THE TAX INSTITUTE

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1 Cases

1.1 WYPF – non-cash consideration and margin scheme

Facts

WYPF was a successful bidder for residential development land offered by the ACT Land Development Authority (**SLA**) for auction. WYPF entered into a series of transactional documents with SLA, including:

1. a contract of sale under which WYPF paid a cash consideration of $14,000,000 in exchange for a grant of a holding lease;
2. a holding lease for a term for a term of 66 months at a nominal rent for the purpose of subdivision and construction of works in accordance with the deed of agreement. If the construction of works was not completed within 48 months the lease was subject to termination. A Consequent Lease needed to be applied for within 6 months of completion of each stage of development;
3. a deed of agreement requiring WYPF to undertake staged development of the land and preparatory works (**Preparatory Works**) in exchange for the progressive, stage-by-stage grant of leases to WYPF and a corresponding progressive surrender of the holding lease;
4. consequent 99 years leases (**Consequent Leases**) granted progressively to WYPF upon completion of the Preparatory Works and the issue of a Certificate of Practical Completion of those works.

Under the Consequent Leases, there were provisions requiring WYPF to complete the construction of residential premises (**Building Works**) within 48 months in default of which the Consequent Leases may be forfeited.

The value of the Preparatory Works was $29,700,648 and the value of the Building Works was $77,034,265.

On the completion of the residential development, WYPF sold apartments to residential purchasers.

WYPF was eligible to work out its GST liability on these sales under the margin scheme, broadly being one-eleventh of the difference between the sale price of the apartment and the relevant proportion of the consideration provided by WYPF for the acquisition of the undeveloped land.

WYPF applied for private binding rulings and engaged in correspondence with the ATO to clarify whether the value of the Preparatory Works and the Building Works constituted non-monetary consideration for WYPF's acquisition of the land.

The ATO accepted that the monetary consideration was paid for the acquisition of the land and ultimately accepted that the Preparatory Works constituted non-monetary consideration for the acquisition of the land. However, did not accept that the Building Works were non-monetary consideration for the land, as the Building Works were carried out for WYPF's own commercial ends.

In respect of the Preparatory Works, the ATO's view regarding the precise value of the Preparatory Works was unclear. This issue arose because, although the parties agreed on the value of the Preparatory Works, there was an issue concerning the effect of an outstanding invoice issued by WYPF to the SLA claiming $2,869,857 for GST on WYPF's supply of the Preparatory Works, in respect of which WYPF intended to issue an adjustment note for $500,499. The ATO considered that non-monetary consideration of the Preparatory Works should be reduced by the amount claimed under this invoice.

WYPF lodged its GST returns on account of its GST liability on its sales of the apartments on a conservative basis by excluding the excluding the value of the Preparatory Works and the Building Works in calculating the margins on the sales. This was despite some of its BASs being lodged after it was clear that the ATO was prepared to treat the value of the Preparatory Works as part of the consideration paid for the land.

WYPF objected to the GST assessments on the ground that by not taking into account the value of the Preparatory Works and the Building Works, it overpaid GST and was entitled to a refund of the overpaid amount.

The ATO disallowed the objection on the basis that WYPF had passed on any overpaid GST to the purchasers, so that section 142-10 of the *A New Tax System (Goods and Services Tax) Act* 1999 applied to deem those overpaid GST amounts has having been correctly payable, and so not refundable. In effect, such amounts are not

refundable unless the taxpayer has reimbursed the recipient of the supply for the excess GST that it has passed on. Section 142-10 of the GST Act does not apply if the GST was never 'passed on' to a recipient of a supply.

WYPF appealed the objection decision to the AAT on the basis that:

1. the Building Works constituted consideration for the acquisition of the land;
2. the value of the Preparatory Works was the full amount agreed by the parties, notwithstanding the proposed adjustment;
3. it did not pass on the GST to residential purchasers; and
4. if it did pass on the GST, section 142-10 of the GST Act should be treated as not applying in accordance with section 142-15(1).

Section 145-15(1) of the GST Act effectively provides that section 142-10 does not apply if applying that section would be inconsistent with the principle that excess GST should not be refunded so as to provide a windfall gain to the supplier.

In respect of the Building Works, consideration as defined in section 9-15(1) of the GST Act includes '… any payment, or any act or forbearance, in connection with the supply of anything, and any payment, or any act or forbearance, in response to or for the inducement of a supply of anything.'

In relation to the Building Works issue, WYPF contended that the suite of documents that included the Consequent Leases pointed to 'a commercial and practical reality' of the obligations of WYPF to complete the Building Works. Therefore, the Building Works 'moved' the transfer of the Consequent Leases and constituted consideration for the Consequent Leases for the purposes of the margin scheme. Building works do not normally form part of the acquisition price of land for margin scheme purposes. However, including the building costs here would not result in any mischief WYPF claimed, as in including the value of the works in its acquisition price, if they moved the transfer of the Consequent Leases, as they were also supplies under the SLA on which it needed to remit GST.

The ATO denied that the Building Works 'moved' the supply of the Consequent Leases and contended that the Building Works were a condition of the Consequent Leases but were not required to be completed for the Consequent Leases to be granted. Instead, the failure to complete the Building Works within the stipulated period would have exposed WYPF to the risk of forfeiture of the Consequent Leases.

WYPF placed reliance on the decision of the High Court in *Commissioner of State Revenue (Victoria) v Lend Lease Development Pty Ltd* [2014] HCA 51. In that case, a state development authority, VicUrban, entered into a complex agreement with the Lend Lease group companies requiring Lend Lease to make various payments and carry out development works and other undertakings. The Court held that all of the various payments, development works and other undertakings, moved the conveyance of the development land to Lend Lease. Thus, the various payments and the performance of the other obligations all formed part of the consideration for the land.

In relation to the section 142-10 issue, WYPF's director give evidence that WYPF did not pass on any GST in the prices it obtained for the apartments it sold, but that it sold the apartments for the price the market would bear, having regard to a feasibility study that took into account an estimate of GST at an effective rate of 7%. It did not work out the prices on a cost plus basis. WYPF also noted by the time WYPF completed the sales of the apartments, it was aware from private rulings it had received from the ATO that the value of the Preparatory Works could be included when working out the margin on its sales, but choose not to include it because the precise value of the Preparatory Works was in dispute.

WYPF further submitted that, even of section 142-10 applied, the Commissioner should exercise its discretion under section 142-15 to treat the restriction on refunds in section 142-10 as not applying.

Issues

1. whether the Building Works constituted consideration for the acquisition of the land;
2. if the value of the Preparatory Works should include on the amount of the outstanding invoice; and
3. if WYPF passed on excess GST;
4. if WYPF did pass on excess GST, should section 142-10 not apply under section 142-15?

Decision

The AAT considered the determination of whether the Building Works constituted consideration involved a judgment about nexus between the Building Works and the grant of the Consequent Leases. In this case, the AAT found that the Building Works did not 'move' the grant of the Consequent Leases, as carrying out the Building Works was in satisfaction of a condition of the Consequent Leases rather than in response to the supply of the leases.

The AAT also did not accept that the *Lend Lease* case applied to WYPF. There were not common consequences of default under the transaction documents as was the case in *Lend Lease*. The AAT observed that a key conclusion underpinning the Court's judgement was that the transaction between Lend Lease and VicUrban was a '*single, integrated and indivisible'* transaction. The Court in *Lend Lease* said this was not just because the rights and obligations were provided in a single set of transaction documents but because the rights and obligations were '*interlocked*'.

The AAT held that there was no basis for reducing the value of the Preparatory Works as a result of the outstanding invoice. A payment or non-payment of the invoice would trigger an adjustment event in relation to the supply of the works, but would not change the value of the Preparatory Works.

In relation to the section 142-10 issue, the AAT was not persuaded that WYPF did not pass on any GST. The key part of the AAT reasoning was that:

> *The applicant was competing in the same market and priced its apartments to what the Director considered the market would bear. Absent other relevant evidence, it would defy both common sense and market forces to suggest the applicant sought to achieve prices that included a material extra amount for GST that the market generally did not. The actions of the applicant in deliberately holding back from deducting the value of the Preparatory Works while the quantum was settled with the ATO, against the background of pricing to the market, distinguish this case from others in which GST has been overpaid and the overpaid amount has been passed on.*

The AAT made no findings on the section 142-15 issue given its decision that section 142-10 did not apply to prevent a refund being paid.

Citation *WYPF and Commissioner of Taxation (Taxation) [2021] AATA 3050* (Senior Member R Olding, Melbourne)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2021/3050.html

1.2 Chetwynd v Rose – express trust

Facts

Brian Chetwynd and Jill Chetwynd are husband and wife. Since the 1970s, Brian and Jill and their friend, Glynis Rose, had been in business together as shareholders and directors of companies that carried on wholesale photography businesses.

In the 1980s, they traded through Rogote Pty Ltd. Brian and Jill's family home in Forestville and Glynis' Neutral Bay unit were used as security to finance the business. By 1989, secured creditors of Rogote were pressing for payments. In what was described as a 'three way split' agreement, Brian, Jill and Glynis agreed that the Forestville property would be sold to pay the secured debts and that Brian and Jill would in turn obtain a two-thirds beneficial interest in the Neutral Bay property.

In 1990, Brian, Jill and Glynis decided to conduct the photography shop and retail business through Wincot Pty Ltd. Glynis held 90% of the shares in Wincot while Brian held 10% of the shares in Wincot. The 'three way split' agreement was subsequently extended into other aspects of the parties' business relationship, including Wincot so that each of the three agreed that they were beneficially entitled to one-third each of the shares in Wincot.

In the early 1990s, Wincot secured an interest only line of credit from Citibank. This loan was secured against the Neutral Bay Property. There was an original limit of $225,000, with each of Brian, Jill and Glynis being guarantors for the loan.

The Neutral Bay Property was tenanted from 1991. The rent was paid into Glynis' personal bank account, and Glynis paid tax on the whole of the rental income received.

In 1992, Brian and Jill leased a property in Armidale from their friends, John and Barbara Phillips. In 1993, Brian and Jill negotiated the purchase of the Armidale property with John and Barbara. The purchase price was $220,000, with $110,000 paid up front and $110,000 payable over seven years at a rate of 9.5% interest (under a 'vendor loan'). The Armidale Property was purchased in Glynis' name to conceal Brian and Jill' beneficial ownership from the claims of creditors.

Wincot provided most of the funds used to acquire the Armidale property using the Citibank credit facility. Payments of the Citibank facility were substantially funded from rental payments from the Neutral Bay property. That is, the rental payment was paid into Glynis' account which she subsequently used rent to pay the interest on the Citibank line of credit for the Armidale Property.

As an attempt to eliminate the Division 7A (then Division 7) exposure for Glynis in 1994, Wincot's accountant, Mr Bill Herd, re-characterised the Citibank Line of Credit from being in substance a liability of Wincot to being a liability of Glynis. The re-characterisation of the Citibank loan facility meant, amongst other things, the Citibank loan facility was removed from the balance sheet, and any advance under the facility was instead accounted for as an advance from Glynis to Wincot. From 1994 to 2000 Mr Herd gave evidence that $780 per month was debited to Brian and Jill's loan account and credited to Glynis' loan account. By debiting and crediting amounts in this manner Glynis became entitled to 'negative gearing' deductions. Brian and Jill, when the matter came before the Court, contended that claiming such amounts was a fraud against the Commissioner of Taxation committed by Glynis as no rent was paid, but the trial judge acquitted her of fraud, finding, instead, that she followed the directions of Mr Herd.

Amounts of $780 between October 1993 and 1995 were paid monthly by cheque to Brian and Jill by Wincot and were banked in the company's account. These amounts appear to have been treated as rent paid to Glynis. These amounts, together with the $780 in monthly rent noted above, were argued by Brian and Jill to be repayments to Wincot for the purchase price of the Armidale property.

Between July 1993 and June 2000 the total repayments of principal and interest made under the vendor loan totalled $151,018.56.

In a letter dated 26 August 2005 from Mr Herd to Brian, Jill and Glynis, Mr Herd proposed that the Armidale property be transferred to Brian and Jill and that they surrender their beneficial interest in the Neutral Bay property. This did not proceed due to stamp duty and capital gains tax implications. In a reply from Brian on 10 November 2005, Brian stated that, 'I believe that all parties acknowledge that the whole of the assets and liabilities are apportioned one third to each person.'

In 2010, the Neutral Bay property was sold, and Glynis resigned as a director of Wincot in 2012.

On 3 January 2015, Glynis wrote to Brian and Jill expressing her wish for the Armidale Property to be sold. Brian responded to Glynis agreeing that the Armidale property was owned beneficially by the three of them, but that all three of them must agree for the Armidale Property to be sold.

On 11 February 2015, Brian and Jill lodged a caveat over the Armidale property, claiming that Brian and Jill had an equitable interest of the Armidale Property under a trust as Glynis purchased the property as trustee for Brian as to 1/3 interest and Jill as to 1/3 interest to Jill with the remaining 1/3 held in her personal capacity'.

Brian and Jill commenced proceedings in 2015, seeking a declaration that Glynis held the Armidale property on trust only for Brian and Jill.

In an amended summons in 2018, Brian and Jill later claimed, in the alternative, that the Armidale property was held on trust for Wincot, as Wincot provided almost all of the moneys for the purchase of the Armidale property.

