case (2018) from a valuation perspective 27

Colaluca, M
A Matter of Trusts
– Reg 13.22C unit trusts – opportunity or burden? 209

Collins, P
Alternative Assets Insights
– Glencore v FCT: transfer pricing decision 332

Connor, L
Member Profile 180

Cormick, R
Member Profile 246

Crosland, V
Alternative Assets Insights
– Significant global entities 392

D
De Zilva, N
Reconsidering the Commissioner's remedial power 359
Donald, A
Member Profile 357

E
Einsiedel, L
Successful Succession
– Walls close in on trustee discretion 271

F
Figot, B
Superannuation
– NALI warning: LCR 2019/D3 325
– SMSF investment strategies: are they a financial product? 265
Folan, R
Tax Education
– How tax study can have a real impact 179
– Not just another program 69
– Tax Agent Program: advance your knowledge 244
– The challenge in the juggle 14
– The CTA Program: a good foundation for YTPs 120
Forsyth, A
Mid Market Focus
– ESIC tax incentives: how well are they understood? 66

G
Godber, P
President's Report
– Looking ahead with 2020 vision 346
Gunthorpe, B
Resolving R&D disputes 124

H
Hanna, N
Applying Subdiv 207-B and Div 6 to franked distributions 138
Houseman, N
Alternative Assets Insights
– PCG 2019/D3: a way forward on the ALDT 218
Hurst, G
CEO's Report
– With a view to the future 55
– Another eventful year at The Tax Institute 287
– Progress is impossible without change 3
– Recognising our family of members 231
– Stepping into a season of new beginnings 107
– The best is yet to come 347
– 'Tis the season for CPD 163

J
Jones, D
Mid Market Focus
– Testamentary trusts: reforms at a trickle 297

K
Kenny, P
Residence tests for individuals: impact of the Harding decision 302
Krunic, D
Are all dwellings "substantial and permanent structures"? 203
No restrictions to negative gearing? Think again! 73

L
Landsberg, S
Alternative Assets Insights
– ATO views on cross-border debt issues 148
Lonergan, W
The Placer case (2018) from a valuation perspective 27

M
Marateo, D
SA land tax developments: aggregation avalanche 254
McEvoy, R
Payroll tax game changer? Optical Superstore decision 248
McKee, M
Payroll tax game changer? Optical Superstore decision 248
Monotti, W
A Matter of Trusts
– The appointor: common problems 263
Morgan, A
Privilege or concession: the modern tax adviser's challenge 20

N
Neilson, T
President's Report
– A nation of (sometimes reluctant) gamblers 162
– Getting involved will ensure your voice is heard 2
– Not goodbye, but reflection and thanks 286
– The music of the spheres 106
– What constitutes a "tax professional"? 54
– Why tax is much more than technical skills 230
Nickless, J
Alternative Assets Insights
– PCG 2019/D3: a way forward on the ALDT 218
Noah, K
Superannuation
– Is the SG system in need of an urgent overhaul? 92
Norbury, M
Tax Cases
– Aggregation and duty 45
– Fortunatow and personal services income 215
– Is it a capital or an income expense? 328
– Pavihi – the helpful bank teller 388
– Subjective intention and land tax 144
– The case of the knight's advocate 268
– Who owned the residence? 95

P
Pandey, R
In-house facilitation, test cases and the AAT Small Business Division 135
Pascale, J
SA land tax developments: aggregation avalanche 254
Paynter, H
Resolving R&D disputes 124
Peiros, K
Successful Succession
– Family law asset protection of a testamentary trust 394
– Main residence and pre-CGT dwellings exemptions 151
Pinto, D
Privilege or concession: the modern tax adviser's challenge 20

Q
Quigley, B
Senior Adviser's Report
– Review of the Tax Practitioners Board 232
– Tax reform can't wait 348

R
Redenbach, G
The onus of proof following the Cassaniti decision 84
Reeves, J
Member Profile 122
Rocher, K
Successful Succession
– Main residence and pre-CGT dwellings exemptions 151

S
Sahyoun, C
Alternative Assets Insights
– ATO guidance on non-concessional MIT income 99
Savvas, K
Member Profile 301
Scotland, J
Alternative Assets Insights
– ATO guidance on non-concessional MIT income 99
Slegers, P
SA land tax developments: aggregation avalanche 254
Sokolowski, P
Member Profile 72
Spencer, L
A Matter of Trusts
– Trusts and the franking credits trap: can we fix it? 380
Stoyanova, T
Alternative Assets Insights
– Significant global entities 392

T
Tam, G
Payroll tax game changer? Optical Superstore decision 248
TaxCounsel Pty Ltd
Tax News – what happened in tax?
– June 2019 5
– July 2019 57
– August 2019 109
– September 2019 166
– October 2019 233
– November 2019 289
– December 2019 349
Tax Tips
– Active asset test 353
– CGT main residence: adjacent land issues 8
– Tax indemnities 61
– Testamentary trusts and minors 238
– Vacant land: the deduction amendments 113
– Vacant land deductions 294
– Were there loans? 170
Thomson, C
Issues for large superannuation funds 196

V
Villios, S
Residence tests for individuals: impact of the Harding decision 302

W
Wallis, C
Elections: outlays by candidates, and gifts and donations for candidates 76
Wilson, B
Deceased estates, real property and real issues 307

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

General Manager, Knowledge and Learning
Alexandra Wilson

Managing Editor
Deborah Powell

Content Consultant
Bob Deutsch

Graphic Designers
Mei Lam
Nicole Welch

Typesetter
Midland Typesetters, Australia

Advertising
Wayne Flekser 02 8223 0071

© 2020 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.

Contacts

National Council

President
Peter Godber, CTA

Vice President
Jerome Tse, CTA

Treasurer
Stuart Glasgow, CTA

National Councillors
Paul Banister, CTA
David Earl, FTI
Len Hertzman, CTA
Marg Marshall, CTA
Eddy Moussa, CTA
Tim Sandow, CTA
Todd Want, CTA

National Office

CEO: Giles Hurst
Level 37, 100 Miller Street
North Sydney, NSW 2060

Tel: 02 8223 0000
Email: ceo@taxinstitute.com.au

State Offices

New South Wales and ACT

Chair: Rae Ni Corraidh, CTA
Manager: Leanne Carter
Level 37, 100 Miller Street
North Sydney, NSW 2060

Tel: 02 8223 0031
Email: nsw@taxinstitute.com.au

Victoria

Chair: Fiona Knight, CTA
Manager: Brian Martin
Level 3, 530 Collins Street
Melbourne, VIC 3000

Tel: 03 9603 2000
Email: vic@taxinstitute.com.au

Queensland

Chair: John Ioannou, CTA
Manager: Paula Quirk Russo
Level 11, Emirates Building
167 Eagle Street
Brisbane, QLD 4000

Tel: 07 3225 5200
Email: qld@taxinstitute.com.au

Western Australia

Chair: Bill Keays, CTA
Manager: Brian Martin
Level 10, Parmelia House
191 St Georges Terrace
Perth, WA 6000

Tel: 08 6165 6600
Email: wa@taxinstitute.com.au

South Australia and Northern Territory

Chair: Peter Slegers, CTA
Manager: Craig Spurr
Ground Floor, 5-7 King William Road
Unley, SA 5061

Tel: 08 8463 9444
Email: sa@taxinstitute.com.au

Tasmania

Chair: Ian Heywood, CTA
Manager: Craig Spurr
Level 3, 530 Collins Street
Melbourne, VIC 3000

Tel: 1800 620 222
Email: tas@taxinstitute.com.au

THE TAX INSTITUTE

0024KNOW_02/20

taxinstitute.com.au