Glynis contended that, as with the Neutral Bay property and Wincot, she enjoyed a one-third interest in the Armidale property, and sought the appointment of trustees for sale of the property under section 66G of the *Conveyancing Act 1919* (NSW).

Brian stated in his evidence that at the time the Armidale property was purchased, there was an agreement that Glynis would hold the Armidale property for Brian and Jill on trust, that Brian and Jill were to make all the outgoings on the Armidale property. Brian stated that Glynis had agreed to never sell the Armidale Property without all three of them agreeing to the sale, and that if Brian and Jill could not pay off the entire mortgage, as a contingency, Glynis would be entitled to one-third of the purchase price, being $220,000.

Glynis deposed that she did not recall Brian using the word 'trust' in relation to the Armidale property. While she recalled Brian agreeing to pay for all outgoings, she did not recall him stating that he would make all the repayments. Glynis recalled a discussion about rent but not the substance of the conversation.

Brian stated that his prior admissions that Glynis as a one-third beneficial owner in the Armidale property was an attempt to appease her out of fear she would sell the Armidale property immediately, and what he meant to say was that she had a one-third beneficial ownership in the original purchase price of $220,000. In relation to the caveat, Brian contended that his solicitor had misunderstood his instructions.

When the matter initially went to the NSW Supreme Court, the primary judge found that the Armidale property was held according to the 'three way split' arrangement and appointed trustees for sale with any proceeds to be divided equally among Brian, Jill and Glynis. The primary judge also ordered Brian and Jill to pay Glynis a further $100,679 plus interest, on the basis that that vendor finance payments paid by Wincot were debited to Glynis' loan account in the amount of $151,018 and that Bill and Jill were liable to indemnify her against her liability to Wincot for two thirds of that amount, namely $100,679.

Brian, Jill and Wincot appealed the primary judge's decision.

Issues

1. Whether Brian and Jill (or alternatively Wincot) enjoyed full beneficial ownership of the Armidale property?
2. Whether there was an agreement that the Armidale property was not to be sold without the agreement of all the parties?
3. whether Brian and Jill repaid Wincot for its payment of the purchase price of the Armidale property?
4. whether the primary judge erred in adjusting the parties' entitlements to the sale proceeds?
5. whether Brian and Jill were entitled to an adjustment in respect of monies purportedly debited to their salary or loan account with Wincot as payment of rent to Glynis that enabled Glynis to claim negative gearing deductions for the Armidale property?

Decision

The Court of Appeal held that the primary judge did not err in rejecting Brian's evidence that Glynis had agreed to hold the Armidale property on trust for Brian and Jill. The Court of Appeal considered that Brian's evidence had no objective corroboration and was rightly rejected. There was no basis for a presumption of a resulting trust in favour of Wincot, as the funds provided by Wincot were treated as a loan to the shareholders.

The Court of Appeal also agreed with the primary judge's decision that there was no agreement between Brian, Jill and Glynis that the Armidale property could only be sold if all agreed. The Court of Appeal noted that the only evidence was the uncorroborated evidence of Brian, which was not persuasive in light of the longstanding three way split agreement that governed the entirety of the parties' personal and professional relationship.

The Court of Appeal further held that primary judge did not err in rejecting Brian's submission that they repaid Wincot for the purchase price of the Armidale property, considering that if there had been repayments to Wincot, they would have been credited to their loan accounts.

The Court of Appeal overturned the primary judge's orders that, after the sale of the Armidale property, Glynis receive from Brian and Jill two-thirds share of the proceeds of sale, as Glynis did not contribute to the payment of the vendor finance except as a one-third beneficial owner of the Neutral Bay rental income.

The Court of Appeal also overturned the primary judge's decision that Glynis did not have to account for two-thirds of the rents she received. The Court noted that, on one view, the adjustment should be of $67,760 (the total amount of rent) and not two-thirds of that sum because the journal entries were fictitious. To adjust the entries only by two-thirds would be to treat as genuine an arrangement for the payment of seven years rent by the Brian

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and Jill to Glynis and then to give the Brian and Jill credit for those payments despite no payments being made. No submissions were made about this point by the parties though and the Court considered that there should be an adjustment through the loan accounts for two-thirds of the amount treated as rent.

Citation *Chetwynd & Ors v Rose* [2021] NSWCA 193 (Meagher JA, Leeming JA, White JA, Sydney)
w http://classic.austlii.edu.au/au/cases/nsw/NSWCA/2021/193.html

1.3 Thomas and Naaz Pty Ltd – payroll tax and medical centres

Dr Thomas and Ms Naaz were directors of Naaz Pty Ltd.

Naaz Pty Ltd operated a business comprised of three medical centres: the Windsor Family Practice, McKenzie House Specialist Medical Centre and The Ponds Family Medical Practice.

Various doctors operated from Naaz's medical centres (**Doctors**). Each Doctor, or a related entity of the Doctor, entered into a written agreement with Naaz (**Agreement**). The arrangement between the Doctors and Naaz was as follows:

1. Naaz provided rooms at its medical centres to the Doctors, as well as shared administrative and medical support services (including nurses, reception, administrative staff);
2. the Doctors saw patients at Naaz's medical centres;
3. there was a roster and hours of work for the Doctors;
4. the Doctors had obligations to comply with protocols and promote the business of the medical centre;
5. there was a leave policy and payment of hourly rates in certain circumstances;
6. the Doctors 'bulk billed' each patient and the patients assigned their Medicare benefits to the Doctors by completing a Medicare 'Bulk Bill Assignment of Benefit' form;
7. the Doctors had the option of dealing directly with Medicare to obtain the benefits that had been assigned to them by the patients, or having Naaz do so; all Doctors, other than three, requested that Naaz do so;
8. Naaz, on behalf of the Doctors, made claims on Medicare and the funds received by Naaz from Medicare were placed into an account held by the medical centre in which the Doctor saw the patient. Each medical centre had a separate account and all of the billings of the Doctors relating to that medical centre were received into that account;
9. at the end of the first four weeks of the Agreement, and every fortnight thereafter, amounts equal to 70% of the claims paid by Medicare for a particular Doctor (without any deductions for tax or superannuation or otherwise) were paid from the medical centre's bank account to that Doctor (**Payments**). The remaining 30% was retained by Naaz as a service fee;
10. Doctors chose the days and times in which they attended the medical centres to provide medical services to patients;
11. Doctors used their own medical equipment when treating patients; and
12. the Doctors had clinical independence, both in how and when they saw patients and what they prescribed for patients; and
13. there was a restrictive covenant, which would become operational upon the Doctor leaving the particular medical centre owned by Naaz, with such covenant to have an 'exclusion zone' of 5 kilometres from that medical centre and to be in place for two years after the Doctor's departure.

On 10 April 2018, Revenue NSW issued five notices of assessment to Naaz, totalling $795,292. The notices of assessment covered the period from 1 July 2013 to 31 March 2018 and assessed Naaz as liable to pay payroll tax together with interest and penalties on the basis that the arrangement between the Doctors and Naaz was a 'relevant contract' under section 32 of the *Payroll Tax Act 2007* (NSW).

On 15 May 2018, Naaz objected to the notices of assessment. Naaz contended that the Agreements were not relevant contracts either because the Doctors were not supplying services to Naaz and, therefore, the conditions in section 32(1) of the PTA were not satisfied or, as the Doctors, or at least a large proportion of them, were providing such services to the public generally each year, the exclusion from being a relevant contract in section 32(2)(iv) of the PTA applied. That section provides as follows:

> *(iv) those services are supplied under a contract to which subparagraphs (i)-(iii) do not apply and the Chief Commissioner is satisfied that those services are performed by a person who ordinarily performs services of that kind to the public generally in that financial year, or*

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On 3 April 2019, the Chief Commissioner disallowed the objections. Naaz applied to the NSW Civil and Administrative Tribunal for a review of the objection decision.

At the hearing in NCAT, there was no evidence that the Doctors provided services to Naaz. Naaz provided services to the Doctors and the Doctors provided services to patients. However, the Chief Commissioner submitted that the Doctors' services formed part of the conduct of the medical centre businesses carried on by Naaz. That is, Naaz required the services of the Doctors in order to carry on its business at the medical centres.

Naaz provided a spreadsheet prepared from the records of Naaz which included the names of a subset of 40 Doctors whom Dr Thomas stated 'I believe provided medical services at one or more medical practices (not related to the Naaz Pty Ltd) during one or more of the financial years' (**Spreadsheet**). Two letters were obtained from Doctors confirming that they provided their medical services from other medical centres, unrelated to Naaz.

Issues

1. Whether the Agreements were 'relevant contracts' in accordance with section 32(1)(b) of the PTA?
2. Whether the services of the Doctors were performed by a person who ordinarily performs services of that kind to the public generally in that financial year such that the exclusion in section 32(2)(b)(iv) of the PTA applies?
3. If the Agreements were relevant contracts, were the Payments 'amounts paid or payable by [Naaz Pty Ltd] during a financial year for or in relation to the performance of work relating to [the Agreement] …', for the purposes of section 35 of the PTA?

Decision

Issue 1: Section 32(1)(b) of the PTA

This issue turned on whether the Doctors were also suppling services to Naaz in addition to providing services to patients. NCAT had regard to the terms of the Agreement, including the following:

1. the Agreements provided the roster and hours of work for the Doctors, obligations on the Doctors to comply with protocols and promote the business of the medical centre, there was a leave policy and payment of hourly rates in certain circumstances; and
2. that the Agreements contained the restrictive covenant.

NCAT considered that these clauses demonstrated that the Agreements secured the services of the Doctors for the benefit of Naaz and that, therefore, the Doctors were not only supplying services to the patients but were also supplying services to Naaz.

NCAT accepted that section 32(1)(b) of the PTA requires that the services provided were provided 'for or in relation to the performance of work'. However, NCAT considered that this only requires that the services supplied under the Agreements are 'work-related'. As the services provided under the Agreement between Naaz and the Doctors were work-related, NCAT was satisfied that the Agreements were 'relevant contracts' within the meaning of section 32(1)(b) of the PTA.

Issue 2: Exemption in section 32(2)(b)(iv) of the PTA

NCAT considered that, in order for this exemption to be available, Naaz would need to establish that the services provided by the Doctors were services:

1. supplied under a contract to which sections 32(2)(b)(i)–(iii) did not apply; and
2. performed by a person who ordinarily performed services of that kind to the public generally in that financial year.

The parties did not adduce evidence as to the first requirement. Therefore, NCAT was unable to conclude that the opening words of section 32(2)(b)(iv) - 'those services are supplied under a contract to which subparagraphs (i)-(iii) do not apply' was satisfied. For this reason, NCAT formed the view that it could not be satisfied that the exclusion under section 32(2)(b)(iv) was available.

Nonetheless, for completeness, NCAT briefly considered the application of section 32(2)(b)(iv) of the PTA. NCAT identified that the only evidence from any of the Doctors identified in the Spreadsheet were the two letters. Therefore, NCAT was satisfied that, by the letters, the two Doctors provided medical services elsewhere and those Doctors ordinarily performed such services to the public generally.

However, in respect of the remainder of the Doctors identified in the Spreadsheet, NCAT considered that the statements of Dr Thomas were mere assertions, and NCAT was not prepared to infer that the other Doctors earned other income. The evidence before NCAT was insufficient to prove that those Doctors ordinarily performed services of the kind provided by them to Naaz to the public generally in any of the financial years.

Issue 3: Section 35 of the PTA

The issue here was whether the Payments were 'for or in relation to the performance of work relating to' the Agreements.

In identifying the 'performance of work', NCAT determined that it was 'clear' that the provision of the Services, as defined in the Agreements, was the 'performance of work'. NCAT was satisfied that the 'performance of work' was 'relating to' the Agreements as the work was the subject of the Agreements.

NCAT then considered whether the Payments were 'for or in relation to' that performance of work. NCAT determined that there was a 'clear relationship between the provision of the services and the Payments'. The availability of the Medicare benefits to the Doctors was a direct consequence of the provision of the services. NCAT accepted that the relationship between the provision of the services and the Payments was not direct, however 'there was a clear indirect relationship sufficient to satisfy the terms of the section'. NCAT concluded that there is nothing in the context of the section nor its legislative history to suggest that an indirect relationship is insufficient to satisfy section 35 of the PTA.

NCAT also addressed the decision in *Homefront Nursing Pty Ltd v Chief Commissioner of State Revenue* [2019] NSWCATAD 145 which considered the question of whether the amounts received by the business from Medicare were received on its own account out of which it paid the doctors or whether it received those amounts on behalf of the doctors as a 'bank of convenience' and as a mere convenient collecting system. NCAT concluded that neither the capacity in which the 'employer' receives the amount which is paid to the 'employee' nor the ownership of the funds transferred is a relevant consideration in applying the words of the PTA. Accordingly, NCAT was satisfied that section 35 of the PTA operates so as to deem the Payments to be wages.

NCAT confirmed the notices of assessment issued by the Chief Commissioner.

Citation *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWCATAD 259 (S Goodman SC, Sydney)
w https://www.caselaw.nsw.gov.au/decision/17ba49dc933fd5acb37385cc

1.4 Australian Karting Association v Karting NSW

Facts

Australian Karting Association Ltd (**Karting Australia**), is the Australian body responsible for promoting the sport of karting in Australia.

Karting (NSW) Incorporated, was, until 21 January 2019 when Karting Australia purportedly expelled it as an Ordinary Member, the NSW entity responsible for promoting the sport and conducting karting races in New South Wales and the Australian Capital Territory.

On 13 August 1994, the predecessor to Karting Australia, AKA Inc, established a National Trust Fund on a trial basis for two years, and resolved by way of motion that the income received by AKA from the National Trust Fund was to be recorded monthly on a State-by-State basis.

Karting NSW and the other State karting associations formed the Track Development Fund, which was a collective fund financed by contributions from each member State from driver levies. The fund was used for the purposes of local track development through loans which were made by the fund to particular clubs. Initially, this

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was an informal arrangement, and it was not until 21 October 2005 that the discretionary trust known as the Track Development Fund Trust was established (**Trust**). AKA Inc, and later Karting Australia, were the trustees of the Trust.

The relevant provisions of the Trust Deed were as follows:

1. Karting NSW and the other State karting associations were specified as the Corpus and Specified Beneficiaries;
2. clause 6 of the Trust Deed conferred extensive powers on the trustee, including powers to borrow, lend or guarantee and to appropriate assets. The power to appropriate assets was to be exercised as follows: *'... by setting apart or crediting in the books or accounts of the trust any sum in or towards the satisfaction of any share whether vested or contingent to which any person may be entitled in the Trust Fund ...'*
3. clause 7 of the Trust Deed provided that the trustee was entitled to pay to any one or more members of the Discretionary Class, or apply or settle on trust, for their benefit, the whole or any part of the Trust Fund;
4. clause 15 of the Trust Deed provided that the trustee was to hold trust funds which had not been appropriated or distributed and which have not been vested absolutely. The Trustee had a discretion to pay, apply or appropriate the whole or part of the income of the trust fund for the benefit of one or more of the members of the discretionary beneficiaries, to the exclusion of one or more other discretionary beneficiaries; and
5. vesting of the Trust was to occur 21 years 'from the death of the last lineal descendant now living of his late Majesty King George IV', or an earlier date which the trustee may appoint in writing. No earlier date was appointed by the trustee. On the vesting date, the trust fund held by the trustee was to vest in the Corpus Beneficiaries in the proportions set out in the schedule to the Trust Deed.

Since the creation of the Trust, the trustee has received money collected by its beneficiaries, the State karting associations, on which it had earned interest. The financial accounts for the financial year ended 30 June 2006 recorded, for the previous financial year, that the balance of Karting NSW's 'loan account' was $230,374. This sum was described as 'Capital Contributed'. The funds held under the informal arrangement, which existed prior to 2005, were treated as comprising loans to beneficiaries.

The trustee deducted from its receipts and income the expenses which it incurred and credited these amounts to the State karting associations. The money was not actually paid to the State karting associations. Instead, the trustee increased their loan accounts, based on their respective contributions.

The accounts for the year ended 31 December 2014 were different from the financial statements for the other years. The loans to beneficiaries, which had formerly been described as 'current liabilities' were reclassified (without explanation) as 'non-current liabilities'. Under the heading 'Beneficiaries Profit Distribution Summary', the following note appeared:

> *'BENEFICIARIES SHARE OF PROFIT*
> *The beneficiaries share the profit in the proportions contributed by the beneficiaries by way of payment of levy or other charge for the specific purpose of the object known as track development*
> *The beneficiaries share in the net income generated from sources other than those imposed on the beneficiaries, primarily interest received less expenses, in proportions based on the prior year closing balances.'*

There was a new note 1 to the accounts, under the heading 'Summary of Significant Accounting Policies', which read:

> *'k. Beneficiary Loans*
> *The capital and income of the Fund is held on trust for the beneficiaries in the proportions contributed by the beneficiaries, by way of payment of levy or other charge for the specific purpose of the object known as Track Development.'*

In the financial year ended 30 June 2015, the notes in the financial statements changed. The notes referred to the accumulation of income by the beneficiaries in the proportion to the amount contributed by each beneficiary. Note 1(k) provided as follows:

> *'k. Beneficiary Accumulation*
> *The capital and income of the Fund is held on trust for the beneficiaries until the Date of Vesting as detailed in the Trust Deed of the Trust.'*

For each of the relevant financial years (2006-2018), the Trust reported that its net assets were $1. Karting NSW's financial statements did not have an entry which corresponded with the liability figure in Karting Australia's balance sheet which was referrable to Karting NSW's contributions to the Trust.

From time to time, Karting Australia advanced funds to the State karting associations for the benefit of particular karting clubs within the corresponding State or Territory. These loans were the subject of written loan agreements. Three loans were relevant to the proceedings, being loans dated 22 April 2010, 14 May 2012 and 20 September 2016 under which an amount of $100,000 was advanced under each loan (**Loans**).

On 30 December 2013, Karting Australia issued an end-of-year update to its members which addressed the administration of the Trust.

On 16 October 2014, Karting NSW wrote to Karting Australia raising concerns regarding the administration of the Trust and set out its intention to withdraw from the Trust and conduct its own NSW-based track development fund. Karting NSW requested a return of the funds held by the Trust on its behalf. Correspondence was exchanged between the parties in 2017 and 2018.

On 9 May 2018, Karting NSW requested a copy of the Trust Deed. Karting Australia refused this request.

Karting Australia contended that the funds were not available to be transferred to Karting NSW as they are to be held on trust until the vesting date of the Trust, and in the meantime, distribution of the funds remained at the discretion of the trustee. Correspondence between the parties escalated in the second half of 2018.

On 21 January 2019, a Special General Meeting of the Ordinary Members of Karting Australia was held by telephone. The minutes recorded that, in response to the resolution that Karting NSW was not of fit and proper character to remain a member of Karting Australia, the result was: one vote against (NSW), six votes in favour and one abstention (SA).

On 22 January 2019, Karting Australia wrote to Karting NSW informing it that it ceased to be an Ordinary Member of Karting Australia. A borrower or guarantor of a loan from the Trust ceasing to be an 'Affiliate' of the trust was an event of default under the loan agreements. The term 'Affiliate' was defined as:

'Affiliate' *means a person or entity who is bound by the Rules or Regulations or Constitution of [AKA Inc] and/or who is authorised to conduct [AKA Inc] sanctioned events.*

On 21 February 2019, Karting Australia filed a statement of claim which claimed that Karting NSW owed money to Karting Australia under three separate loan agreements. Karting NSW defended the claim on the basis that it was not in default of the loan agreements as Karting Australia had not validly expelled it as an Ordinary Member. It also argued that Karting Australia's conduct was unconscionable and that the default provisions of the loan agreements ought not be enforced.

On 5 September 2019, Karting NSW filed a crossclaim in which it claimed the return of $616,065 which comprised of the driver levies which Karting NSW had been obliged to collect, between 2005 to 2018, on behalf of Karting Australia. Karting NSW alleged that because, at the end of each financial year, Karting Australia had allocated these amounts in its financial statements to a loan account in favour of Karting NSW, the monies amounted to unpaid distributions under a trust created in 2005. In response, Karting Australia contended that no monies had ever been distributed under the trust and that, accordingly, the monies claimed remained part of the trust property.

The issue and decision below relate to Karting NSW's crossclaim which relied upon the Trust Deed and its terms.

Issue

Whether Karting Australia exercised its power to pay out capital and make distributions of trust property to Karting NSW and the other Ordinary Members of Karting Australia who were members of the Trust?

Decision

The Court confirmed that a distribution of trust property has the effect of removing the amount distributed from the corpus of the trust. If the distribution made but not yet paid to the beneficiary, the amount of the unpaid distribution becomes the subject of a 'bare' trust in favour of the beneficiary to which the distribution has been made. As the beneficiary's entitlement in such a case is absolute (by reason of the distribution), the beneficiary can call for the distribution or obtain judgment for the amount of the distribution.

The Court confirmed that Karting Australia had the power under clause 7 of the Trust Deed to pay out capital and make distributions of trust property. Karting Australia dealt with the capital sums, including the driver levies, by crediting those amounts to loan accounts in the names of the Ordinary Member beneficiaries. The Court held that the effect of crediting these amounts to the beneficiaries' loan accounts, was to distribute the amounts to the beneficiaries. That is, these funds were held on bare trust in favour of the beneficiary in the amounts set out in the loan accounts and were repayable on demand by each beneficiary.

The Court confirmed that its conclusion was consistent with the net assets of the trust being $1 at the end of each financial year, those accounts showing the total liabilities of the Trust, which included the amounts in the loan accounts, and the fact that the trustee declared for each year that the financial statements of the Trust fairly represented the financial position of the Trust.

The Court referred to authority that '*where a trustee admits a debt to a beneficiary, an action for money had and received lies at the suit of the beneficiary*'.

In response to the fact that Karting Australia did not make any resolutions to distribute the amounts to Karting NSW, the Court confirmed that the intention of the directors of a company may be determined by reference to what they say or do. Therefore, the Court held that the fact that there was no board meeting or resolution did not mean that the trustee's intention had not been sufficiently established.

Accordingly, the Court held that the crediting of the loan account of Karting NSW with the initial capital sum, the levies and interest each year constituted an admission by Karting Australia of a debt in favour of Karting NSW in the total sum recorded in the financial statements as the balance of Karting NSW's loan account.

In respect of the differences between the financial statements of Karting Australia and Karting NSW, the Court stated that it did not regard what was contained in Karting NSW's financial statements as bearing on the issue of the correct characterisation of the sums which Karting NSW had paid to Karting Australia over the years. The Court referred to the principle that a trustee has fiduciary duties to identify the beneficiaries and inform them of the property held on their behalf and their entitlement to money in the hands of the trustee. Therefore, if the beneficiary misapprehends the character or amount of monies or property to which it is entitled (including in its financial statements), this cannot be held against the beneficiary by the trustee.

Citation *Australian Karting Association Ltd v Karting (NSW) Incorporated* [2021] NSWSC 1075 (Adamson J, Sydney)
w http://classic.austlii.edu.au/au/cases/nsw/NSWSC/2021/1075.html

1.5 Royal Lion Capital – onus of proof for GST

Facts

Royal Lion Capital Pty Ltd was incorporated on 20 December 2017 and registered for a Tax File Number and Australian Business Number. Royal Lion carried on a management consulting service. Royal Lion was not registered for GST.

The Commissioner undertook a covert audit of the GST affairs of Royal Lion using a bank account methodology, and formed the view that Royal Lion had exceeded the GST registration turnover threshold of $75,000 from 1 April 2018, and that it was carrying on an enterprise of providing investment services.

The Commissioner reviewed 22 deposits into two Commonwealth Bank of Australia accounts, and calculated Royal Lion's quarterly sales and corresponding GST payable for the periods from 1 April 2018 to 31 December

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2018 (the **Relevant Periods**). Input tax credits in respect of withdrawal amounts on the bank statements were not allowed by the Commissioner.

The audit concluded on 8 April 2019, when the Commissioner registered Royal Lion for GST and issued an audit completion letter, notices of assessment for the Relevant Periods and notices of assessment of penalty.

On 1 May 2019, the legal representative of Royal Lion, and Mr Mustapha, the company's director, attended a meeting with the Commissioner's audit officer. At this meeting, the Commissioner requested documentation to demonstrate that the deposits were not in relation to taxable supplies.

On 31 May 2019, Royal Lion provided a response to the audit decision, including an explanation for each of the 22 deposits. Royal Lion conceded that 8 of the deposits, totaling $91,305.87 were commission and should be classified as GST income. Royal Lion submitted that the other deposits were loans made to the Royal Lion, or interest income received.

On 23 July 2019, the Commissioner notified Royal Lion that the informal review of the audit was completed. The Commissioner accepted that 4 of the deposits in question were not consideration for taxable supplies and issued amended assessments.

On 23 September 2019, Royal Lion lodged an objection on the basis that the majority of credits deposited into the accounts were treated as GST income when they should have been treated as loans.

On 19 March 2020, Royal Lion provided a letter outlining explanations in relation to the transactions in dispute together with supporting evidence, including:

1. the interest rate breakdowns in relation to the loans;
2. how the deposits described interest income were distributed to lenders; and
3. two amounts that were loans.

On 29 May 2020, Royal Lion disallowed the objection on the basis that Royal Lion had not provided sufficient evidence to support the objection.

Royal Lion made an application to the AAT to have the Commissioner's decision reviewed on the basis that the GST assessments were excessive.

Royal Lion explained to the AAT that the company was initially set up to act as an intermediary between lenders and borrowers, whereby the company would secure funds to be loaned to a borrower who would pay interest at a high rate of around 10-15%. Royal Lion would pay the interest to the lender, after keeping a portion as profit for Royal Lion.

However, the evidence was unclear as to the distinction between occasions when it was the intermediary, and when it was the lender itself. Documents evidencing the arrangements could not be produced, as it was said they had never been prepared. Significantly, there were no written loan agreements.

Royal Lion accepted that it was carrying on a business, but contended that it was not required to be registered for GST as it did not have a turnover of more than $75,000. However, Royal Lion acknowledged that there was a lack documentary evidence to support this contention and, instead, was effectively asking the AAT to accept its contentions on the verbal evidence of Mr Mustapha. Mr Mustapha stated that he did not want to approach some of the lenders as he owed them money. One of the borrowers had also been running a since publicly disclosed Ponzi scheme. Mr Mustapha said in the AAT that there were further documents to support the company's position, but that he was unable to provide them. He did not explain to the Tribunal why he could not provide them.

Issues

1. Whether Royal Lion was required to be registered for GST?
2. Whether Royal Lion has discharged its burden of proof to establish that the GST assessments were excessive or otherwise incorrect?

Decision

The AAT noted that the onus to prove that the GST assessments were excessive is on Royal Lion. In *Bosanac v Commissioner of Taxation* [2018] FCA 946, Stewart J found that:

> *The onus is on the taxpayer to prove on the balance of probabilities the extent to which an impugned assessment is excessive. Where a taxpayer fails to retain records which evidence the course of a business, or fails to create such documents, he or she may well face a great difficulty in demonstrating excessiveness. This was the very problem which the applicant faced here.*

The AAT considered that Royal Lion faced the same difficulty, describing the evidence as 'lacking and unreliable'.

In the absence of evidence, the AAT found that Royal Lion was required to be registered for GST. Royal Lion failed to discharge its onus to prove that the assessments were excessive or otherwise incorrect.

The AAT affirmed the Commissioner's decision.

Citation *Royal Lion Capital Pty Ltd and Commissioner of Taxation* [2021] AATA 3049 (Member D Mitchell, Brisbane)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2021/3049.html

1.6 Appeal Update – Bosanac

The Commissioner of Taxation has been successful in an appeal against the decision in *Commissioner of Taxation v Bosanac (No* 7) [2021] FCA 249 (see our April 2021 Tax Training Notes).

The case involved the ownership of the matrimonial home of Vlado Bosanac and Bernadette Bosanac, of which Bernadette was the sole registered proprietor. Vlado is an undischarged bankrupt and owed money to the Commissioner of Taxation at the time of his bankruptcy. The Commissioner sought a declaration that Bernadette held 50% of her interest in the home on trust for Vlado.

The Commissioner relied on a decision of the High Court in *Trustees of Property of Cummins (a bankrupt) v Cummins* (2006) 227 CLR 278 in which a plurality of the High Court commented that, where spouses acquire a matrimonial home, it is to be inferred that they intended that each spouse holds a one-half interest in the property, irrespective of legal title and actual contributions made to the purchase price.

Bernadette contended that she owned the whole of the home legally and beneficially and relied upon the presumption of advancement – this is a rule of equity that provides that, in respect of certain relationships, a benefit conferred on one person by another person, such as contributing to the purchase price of a property acquired solely in the first person's name, will not give rise to a presumption that the first person holds the property, or part of it, on resulting trust for the second person.

The 'presumption' of advancement applies to benefits conferred by a husband on his wife (but not vice versa and not with respect to de facto relationships) or by a parent to a child.

The Commissioner contended that the principle in *Cummins* qualifies the presumption of advancement in relation to matrimonial property.

At first instance, the Federal Court considered that *Cummins* had not changed the presumption of advancement as it applied to the matrimonial home and, accordingly, found that Bernadette did not hold any interest in the home on trust for Vlado.

The Commissioner appealed to the Full Federal Court.

The Full Federal Court allowed the Commissioner's appeal.

The Full Court did not accept that the High Court in *Cummins* had qualified the presumption of advancement. However, it noted that the presumption of advancement can be rebutted and that in *Cummins* the High Court was

noting that if certain facts exist, as was referred to in *Cummins*, it may be inferred that a trust was intended. That is, that the presumption of advancement is rebutted.

The Full Court considered that in this case, as in *Cummins*, it could be inferred that a trust was intended for the following reasons:

1. the circumstances involved a substantial borrowing by Vlado. He was liable for the loan but did not have legal title to the asset purchased with the loan. The Full Court considered that the significance of this transaction permitted a drawing of an inference of a trust consistent with *Cummins*;
2. Mr Bosanac later used the property as security for other borrowings;
3. neither Vlado nor Bernadette gave evidence on the circumstances of the purchase of the home;
4. Vlado and Bernadette purchased the property to be their matrimonial home and made it their family home shortly afterwards. It was intended and was used for their joint benefit, notwithstanding Bernadette was the only person on title; and
5. the whole of the purchase price was paid from joint borrowings.

Accordingly, Bernadette was held to hold 50% of her interest in the home on trust for Vlado.

Citation *Commissioner of Taxation v Bosanac* [2021] FCAFC 158 (Kenny, Davies and Thawley JJ, Perth)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC//2021/158.html

1.7 Appeal Update – Advanced Holdings

The taxpayer has been unsuccessful in its appeal from the decision in *Advanced Holdings Pty Limited as trustee for the Demian Trust v Commissioner of Taxation* [2020] FCA 1479 (see our November 2020 Tax Training Notes).

The case considered, amongst other things, whether Advanced Holdings Pty Ltd was taxable in its own right on amounts received Lewisham Estates Trust resulting from the sale of a number of properties in Lewisham, New South Wales, or whether it was taxable as trustee of another trust, the Demian Trust.

From May 1998, Demian Holdings Pty Ltd was the trustee of the Demian Trust.

On 2 April 2003, Charbel Demian signed a document entitled 'Deed of Appointment of a Trustee' addressed to 'the Trustee and Beneficiaries' of the Demian Trust. The document stated:

> *Pursuant to clause 22 of the trust deed dated 20th March 1998 governing the said Trust, I appoint Advanced Holdings Pty Limited as trustee of the Demian Trust.*

Clause 22 of the trust deed of the Demian Trust provides, relevantly:

> *The Principal may at any time by notice in writing to the Trustee remove from office any or all of the Trustees or Trustee for the time being of this Deed and may by Deed appoint a new Trustee in its or their place to be the Trustee hereof.*

The 'Principal' at the relevant time was Charbel.

In May 2003, the Lewisham Estates Trust was established as a unit trust by a unit trust deed between Advanced Holdings Pty Ltd as initial unitholder and Lewisham Estates Pty Ltd as trustee.

The Federal Court had considered that a proper construction of clause 22 of the trust deed was that the clause required one or more trustees to be removed and, that having happened, permitted one or more trustees to be appointed in their place. Removal of a trustee was a pre-condition of the power of appointment. Accordingly, the Court found that Advanced Holdings was not validly appointed as trustee of the Demian Trust in 2003 so that it owned its units in the Lewisham Estates Trust in its own right.

The Commissioner had argued before the primary judge that clause 22 of the Demian Trust Deed is a power of the Principal in two parts. First, it is a power of removal of a trustee in office. Second, epexegetically to the first power, it is a power to appoint a new trustee in substitution of the removed trustee.

On appeal it was argued for the taxpayers that the 2 April 2003 document impliedly removed Demian Holdings so that Advanced Holdings had been properly appointed as trustee. They contended that the Court should give effect to the objective intention sought to be achieved where the words of an instrument allow that intention to be given effect: *Fell v Fell* [1922] HCA 55. Further, to the extent of any ambiguity in the terms, the Court should construe the clause so that the operation of the trust is advanced: *Re Baden's Deed Trust* [1969] 2 Ch 388 . The argued that the Court should seek to determine and give effect where possible to the relevant parties' objective intention, here, as evidenced by the terms of the Demian Trust Deed and the instrument dated 2 April 2003: *Re Gulbenkian's Settlements Trust* [1970] AC 508.

The Full Federal Court considered that there is an important addendum to the principle in *Fell*, namely, that the Court 'cannot give effect to any intention which is not expressed or plainly implied in the language of', in this case, the 'Deed of Appointment' dated 2 April 2003. To do otherwise, they said, would be to engage impermissibly in what Issacs J referred to as 'gratuitous, groundless, fanciful implication'.

The Court considered that the text of the 2003 document did not support the submissions advanced by the taxpayers because it does not in any way refer to removal of the existing trustee. It spoke only of appointing Advanced Holdings 'as trustee', not as the '*new*' trustee for the Demian Trust. The absence of words such as 'new' or '*replacement*' also created a significant difficulty for the appellants. The absence of such essential words pertaining to a straightforward concept meant that to achieve the outcome advanced by the taxpayers, they would cross the line from construction into rectification.

The Court upheld the position that Advanced Holdings held the interest in the Lewisham Investment Trust in its own right.

Citation *Advanced Holdings Pty Limited as Trustee for The Demian Trust v Commissioner of Taxation* [2021] FCAFC 135 (Logan, McKerracher and Perram JJ, Sydney)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2021/135.html

1.8 Appeal Update - Auctus Resources

The High Court has dismissed Auctus Resources Pty Ltd's application for special leave to appeal the decision of *FC of T v Auctus Resources Pty Ltd* [2021] FCAFC 39 (*Auctus*).

In *Auctus*, the Full Federal Court allowed the appeal and found that it was open to the Commissioner to apply section 8AAZN of the *Taxation Administration Act 1953* to recover a refund relating to an R&D tax offset for activities subsequently found to be ineligible for the offset. The High Court stated 'The relevant provision, s 8AAZN of the *Taxation Administration Act 1953* (Cth), has not operated to permit recovery of a tax offset refund since the 2014 income year and, accordingly, the proposed appeal does not appear to raise a matter of general importance. Special leave should therefore be refused.'

Citation *Auctus Resources Pty Ltd v Commissioner of Taxation for the Commonwealth of Australia* [2021] HCASL 155
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCASL/2021/155.html

2 Legislation

2.1 Progress of legislation

Title	Introduced House	Passed House	Introduced Senate	Passed Senate	Assented
Treasury Laws Amendment (2020 Measures No. 4) 2020	28/10	25/3	11/5		
Treasury Laws Amendment (2021 Measures No. 1) 2021	17/2	17/3	18/3	9/8	
Treasury Laws Amendment (2021 Measures No. 2) 2021	17/3	11/8	11/8		
Treasury Laws Amendment (2021 Measures No. 5) 2021	24/6	10/8	11/8		
Treasury Laws Amendment (2021 Measures No. 6) 2021	11/8				
Treasury Laws Amendment (COVID-19 Economic Response No. 2) 2021	3/8	3/8	4/8	9/8	10/8

2.2 Miscellaneous tax amendments

The *Treasury Laws Amendments (2021 Measures No. 6) Bill 2021* passed on 2 September 2021.

The measures of interest are:

- Schedule 3 to the Bill introduces amendments to the ITAA 1997 to remove the requirement for superannuation trustees to provide an actuarial certificate when calculating exempt current pension income using the proportionate method, where all members of the fund are fully in the retirement phase for all of the income year. The amendment commences on the first 1 January, 1 April, 1 July or 1 October to occur after this Bill receives Royal Assent
- Schedule 5 to the Bill introduces amendments to the *Family Law Act 1975* and *TAA 1953* to create an information sharing mechanism to allow the family law courts to access certain superannuation information held by the Commissioner of Taxation for the purpose of family law proceedings. The Registries of the Federal Circuit and Family Court of Australia and the Family Court of Western Australia may request superannuation information of a party from the Commissioner on application of the other party to the proceedings. The Commissioner may disclose superannuation information to the requesting Registry to provide to the parties and their lawyers.

Treasury Laws Amendment (2021 Measures No. 6) Bill 2021
w https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6750

2.3 NANE – COVID-support payments

On 20 August 2021 the Treasurer made a declaration which has the effect of amending the *Income Tax Assessment (Eligible State and Territory COVID-19 Economic Recovery Grant Programs) Declaration 2020*.

The declaration includes certain additional state grant payments made to support eligible businesses in the COVID pandemic in the 2021 and 2022 income years as being non-assessable non-exempt (NANE) income for income tax purposes.

The following grant programs in NSW are eligible under the declaration:

- 2021 COVID-19 business grant
- 2021 COVID-19 JobSaver payment
- 2021 COVID-19 micro-business grant
- NSW Performing Arts COVID Support Package

The following grant programs in Victoria are eligible under the declaration:

- Alpine Resorts Support Program (Streams 1, 2 and 3)

- Business Continuity Fund
- Business Costs Assistance Program Round Two — July Extension
- Licenced Hospitality Venue Fund 2021 — July Extension
- Small Business COVID Hardship Fund

Income Tax Assessment (Eligible State and Territory COVID-19 Economic Recovery Grant Programs) Amendment Declaration (No. 2) 2021
w https://www.legislation.gov.au/Details/F2021L01178

2.4 Exposure draft on financial reporting obligations for RSEs

The exposure draft of the *Treasury Laws Amendment (Financial Reporting and Auditing Requirements for Registrable Superannuation Entities) Bill 2021* amends the *Corporations Act 2001, Superannuation Industry (Supervision) Act 1993* and *the Australian Securities and Investments Commission Act 2001* to extend and adapt the financial reporting and auditing requirements in Chapter 2M of the *Corporations Act* to apply to registrable superannuation entities (**RSEs**). RSEs include regulated superannuation funds, approved deposit funds and pooled superannuation trusts, but do not include self-managed superannuation funds.

The purpose of these amendments is to impose financial reporting obligations on RSEs that are consistent with those that currently apply to public companies and registered schemes.

The financial reporting requirements in the Bill require RSE licensees for RSEs to do all of the following:

1. keep relevant records for the preparation of correct financial reports;
2. prepare financial reports for each financial year and half-year, which includes directors' reports and financial statements for the entity and each sub-fund;
3. have these financial reports audited or reviewed and obtain a copy of the auditor's report;
4. lodge the financial and directors' reports and auditor's reports for each financial year and half-year with ASIC;
5. make the financial report, directors' report and auditor's report for a financial year publicly available on the entity's website;
6. include details of how to access an entity's financial report for a financial year and relevant auditor's report with the notice to the annual members' meeting; and
7. provide financial reports for a financial year and half-year to members upon request.

In addition to current auditing requirements, the Bill requires the following auditing requirements:

1. the RSE licensee to appoint an auditor of the RSE within one month of the entity being registered as a RSE;
2. the auditor of the entity must:
   (a) meet the eligibility requirements to be appointed as the auditor of a RSE, including the requirement to be a fit and proper person;
   (b) prepare an auditor's report for an audit or review of a financial report for a financial year and half-year that complies with the auditing standards and provides a true and fair view of the entity's financial position and performance;
   (c) report suspected contraventions and attempts to interfere with the proper conduct of an audit;
   (d) comply with auditor independence and conflict of interest requirements;
   (e) comply with auditor rotation requirements; and
   (f) prepare, lodge and publish auditor transparency reports, if required.

Under the proposed amendments, RSEs will be required to keep their financial and auditing records for 7 years (increased from 5 years).

It is expected that the proposed amendments will apply for income years of RSEs beginning on or after 1 July 2022. The draft exposure bill is open for consultation until 13 September 2021.

w https://treasury.gov.au/consultation/c2021-196275

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2.5 COVID-19 – WA support for tourism businesses

On 22 August 2021, the Commonwealth and Western Australian Governments announced a joint $16.8 million tourism business assistance grants program to assist with the financial impacts caused by the COVID-19 restrictions across Australia.

Applicants must demonstrate at least a 30 per cent reduction in turnover by comparing the period 15 May - 25 June with 10 July – 20 August to be eligible for support.

Eligible tourism businesses are those which are:

- registered with Tourism WA as a previous grant recipient or as part of the agency's marketing campaigns in 2020 or 2021; or
- a member of, or accredited through, a relevant tourism organisation (as of today); or
- a travel agent that has been offering domestic product to travellers.

The following funding amounts are available to eligible businesses:

- $2,000 grant for all sole traders and for employing businesses with an annual turnover between $50,000 and $100,000;
- $5,000 grant for employing businesses with an annual turnover between $100,000 and $1 million; or
- $10,000 grant for employing businesses with an annual turnover between $1 million and $10 million.

w https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/assistance-grants-wa-tourism-businesses-impacted

2.6 COVID-19 – Qld additional support for businesses

On 13 August 2021, the Commonwealth and Queensland government announced a joint funding agreement which will increase the Queensland COVID-19 Business Support Grants from $260 million to $600 million.

This package will see additional support for business who have a decline in turnover of more than 30 percent, and includes:

- a $1,000 one-off grant to non-employing sole traders;
- a $5,000 one-off, top-up grant to small business with payroll of less than $1.3 million;
- a $10,000 one-off, top-up grant to medium sized business with payroll between $1.3 million and $10 million; and
- a $25,000 one-off, top-up grant to large sized tourism and hospitality focused businesses with payroll of greater than $10 million.

Eligible Queensland business could apply for a 'top-up' grant from 16 August 2021.

w https://statements.qld.gov.au/statements/92943

2.7 COVID-19 – NT lockdown support for businesses

On 19 August 2021, the Commonwealth and Northern Territory Governments announced a joint $12.5 million business assistance package for businesses who have been impacted by COVID-19.

To be eligible, businesses must have annual turnover of less than $10 million and be able to demonstrate a 30% decrease in turnover as a result of the lockdown.

A $9 million Visitation Reliant Support Program will specifically be available for tourism and hospitality businesses reliant on international and interstate visitation.

If eligible, employing businesses will receive a $3,000 payment, while sole traders will receive a $1,000 payment.

A $1.3 million Tourism Survival Fund will also be available for touring, professional conference organisers, exhibition build companies and eligible attractions who are impacted by the lack of international visitors and who have not benefitted from tourism vouchers.

Such businesses will be able to access payments between $5,000 and $30,000 depending on their annual turnover.

w https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/lockdown-support-package-territory-businesses

2.8 COVID-19 – VIC continued support for businesses

On 19 August 2021, the Commonwealth and Victorian Governments announced a joint $807 million support package to ensure that the current level of support being provided to businesses in Melbourne will continue during the current two week lockdown extension (ending 2 September 2021).

This support package will flow automatically to eligible businesses.

The Commonwealth COVID-19 Disaster Payment arrangement for Melbourne workers and eligible sole-trader businesses has also been extended to 2 September 2021 in line with the new restrictions period.

w https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/backing-melbourne-businesses-and-their-workers

2.9 COVID-19 – TAS support for targeted industries

On 17 August 2021, the Commonwealth and Tasmanian Governments announced a joint $20 million Business Support Package for those business impacted directly by reduced interstate visitation.

Businesses which have suffered a 30 percent decline in turnover will be eligible for financial support between $2,000 and $10,000.

w https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/20-million-package-help-tasmanian-businesses

2.10 COVID-19 – ACT support for businesses affected by lockdown

On 13 August 2021, the Commonwealth and Australian Capital Territory (ACT) Governments announced the ACT COVID-19 Business Support Grant for small and medium businesses impacted by current lockdown measures.

The COVID-19 Business Support Grant will deliver $3,000 for employing businesses and $1,000 for non-employing businesses who have seen a decline of 30% or more in turnover between 13 August 2021 and 20 August 2021 (compared to the prior 7-day period) due to restricted trading conditions.

On 17 August 2021, the COVID-19 Business Support Grants were extended in line with the extension of the ACT lockdown till 2 September 2021.

The extension will deliver support of up to $10,000 for employing businesses and $4,000 for non-employing businesses.

To be eligible for COVID-19 Business Support Grants, businesses must demonstrate:

- a 30% decrease in turnover or more as a result of the COVID-19 restrictions;
- be registered in the ACT;
- be able to demonstrate their primary operation in the ACT;
- have an annual turnover of more than $75,000;
- be registered for GST; and
- have a total payroll of less than $10 million.

w https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/support-act-businesses-impacted-covid-19
w https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/extended-support-act-businesses-impacted-covid-19

2.11 COVID-19: expanding eligibility for SME Recovery Loan Scheme

The Federal Government has announced changes to the eligibility criteria for the SME Recovery Loan Scheme given the ongoing COVID-19 pandemic and associated lockdowns.

Initially, loans were only available to recipients of JobKeeper payments between 4 January 2021 and 28 March 2021. This was extended in March 2021 to include SMEs impacted by the 2021 floods in NSW and Queensland. These eligibility requirements have now been removed. Accordingly, any SME dealing with the economic impacts of the COVID-19 pandemic with a turnover of less than $250 million will be able to access loans of up to $5 million over a term of up to 10 years. The Federal Government will guarantee will be 80 percent of the loan amount.

Loans can be either unsecured or secured (excluding over residential property). Lenders are allowed to offer borrowers a repayment holiday of up to 24 months. The loans can be used for a broad range of business purposes, including to support investment and refinance pre-existing debt. The loans are available through participating lenders until 31 December 2021.

w https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/supporting-more-small-and-medium-sized-business
w https://treasury.gov.au/coronavirus/sme-recovery-loan-scheme

2.12 Extension of JobSaver Program and Micro-business Grant, further support

On 2 September 2021, the NSW Government announced an additional $3.9 billion (including $1.5 billion from the Commonwealth government) to assist businesses and individuals impacted by the Covid-19 lockdowns and public health orders.

Extension of JobSaver from 28 August

Eligible businesses with a turnover between $75,000 to $250 million that continue to experience a minimum 30 per cent decline in turnover due to the Public Health Order will be eligible for payments of up to 40 per cent of their pre-COVID weekly NSW payroll.

Eligible businesses in the hospitality, tourism and recreation sectors with a turnover of more than $250 million and up to $1 billion that continue to experience the requisite decline in turnover due to the Public Health Order will be eligible to receive payments of 40 per cent of their pre-COVID weekly NSW payroll, up to $500,000 per week.

Eligible Not-for-Profit (NFP) organisations in the social support and animal welfare sectors with a turnover between $75,000 and $250 million that show a minimum 15 per cent decline in turnover will be eligible for payments of up to 40 per cent of their pre-COVID weekly NSW payroll. Eligible NFPs will be able to apply from later in September to access backdated payments.

Extension of the COVID-19 Micro-business Grant from 28 August

Eligible businesses with a turnover of more than $30,000 and less than $75,000 that continue to experience a minimum 30 per cent decline in turnover due to the Public Health Order will be eligible for a fortnightly payment of $1,500.

Extension of payroll tax deferrals and waivers

Businesses eligible for a 2021 COVID-19 Business Grant or JobSaver with payrolls $10 million or less will be eligible for a 50 per cent reduction (waiver) in their 2021-22 payroll tax, up from 25 per cent.

All businesses will also be able to further defer payroll tax payments due from July 2021 through to December 2021. The payments will now not be due until 14 January 2022, and 12-month interest free repayment plans will become available.

Extension of support for commercial, retail, and residential landlords

Eligible commercial and retail landlords that provide rental waivers to COVID-19 impacted tenants and have not claimed land tax relief, will be eligible for a monthly grant of up to $3,000.

Eligible residential landlords can choose between applying for land tax relief or a further payment of $1,500, taking total assistance to a maximum of $4,500 per tenancy if they agree to reduce the rent for COVID-19 impacted tenants by at least $4,500.

A new hardship panel will be formed to assess businesses that do not qualify for COVID-19 grants, on a case-by-case basis.

w https://nsw.liberal.org.au/Shared-Content/News/2021/COVID-19-economic-support-measures-extended

2.13 COVID-19 – paid parental leave requirements

The *Paid Parental Leave Amendment (COVID-19 Work Test) Bill 2021* will enable parents to access parental leave pay, and dad and partner pay, where they do not meet the current work test provisions because their employment has been affected by the COVID-19 pandemic, and they have received Commonwealth COVID-19 support payments.

The changes aim to prevent situations where a person is unable to satisfy the work test for parental leave or dad and partner pay, due to having their work hours reduced, being stood down or ceasing work entirely as a result of COVID-19 and lockdown measures.

Relevantly, the work test to access parental leave pay, and dad and partner pay requires that the person:

1. perform qualifying work for at least 10 of the 13 months prior to the expected or actual birth date of the child;
2. work at least 330 hours during those 10 months; and
3. not have a break between workdays of more than 12 weeks.

Qualifying work includes a person performing at least one hour of paid work on a day or taking at least one hour of paid leave on a day. Currently, unpaid leave and being stood down from work as a result of the impact of COVID-19 pandemic would not be considered qualifying work, impacting the ability for people to satisfy the work test.

The amendments provide that a person in receipt of an Australian Government COVID-19 payment will be considered to be performing qualifying work for the purpose of the work test. This will mean that the period the person receives specified payments will count toward the paid parental leave work test.

w https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6761

2.14 Report released on tax treatment of employee share schemes

The House of Representatives Standing Committee on Tax and Revenue has released a report titled ‘Owning a Share of Your Work: Tax Treatment of Employee Share Schemes’. The report makes 18 recommendations for improving the taxation of employee share schemes (**ESS**) in Australia.

Some of their recommendations include:

- the following changes be made to the definition of a ‘start-up’ for tax concession purposes:
  - the definition be extended to listed companies that otherwise fulfil the criteria to be considered a ‘start-up’.

  - the aggregated turnover test be removed to relate to wholly owned groups or entities that can be shown to be controlled by the entity as per the definitions of control under the *Corporations Act 2001*.
- the definition of 'safe harbour' valuation contained in Legislative Instrument – Income Tax Assessment (ESS 2015/1) be extended to all unlisted companies.
- increasing the $1,000 limit in section 83A.35(2)(a) of the ITAA 1997 (the '$1,000 rule') to $50,000.
- the requirement for a maximum 15 per cent discount under the Income Tax Assessment Act 1997 start-up regime be scrapped.
- a 'safe-harbour' methodology be introduced for ESS buy-backs for the purposes of determining the dividend / capital split and administrative treatment be allowed when no part of the purchase price paid under an ESS buy-back is deemed to be capital.
- the Australian Taxation Office (ATO) clarify whether sections 109F(4) and 245-35(a) of the Income Tax Assessment Act 1997 and ATO Interpretive Decision Fringe Benefits Tax (2003/317) mean that Fringe Benefits Tax is not in fact payable for discharged ESS loans.
- removing the real risk of forfeiture requirement for shares and removing the 75 per cent offer requirement for shares.

w
https://www.aph.gov.au/Parliamentary_Business/Committees/House/Tax_and_Revenue/EmployeeShareSchemes/Report

2.15 Electronic execution of documents and remote meetings

Virtual company meetings and electronic signatures (including split execution of documents) under section 127 of the *Corporations Act 2001* (Cth) are now officially allowed, after the *Treasury Laws Amendment (2021 Measures No. 1) Bill 2021* received Royal Assent on 13 August 2021.

The Bill also allows measures for the remote witnessing of affixing a company seal. It is important to note that these rules are not permanent and will only be in force until 31 March 2022. Despite these temporary measures, the explanatory memorandum to the Bill clarifies that the Australian Government intends to implement these changes permanently before the lapsing of the temporary measures.

Electronic signatures

Under section 127 of the *Corporations Act*, a director, secretary or witness can now electronically execute documents (or a copy or counterpart of the document).

For valid electronic execution:

1. the identity of the person signing and their intention to sign can be determined using a 'method';
2. the electronic document includes the entire contents of the document; and
3. the 'method' used was reliable and appropriate for the purpose of the document or communicated or proven to have indicated the person's identity and intention to sign.

Notably, the amendments to section 127 now mean that companies executing deeds do not need to do so using wet ink signatures, and can follow the above procedures. Electronic signing can also happen in a number of ways, including by signing using a stylus on a tablet device or using electronic signature software such as DocuSign or Adobe Sign.

Split execution (which is using a mix of electronic and wet ink signatures) under section 127 of *Corporations Act* is also allowed under these new amendments.

For valid remote witnessing of affixing the company seal:

1. the witness must electronically observe the fixing of the company seal;
2. the witness must sign the document (either electronic or wet ink signatures); and
3. the document must contain a statement that the witness who observed the fixing of the seal did so by electronic means.

Virtual company meetings

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The Bill also amends the *Corporations Act* to allow companies to hold virtual meetings or a hybrid of virtual and in-person meetings at one or more physical locations using technology. The Bill only provides temporary relief for virtual AGMs until 31 March 2022.

Importantly, a company can hold virtual meetings without amending the company constitution to allow for virtual meetings. The amendments will override any prohibition in a constitution preventing virtual meetings. Companies who plan to hold their upcoming AGMs as virtual meetings should factor in their obligations to give members a reasonable opportunity to participate. This includes holding the meeting at a reasonable time and place, using reasonable technology to allow members to speak and ask questions at the virtual meeting.

The minutes for meetings of members of companies may also be taken electronically and the record of minutes may be kept and provided to members electronically.

Reference *Treasury Laws Amendment (2021 Measures No. 1) Bill 2021*
w https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6674

2.16 Data sharing with COVID-19 support programs

On 20 August 2021, the Treasurer issued *Taxation Administration (Data Sharing — Relevant COVID-19 Business Support Program) Declaration 2021*.

The Declaration specifies the programs that have been declared relevant COVID-19 business support programs to enable the ATO to share protected data it holds with relevant Australian government agencies that administer the programs.

The effect of a program being declared a COVID-19 business support program is to create an exception to section 355-25 in Schedule 1 to the *Tax Administration Act 1953 (Cth),* enabling the ATO to share protected information for the purpose of administering the declared program without committing an offence.

The Australian government agency receiving the protected information must only use the information for the purposes for which it was disclosed. The Act provides offences relating to the misuse of disclosed information.

w https://www.legislation.gov.au/Details/F2021L01157

2.17 Rebates for purchases of electric vehicles

On 25 August 2021, the NSW Government announced that purchasers of new electric vehicles (**EVs**) will be able to claim rebates worth $3,000 and refunds on stamp duty retrospectively, if the *Electric Vehicles (Revenue Arrangements) Bill 2021* passes NSW Parliament.

Due to the COVID-19 lockdown, the NSW Parliament has not been able to sit which has resulted in a delay in the passing of the Bill. However, if the legislation passes, it will apply retrospectively from 1 September 2021, so that EV purchasers will be able to apply for a refund for the following:

1. stamp duty on eligible EVs (battery and hydrogen fuel cell vehicles) priced up to $78,000; and
2. a rebate of $3,000 for the first 25,000 eligible EVs under $68,750.

The Electric Vehicle Strategy intends to cut taxes, incentivise uptake and reduce barriers for EV purchases over the next four years.

w https://www.treasury.nsw.gov.au/sites/default/files/2021-08/Dominic%20Perrottet%20Andrew%20Constance%20Matt%20Kean%20med%20rel%20-%20Big%20savings%20on%20new%20electric%20vehicles%20will%20be%20backdated%20if%20legislation%20passes%20parliament.pdf

3 Rulings and determinations

3.1 NALI — expenditure under non-arm's length arrangements

On 28 July 2021, the ATO finalised the draft LCR 2019/D3 as LCR 2021/2. The Ruling addresses the operation of section 295-550 of ITAA 1997, which applies to treat an amount of ordinary or statutory income of a complying superannuation fund as non-arm's length income (**NALI**) where:

- there is a scheme in which the parties were not dealing with each other at arm's length;
- the fund incurs a loss, outgoing or expenditure of an amount in gaining or producing the income; and
- the amount of the loss, outgoing or expenditure is less than the amount that the fund might have been expected to incur had those parties been dealing with each other at arm's length in relation to the scheme.

The Ruling is effective from 1 July 2018 and applies to income derived in the 2018-19 income year and later income years, regardless of whether the scheme was entered into prior to 1 July 2018.

A summary of the draft LCR 2019/D3 can be found in our October 2019 training notes.

The final ruling makes the following clarifications to the draft ruling.

All of the income of the fund is NALI

A controversial aspect of the draft ruling was that certain expenses, if not incurred on arm's length terms, could cause all of the income of a superannuation fund to be NALI.

The finalised ruling states that, where a fund incurs expenditure that does not specifically relate to a particular amount being derived by the fund but it has a sufficient nexus more generally to all income derived by the fund to be deductible under section 8-1 of the ITAA 1997, all the income can be NALI under paragraphs 295-550(1)(b) and (c). The following examples of expenditure that may relate to all of the income are given in the finalised ruling:

- actuarial costs;
- accountancy fees;·
- audit fees;
- costs of complying with a 'regulatory provision' as defined in section 38A of the SIS Act, unless the cost is a capital expense;
- trustee fees and premiums under an indemnity insurance policy;
- costs in connection with the calculation and payment of benefits to members - the ATO gives an example of interest on money borrowed to secure temporary finance for payment of benefits and medical costs in assessing invalidity benefit claims;
- investment adviser fees and costs in providing pre-retirement services to members; and
- other administrative costs incurred in managing the fund.

The ATO notes that where the fund subsequently ceases to incur the non-arm's length expenditure in a later income year, income derived by the fund in the later income year is not NALI.

The ATO has adopted a compliance approach in the finalised ruling, stating '… the Commissioner is alive to concerns that a finding that general fund expenses are non-arm's length is likely to have a very significant tax impact on the complying superannuation fund, even where the relevant expenses are immaterial'. From 1 July 2022, the ATO's compliance recourses in relation to general fund expenses will be directed to the following:

- SMSFs – to ascertaining whether the parties have made a reasonable attempt to determine an arm's length expenditure amount for services provided to the fund (excluding services provided as trustee or director);
- large APRA-regulated superannuation fund – to reviewing supporting documentation evidencing that appropriate internal controls and processes are in place and that reasonable steps were taken to determine an arm's length expenditure amount.

Performing services as a director or trustee?

The finalised ruling clarifies that, as there is a statutory restriction that prevent a trustee or director of a corporate trustee from receiving remuneration, the non-arm's length expenditure provision will not apply in circumstances where a trustee or director does not charge for the services performed in relation to the fund when acting in a trustee capacity. What needs to be determined is whether the person is acting in their trustee capacity or not. The following examples from the finalised ruling illustrate the ATO's view.

Example 7 – SMSF trustee carrying out duties - trustee capacity

Levi is the trustee of his SMSF of which he is the sole member. He is also a financial advisor and director of Levi and Co Financial Services Pty Ltd. Levi operates the business of Levi and Co Financial Services Pty Ltd from a commercial office and on regular occasions from his home. At home, Levi uses the computer and office equipment supplied by and paid for by the business.

When at home, but not while working or billing clients, Levi undertakes the bookwork and occasionally makes online investments for his SMSF using the computer and office equipment supplied by the business.

Levi performs these activities as trustee of his SMSF and does not charge the SMSF for this work. Levi's use of the computer and office equipment at home is minor and incidental in nature and will not, of itself, indicate that he is undertaking these services in any capacity other than as trustee for his SMSF.

Example 10 – SMSF trustee carrying out duties - individual capacity

Jean is the trustee of his SMSF of which he is the sole member. He is also a licenced electrician by trade. The SMSF owns a residential property which it leases for a commercial rate of rent.

Jean undertakes electrical work on the rental property that can only be done by a licenced electrician. In that instance, the work done by Jean is not as trustee of his SMSF but in his individual capacity. Jean charges the SMSF the commercial rate for the work undertaken on the rental property. Accordingly, the non-arm's length expenditure provisions will not apply.

Discounted prices

Where a complying superannuation fund enters into arrangements in which it receives discounted prices, those arrangements will be considered arm's length terms where they are consistent with normal commercial practices, such as an individual acting in their capacity as trustee (or a director of a corporate trustee) being entitled to a discount under a discount policy where the same discounts are provided to all employees, partners, shareholders or office holders.

The ATO gives the following example of a discount that would not result in NALI.

Example 8 – third party providing services - discounts

Sasha is the trustee of her SMSF of which she is the sole member. She is also an employee of Eren & Co Accountants.

Sasha engages Eren & Co Accountants to provide accounting services to her SMSF. Sasha is entitled to a staff discount rate that is available to all staff of Eren & Co Accountants. Sasha is charged the discounted rate for these services.

As the discount is available to all staff of Eren & Co Accountants and is not able to be influenced by Sasha, the discounted rate has been provided on an arm's length basis. Accordingly, the non-arm's length expenditure provisions will not apply.

Purchase of asset under a non-arm's length arrangement

The ATO consider that non arm's length expenditure incurred to acquire an asset will have a sufficient nexus to all ordinary or statutory income derived by the complying superannuation fund in respect of that asset. This will result in that income, including capital gains derived on the disposal of the asset, being NALI.

The ATO considers that there will still be a sufficient nexus to treat all income derived from that asset as NALI even where the trustee subsequently refinances borrowing arrangements (if that has what has resulted in income from the asset being NALI) on arm's length terms.

The finalised ruling gives the following example:

Example 4 - purchase financed through a limited recourse borrowing arrangement on non-arm's length terms - NALI

During the 2018-19 income year, Kellie (as trustee of her SMSF) entered into a non-commercial LRBA with herself in her individual capacity to purchase a commercial property valued at $2 million. Her SMSF borrowed 100% of the purchase price and the terms of the loan included interest being charged at a rate of 1.5% per annum and repayments only being made on an annual basis over a 25-year period. Kellie's SMSF received a commercial rate of rent from the property of $12,000 per month.

If Kellie's SMSF had entered into an LRBA on arm's length terms, it would be expected that repayments of principal and interest would have occurred on a monthly basis and interest would be charged on the LRBA at a commercial rate. The loan to market value ratio would have also not exceeded commercial levels.

For the purposes of subsection 295-550(1), the scheme involves the SMSF entering into the LRBA with Kellie, complying with the terms of the LRBA, purchasing the commercial property, and deriving the rental income. The terms of the LRBA constitute a non-arm's length dealing between the SMSF and Kellie, which resulted in the SMSF incurring expenditure in gaining or producing rental income that was less than would otherwise be expected if those parties were dealing with each other at arm's length in relation to the scheme. The rental income derived from the commercial property by the SMSF for all income years is therefore NALI, regardless of whether the LRBA is subsequently refinanced on arm's length terms.

The non-arm's length expenditure incurred under the LRBA will also result in any capital gain that might arise from a subsequent CGT event happening in relation to the property (such as disposal of the property) being NALI. This will be the case regardless of whether the LRBA is subsequently refinanced on arm's length terms.

The ATO also confirm in the final ruling that the application of the market value substitution rule will have no impact on whether a fund derives NALI, in circumstances where it acquires an asset for less than arm’s length consideration. That is, while a fund might have a market value cost base for an asset acquired through a non-arm’s length dealing that is used in calculating a capital gain on the disposal of the asset, the resulting gain will be treated as NALI if the asset was acquired through a non-arm’s length arrangement where the consideration given was less than would have been paid had the parties been dealing at arm’s length.

ATO reference *Law Companion Ruling LCR* 2021/2
w https://www.ato.gov.au/law/view/document?docid=COG/LCR20212/NAT/ATO/00001&PiT=20210728000001

3.2 Charge on the land for landholder duty

Revenue NSW recently issued revenue ruling DUT 051 which explains that a landholder will be jointly and severally liable for the landholder duty payable when a person makes a relevant acquisition, and how the liability of the landholder is a charge on the land for which a caveat can be registered, under section 154 of the *Duties Act 1997* (NSW).

From 24 June 2020, section 154 of the *Duties Act* extends liability for landholder duty payable by a person when the person acquires an interest in a landholder, so that the landholder and the acquirer are jointly and severally liable to pay the duty.

Charge on the landholdings

Any liability of a landholder, to pay duty chargeable (including any interest or penalty tax payable), is a charge on the land of the landholder (including constructive ownership of landholdings through linked entities and discretionary trusts).

The charge gives the Chief Commissioner an interest in the land and, therefore, the Chief Commissioner may lodge a caveat in respect of the land to protect that interest and revenue of the State.

If a landholder pays landholder duty that is not paid by the acquirer or other relevant persons, the landholder is entitled to recover that duty as a debt from the persons jointly and severally liable to pay the duty under section 154(2) of the *Duties Act*.

If the acquirer pays the landholder duty payable, it will be entitled to recover the proportionate amount of that duty as a debt from other persons jointly and severally liable to pay the debt but not the landholder.

Should a landholder have a number of landholdings in NSW, section 154 of the *Duties Act* creates a charge on all landholdings of the landholder and authorises the Commissioner to lodge a caveat on the title of all the landholdings of the landholder.

Where a person jointly liable for landholder duty is a unit trust scheme, it is only the landholders of the unit trust scheme that will be subject to any charge for that landholder duty and land owned by the trustee beneficially will not be subject to a charge.

Administrative Practice

The Chief Commissioner will undertake the following general administrative practice in respect of landholder duty:

1. an initial notice of assessment will be issued only to the acquirer or their tax representative;
2. if landholder duty is not paid, the Chief Commissioner will issue a separate joint and several liability notice of assessment to each of the liable parties;
3. if payment is still not made, the Chief Commissioner will send a Notice of Intended Legal Action to each of the liable parties; and
4. generally, the Commissioner will only lodge a caveat on title where there has been a tax default, however a caveat may be lodged at any time where they consider it appropriate.

Revenue NSW reference *DUT 051*
w https://www.revenue.nsw.gov.au/help-centre/resources-library/rulings/duties/landholder-charge-on-the-land

3.3 NSW - contractor who ordinarily performs services to the public

This Revenue Ruling explains how section 32(2)(b)(iv) of the PTA applies to exclude a contract from the definition of 'relevant contract' for the purposes of the contractor provisions in the PTA.

The Revenue Ruling addresses the decision in *Nationwide Towing & Transport Pty Ltd & Ors v Commissioner of State Revenue* [2018] VSC 262. In that case, the Supreme Court of Victoria found that, contrary to the former PTA-021, the Chief Commissioner does not need to be satisfied that a contractor conducts a genuine independent business in order for the exclusion under section 32(2)(b)(iv) of the *Payroll Tax Act 2007* (NSW) to apply.

Section 32(2)(b)(iv) of the PTA provides that a contract is not a 'relevant contract' in relation to a financial year if the Commissioner is satisfied that the person who performed the services under the contract ordinarily performs services of that kind to the public generally in that financial year.

This Revenue Ruling provides that the Chief Commissioner considers that the following factors may be relevant, and would generally support, a finding that the exclusion in section 32(2)(b)(iv) of the PTA applies:

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1. the contractor provides the same type of services to a range of principals in the financial year (however, providing the same type of services to members of the same payroll tax group is not a strong factor supporting a finding that the contract is not a relevant contract);
2. the contractor derives income from principals other than the principal claiming the exclusion in the financial year. The case for exclusion is stronger when the proportion of the contractor's income obtained from other principals is greater;
3. the contractor enters into contracts which do not tie the contractor to the principal and do not restrict the contractor from providing the same type of services to other principals in the financial year;
4. the contractor is proactive in sourcing work from a range of principals in the financial year for example, by advertising to the public. However, merely advertising to the public without actually providing services to the public is not a strong factor supporting a finding that the contract is not a relevant contract; and
5. the contractor performs work on separate contracts with separate principals concurrently in the financial year.

These factors are not conclusive, and the Chief Commissioner may consider other relevant factors.

The Chief Commissioner will also accept that a contract is excluded under section 32(2)(b)(iv) of the PTA in the following circumstances, in which case the principal can exclude the payments made to the contractor from its taxable wages without obtaining a private ruling from the Commissioner:

1. the contractor provides services of the same type to the principal claiming the exclusion and to one or more other principals (not being members of a group) during the financial year; and
2. the contractor provides services of that type to the principal claiming the exclusion for an average of 10 days or less per month (excluding the months in which no services were provided to that principal).

The following example is provided to demonstrate this:

Example 3
Michael is a computer programmer. During the financial year, he provided the same type of services to Principal B and Principal C. Under his contract for service with Principal B, he provided his services as follows during the financial year… In that financial year, Michael worked for a total of 100 days for Principal B which is an average of 8.3 (100 days divided by 12 months) days per month. As a result, the Commissioner will be satisfied that Michael ordinarily performed services of that kind to the public generally in that financial year. Principal B can exclude the payments it makes to Michael from its taxable wages without obtaining a private ruling from the Commissioner.

Revenue NSW reference *PTA 012v2*
w https://www.revenue.nsw.gov.au/help-centre/resources-library/rulings/payroll/pta021v2

3.4 Queensland – ruling on exemption for leave pay

On 9 August 2021, Queensland Treasury released Public Ruling PTAQ014A.3.1 *Exemption for parental, adoption, surrogacy or cultural parent leave pay.*

Section 14A of the *Payroll Tax Act 1971* (Qld) exempts certain wages paid or payable to employees in respect of parental leave, adoption leave, surrogacy leave or cultural parent leave. The purpose of the Ruling is to explain the application of this exemption.

The exemption applies to all wages to the extent that they relate to the period of parental, adoption, surrogacy or cultural parent leave, but does not apply to payments made in relation to services performed before the period of leave or for future periods of service after the employee returns from leave. Fringe benefits provided to an employee on parental, adoption, surrogacy or cultural parent leave are not exempt.

The exemption is limited to a maximum of 14 weeks pay at the rate or amount of wages that would normally be paid by the employer if the employee has worked (or an equivalent period of leave at a reduced rate of pay).

The employer is required to keep certain documentation regarding the leave. This documentation is set out in the Ruling. For example, for maternity leave, the employer is required to hold a medical certificate for, or statutory declaration by, the employee stating the employee was pregnant or that the employee has given birth and the date of the birth.

Queensland OSR reference *PTAQ014A.3.1*
w https://www.treasury.qld.gov.au/resource/public-ruling-ptaq014a-3/

3.5 Revenue Victoria – meaning of land development under the Duties Act

On 8 September 2021, the Victoria State Revenue Office released Ruling DA-064 to clarify on the actions and activities that constitute 'land development' as defined in section 3(1) of the *Duties Act 2000* (Vic).

In the Duties Act, the definition of 'land development' is relevant in the following two contexts:

1. in determining whether foreign purchaser additional duty (**FPAD**) is imposed on the acquisition of residential property. The definition of 'residential property' in the Duties Act includes land on which a person has undertaken or intends to undertake land development to create residential property. Therefore, FPAD may be imposed where a foreign purchaser acquired a property that was not a residential property, but later formed an intention to undertake land development to convert it into a residential property; and
2. where there has been an acquisition of a transfer right between a contract/option date and settlement of a transfer, the presence of land development can trigger the application of the sub-sale provisions under the Duties Act. For example, land development that occurs between the contract date and the nomination date will attract duty liabilities under the sub-sale provisions. However, if land development occurred after the nomination date or before the contract date, the additional duty consequences under the sub-sale provisions will not be triggered.

Broadly, 'land development' is the process of altering the state and/or use of the land. Under section 3(1) of the Duties Act, 'land development means' any one or more of the following limbs:

1. preparing a plan of subdivision of the land or taking any steps to have a plan registered under the *Subdivision Act 1988* – the initial activities undertaken to prepare a plan of subdivision include engaging professional surveyors to survey the property, drafting a plan of subdivision, or commissioning a professional to review the plan of subdivision. Activities which are not caught under this limb include preliminary research and analysis of the land, informal surveys or general and preliminary enquiries;
2. applying for or obtaining a permit under the *Planning and Environment Act 1987* in relation to the use or development of the land – either applying for a permit or obtaining a permit satisfies this limb;
3. requesting under the *Planning and Environment Act 1987* a planning authority to prepare an amendment to a planning scheme that would affect the land – the Commissioner takes the view that a request in the form of a submission would satisfy this limb. However, submissions that do not advocate for amendments to be made to a planning scheme do not constitute land development under this limb;
4. applying for or obtaining a permit or approval under the *Building Act 1993* in relation to the land – either applying for a permit or approval, or obtaining a building permit or approval satisfies this limb;
5. doing anything in relation to the land for which a permit or approval referred to in (4) would be required - the Commissioner will take guidance from the *Building Act 1993* and its subordinate instruments regarding the type of works that would constitute land development under this limb;
6. developing or changing the land in any other way that would lead to the enhancement of its value – limbs 1 to 5 encompass activities typically involved in developing land regardless of whether they lead to an enhancement of its value. This limb 6 is focused on activities that enhance the value of the land.

In determining whether an activity constitutes 'land development', the Commissioner will consider the following:

1. facts, circumstances and contexts of each matter;
2. tangible and intentional actions associated with developing and changing the use of the land; and
3. overall effect and consequence of the activity.

Generally, the Commissioner will only take into consideration activities undertaken directly or indirectly by a party to the contract/agreement and nomination, including activities by related parties, agents, associates or tenants who act with the knowledge or consent from any of the parties.

Victorian SRO reference *Ruling DA-064*
w https://www.sro.vic.gov.au/legislation/land-transfer-duty-meaning-land-development

4 Private Binding Rulings

4.1 Foreign super fund and 99B

Facts

A person joined a superannuation fund while living and working in a foreign country.

The Fund was governed by the Superannuation Act of the foreign country.

Both the person and their employer made contributions to the Fund and the Fund derived interest income.

Under the Fund rules, members of the Fund are entitled to withdraw their savings on grounds of unemployment, retirement, permanent disability, death or emigration.

After moving to Australia and becoming a tax resident, in 20XX the person withdrew their full balance from the Fund which was paid into their personal bank account.

Questions

1. Is the foreign fund a superannuation fund?
2. If not, is the payment assessable under section 99B?

Decision and reasons

The ATO considered that the fund did not qualify as a foreign superannuation fund.

The ITAA 1997 defines a superannuation fund as having the same meaning given by section 10 of the *Superannuation Industry (Supervision) Act 1993* (SISA), that is:

1. a fund that:
   (a) is an indefinitely continuing fund; and
   (b) is a provident, benefit, superannuation or retirement fund; or
2. a public sector superannuation scheme;

The ATO set out that in *Mahony v. Federal Commissioner of Taxation* (1967) 41 ALJR 232, Kitto J held that a fund had to exclusively be a 'provident, benefit or superannuation fund' and that 'connoted a purpose narrower than the purpose of conferring benefits in a completely general sense...'. This narrower purpose meant that the benefits had to be 'characterised by some specific future purpose' such as the example given by Kitto J of a funeral benefit.

Kitto J's judgement also indicated that a fund does not satisfy any of the three provisions, that is, 'provident, benefit or superannuation fund', if there exist provisions for the payment of benefits 'for any other reason whatsoever'. Although a fund may contain provisions for retirement purposes, it could not be accepted as a superannuation fund if it contained provisions that benefits could be paid in circumstances other than those relating to retirement.

Under the sole purpose test, a regulated superannuation fund must be maintained solely for the provision of retirement or death benefits for, or in relation to, fund members but it may also provide benefits on the cessation of a member's employment and other death benefits and other approved benefits.

Notwithstanding the SISA applies only to 'regulated superannuation funds' the ATO's view is that the SISA provides guidance as to what 'benefit' or 'specific future purpose' a superannuation fund should provide.

The information provided indicates that the Fund could pay benefits in circumstances outside of retirement, invalidity or death; such as unemployment and emigration. As such, the Fund does not meet the definition of a foreign superannuation fund.

As the foreign fund is not a foreign superannuation fund it will be a foreign trust so that amounts paid from the trust may result in tax being payable under section 99B of ITAA 1936. Broadly this could result in an amount not representing the corpus of the trust (as defined in that section) being included in the assessable income of the person.

The ATO also note that where an amount is included in assessable income under section 99B that the person may be liable for interest charges under section 102AAM. The interest charges are applied to reflect the fact that the person may be paid income derived by the trust in an earlier income year, that has been accumulated.

The ATO set out that interest is intended to make up for the deferral of Australian tax on any accumulated income not taxed in a previous year of income of the non-resident trust.

The ATO advised that the person will be required to complete the section 102AAM calculation and include the amount on an additional information schedule when lodging the relevant income tax return. The ATO stated it would then confirm the calculation and the amount payable.

TRAP – the interest charge under section 102AAM can be difficult to calculate, and difficult to get the data needed for a calculation from a foreign trust. It also results in a person that was a non-resident when income was accumulated, being subject to tax on such amounts once an Australian resident.

ATO reference *Private Binding Ruling Authorisation No. 1051851356065*
w https://www.ato.gov.au/law/view/document?docid=EV/1051851356065

4.2 Deductibility of break costs

Facts

An individual acquired listed shares solely to produce assessable income, by way of dividend income and capital gains following the disposal of the shares.

The acquisition was funded by way of margin loans that were initially secured against the shares, and the security was withdrawn when the margin loans were paid out.

In order to avoid interest costs, the shares were disposed of and the margin loans were paid out.

As a result of early termination, the individual incurred break costs under the margin loans agreements.

The individual considered that, on balance, it was preferable to realise the profits and pay the break costs rather than continue paying interest.

The lender charged break costs comprising of:

- Interest foregone by the lender due to voluntary termination in the amount of $X;
- Administration fee - 15 x Loan closures in the total amount of $X; and
- Administration fee - 1 x PPSR Discharge in the amount of $X.

Questions

Were the break costs deductible?

Decision and reasons

The ATO considered that the break costs would be deductible both under section 8-1 and section 25-30 of ITAA 1997.

The ATO referenced *Taxation Ruling* TR 2019/2, which defines penalty interest as an amount payable by a borrower under a loan agreement consideration for the lender agreeing to an early repayment of the loan. The

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ruling notes the amount payable is commonly calculated by reference to a number of months of interest payments that would have been received but for the early repayment.

Paragraph 5 of the TR 2019/2 states that penalty interest is generally deductible under section 8-1 of the ITAA 1997 where the borrowings are used for gaining or producing assessable income or in a business carried on for that purpose and it is incurred to rid the taxpayer of a recurring interest liability that would itself have been deductible if incurred.

A deduction is not available under section 8-1 of the ITAA 1997 for a loss or outgoing that is capital or of a capital nature. The ATO consider the critical factor in determining whether penalty interest is capital in nature is the advantage sought by the early loan repayment. They state that this is a question of fact to be considered on a case by case basis, from a practical and business point of view. Where the advantage sought is release from the recurrent liability to pay interest which have been deductible, the penalty interest payable is revenue in character. This is despite the payment displaying capital characteristics such as being a once-and-for-all type lump sum which eliminates a threatened disadvantage and produces a benefit of a lasting character for the taxpayer.

The ATO stated in the background facts that considered that on balance, it was preferable to realise the profits and pay the break costs rather than continue paying interests. On that basis the ATO ruled the break costs were not capital, private or domestic in nature and are deductible under section 8-1 of the ITAA 1997.

The ATO noted that TR 2019/2 states that penalty interest incurred to discharge a mortgage is deductible under section 25-30 to the extent that the loan moneys were used for producing assessable income. Unlike section 8-1, deductibility is not affected whether the expenditure is capital or revenue in nature.

Paragraph [26] of TR 2019/2 states penalty interest i.e. payment arising from early repayment of a loan is not in

As the margin loans were used solely for the purpose of producing assessable income, all expenditure incurred in discharging the loans is deductible under section 25-30(1) of the ITAA 1997.

ATO reference *Private Binding Ruling Authorisation No. 1051852332472*
w https://www.ato.gov.au/law/view/document?docid=EV/1051852332472

4.3 Option fees and GST turnover

Facts

An entity not registered for GST owns a property which rented to an arms-length party on a commercial basis. The rent collected is currently $XX per year.

The property is XX acres and has no residential premises on it. Apart from a shed which is also leased as part of the commercial lease, the property is vacant land.

A Call Option Deed has been entered into with a developer for the sale of the property.

The Call Option Deed includes an amount to be paid on grant of the option, and then further amounts if rezoning has not occurred within a specified period after the grant of the option.

Question

Are the option fees included in GST turnover?

Decision and reasons

Yes, the option fees are included in GST turnover.

An entity is required to be registered for GST if its current or projection turnover equals or exceeds the turnover threshold, usually $75,000.

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Projected annual turnover excludes the proceeds from the 'transfer of ownership of a capital asset' from the calculation of GST turnover.

The ATO noted that Goods and Services Tax Ruling GSTR 2001/7 *Goods and services tax: meaning of GST turnover, including the effect of section 188-25 on projected GST turnover* (GSTR 2001/7) provides the ATO view in relation to GST turnover.

Paragraphs 31 to 36 discusses the meaning of 'capital assets' and paragraph 37 discusses the meaning of 'transfer of ownership'.

In the context of a call option over real property, the ATO reason that subsection 9-17(1) of the GST Act recognises that the supply of the option is a separate supply to the supply of the underlying property. As a consequence of subsection 9-17(1) of the GST Act, the consideration for the call option is the call option fee, and the consideration for the supply or acquisition of the underlying property is limited to any additional consideration provided.

In the ruling, the ATO considered the call option fee being consideration for the Call Option did not constitute proceeds from the 'transfer of ownership of a capital asset' as required by section 188-25 of the GST Act. Therefore, the Call Option Fee is not excluded from the calculation of GST turnover.

ATO reference *Private Binding Ruling Authorisation No. 1051852780283*
w https://www.ato.gov.au/law/view/document?docid=EV/1051852780283

4.4 SBE rules – control of an entity

Facts

A and B formed a company to operate a business. At time the Company was formed A and B were the sole shareholders and sole employees.

C Pty Ltd, a member of the XYZ Group, acquired a 49% interest in the Company and appointed a director to the board of the Company.

The Company's annual turnover is less than $XX million. C's annual turnover is more than $XX million.

Currently, the 3 shareholders of the Company are as follows:

- A, in his capacity as trustee for A's Trust: 25.5%
- B1 Pty Ltd in its capacity as trustee for B's Trust: 25.5%
- C: 49%.

All shares carry the same rights vote, dividends and distributions on winding up.

The 3 directors of the Company are A, B and a person nominated by C Pty Ltd.

C Pty Ltd operates a business of acquiring passive interests in financial planning businesses of, generally between 20% to 40%, and not more than 50%, and does not take an active role in the operation of the businesses.

This is the case with the Company. A and B have complete control of the day-to-day operations of the Company. C Pty Ltd's main role is to assist with strategic direction only and to assist with the exit strategy for A and B as they both wish to exit the business over the next 10 to 15 years.

C Pty Ltd initially intended to only acquire up to 40% of the shares but A and B wanted it to acquire more to enable them to pay down personal debts.

All decisions in the business are agreed to by A and B before they are made. They manage the business on a consensus basis. A and B are close friends and spend time together outside of work, including holidaying together.

The Constitution for the Company provides that a quorum for a meeting of shareholders and directors requires the attendance of C Pty Ltd and the nominee director, respectively.

Decisions of shareholders and directors are carried by majority vote.

The Shareholders Agreement provides that A and B may each appoint 1 director and C Pty Ltd may appoint up to 2 directors if it holds 40% of the shares.

All decisions of the board are by simple majority. Each director has votes equal to the number of shares held by their appointing shareholder.

The Shareholders Agreement, at some stage, required that the majority include all directors appointed by C Pty Ltd. However, this requirement was subsequently removed from the Shareholders Agreement when it was amended.

At some stage, there were certain decisions that the board could make without the consent of C Pty Ltd, including appointing directors, acquiring securities, borrowing, entering mortgages, giving guarantees, undertaking activities not provided for by the business plan, acquiring or disposing of any company or business, acquiring or disposing assets of value in excess of $50,000 and paying remuneration to directors or making agreements with directors/shareholders.

The requirement that C Pty Ltd consent to such matters was subsequently removed upon a later amendment to the Shareholders Agreements.

The Shareholders Agreement provided that if C Pty Ltd does not approve a business plan, the previous business plan remains in place.

The Shareholders Agreement provides that the Company must distribute at least 90% of profits to shareholders each financial year

Shares in the Company are not able to sold without consent of 75% of the shareholders of the Company.

Question

Will the Commissioner exercise the discretion under section 328-125(6) of the ITAA 1997 to determine that C Pty Ltd does not control the Company?

Ruling and reasons

The ATO ruled no, the discretion in section 328-125(6) of the ITAA 1997 would not be exercised.

The ATO noted that an entity is connected with another entity under section 328-125(1) of the ITAA 1997 if:

1. either entity controls the other entity in a way described in this section, or
2. both entities are controlled in a way described in this section by the same third entity.

Control, in the case of a company, arises where an entity, together with its affiliates, has rights to, or rights to acquire interests to, at least 40% of either income, capital, or votes.

However, the ATO has a discretion under section 328-125(6) of the ITAA 1997 to treat an entity as not controlling another entity as follows:

> *If the control percentage referred to in subsection (2) or (4) is at least 40%, but less than 50%, the Commissioner may determine that the first entity does not control the other entity if the Commissioner thinks that the other entity is controlled by an entity other than, or by entities that do not include, the first entity or any of its affiliates.*

The ATO considered that there are two requirements that must be met before the Commissioner's discretion in section 328-125(6) of the ITAA 1997 may be exercised as follows:

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1. the first entity's control percentage in the target entity must be at least 40% but less than 50%, and
2. the Commissioner must think that another entity, or entities, control the target entity.

The ATO considered that the concept of 'control' in section 328-125(6) of the ITAA 1997 is a strict test of legal control and that, while day-to-day control over the operations may be a relevant consideration, it is not sufficient to establish legal control.

The ATO considered that 'legal control' means powers under the relevant law and governing documents, such as the Corporations Act, Company Constitution and Shareholders Agreement.

The ATO considered the following factors to be relevant from the governing documents:

1. the directors manage the Company;
2. director resolutions are determined by majority, the chair does not have a casting vote, and the nominee of C Pty Ltd need not be part of the majority;
3. each director has votes equal to the number of shares held by their appointing shareholder;
4. shares cannot be sold or transferred without the consent of C Pty Ltd; and
5. directors must distribute at least 90% of company profits as dividends to ordinary shareholders.

The ATO concluded that neither of A and B, considered independently, controlled the Company.

In terms of whether the ATO could treat A and B as controlling the Company collectively, the ATO considered that, given control requires strict legal control, unless the parties have a relationship that demonstrates a common identity or collective interests, they should not be treated as a collective for the purpose of section 328-125(6) of the ITAA 1997.

The ATO considered that a habit or established practice of acting together in conducting a business on a 'consensus basis' is not sufficient to establish that entities have a common identity or collective interests as unrelated parties would normally only agree when it is in their individual interests.

While there is no requirement, in order for other entities (A and B here) to control the Company under section 328-135(6) of the ITAA 1997, that he other entities be affiliates or connected entities, the ATO considered that, unless the entities are affiliates or connected entities, there is unlikely to be the necessary common identity or collective interests.

The ATO noted that A and B are not connected entities but considered whether they are affiliates. The ATO noted that '[a]n individual or a company ('the first entity') is an affiliate of another entity ('the second entity') if the first entity acts, or could reasonably be expected to act:

1. in accordance with the second entity's directions or wishes, ('the **directions or wishes test'**); or
2. in concert with the second entity ('the **in concert test'**).

The ATO noted that both the directions or wishes test and the in concert test operate in relation to the affairs of the business or A and B and not the Company's business. The ATO noted that, while A and B arguably 'act in concert' when making Company decisions, their relationship is limited to the Company's business. They do not 'act in concert' in relation to other business affairs they may have.

The ATO stated that the same reasoning applied equally to the directions or wishes test.

Accordingly, the Commissioner concluded that neither of A and B were affiliates of each other.

As A and B were not affiliates or connected entities, they did not collectively control the Company within the requisite meaning and, as a result, the condition an entity or entities other than C Pty Ltd control the Company in order for the Commissioner to exercise the discretion was not enlivened.

ATO reference *Private Binding Ruling Authorisation No. 1051847535247*
w https://www.ato.gov.au/law/view/document?docid=EV/1051847535247

4.5 CGT – dissolving/cancellation of strata title

Facts

A and B, a couple at the time, acquired a property with another couple, with each person having a 25% interest in the property.

There is a building on the property containing several strata residential units.

The strata units have been held for investment purposes and have always been rented.

A and B acquired the interest of the other couple after a number of years. A and B now hold an equal share in the property.

A and B divorced and under the divorce orders, the strata units were split equally between A and B.

The strata-body is self-managed by A and B and strata fees are not collected.

A and B are considering developing the property and the following will occur:

- the strata title will dissolved/cancelled with the property becoming Torrens Title land held in equal shares by A and B;
- the units will be demolished; and
- four stand-alone residential dwellings will be constructed and the property will be subdivided into four Torrens Title blocks.

A will wholly own 2 of the subdivided blocks and B will wholly own the other 2 blocks.

Question

Will the dissolution/cancellation of the existing strata title trigger a capital gains tax event?

Ruling and reasons

The Commissioner ruled no.

The Commissioner noted that the only relevant CGT event is CGT event A1, being a disposal of an asset. However, section 112-25 of the ITAA 1997 provides that if a CGT asset is split, or two or more CGT assets are merged, and you are the beneficial owner of the original asset(s) and the new asset(s), no CGT event happens.

The act of dissolving or cancelling the strata title will not involve a change in beneficial ownership. Accordingly, the step of cancelling the strata title will not be a CGT event.

TRAP – while dissolving the strata title will not be a CGT event, the transferring of interests between A and B in the PBR above will be a CGT event which may cause a taxable capital gain or loss.

ATO reference *Private Binding Ruling Authorisation No. 1051822504940*
w https://www.ato.gov.au/law/view/document?docid=EV/1051822504940

4.6 FBT and deceased associate of employee

Facts

The Employee is an employee of the Employer.

The Employee's child passed away.

The child was not an employee of the Employer. The child did not have a will.

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An invoice was issued by W Pty Ltd to the Employer for $9,980 (including GST) for food, drinks and equipment hire for the wake of the child

The Employer paid the invoice.

Probate of the estate of the child had not been granted at the time the payment of the wake expenses was made. As a result, no person was beneficially entitled to the income of the estate.

The Employee's employment contract did not provide that wake expenses of family members would be paid for.

Question

1. Did the child cease to be an associate of the employee under section 318(1) of the ITAA 1936 on his death?
2. Is the child's estate an associate of the Employee for the purposes of subsection 136(1) of the FBT Act?
3. Will the payment by the employer of the wake expenses constitute the provision of a 'fringe benefit' for the purpose of subsection 136(1) of the FBT Act?

Ruling and reasons

The Commissioner ruled yes to question 1 and no to questions 2 and 3.

Question 1

The ATO noted that section 318 of the ITAA 1936 provides that associates of a natural person include a relative of that person.

The child would have been an associate of the Employer while alive.

The ATO noted that ATO ID 2006/159 states that where an employer pays the funeral expenses of a deceased employee, FBT does not apply as the individual ceased to be a person upon their death for the purposes of the FBT Act.

The ATO stated that, while the circumstances are different here as it is an associate that has died, it also follows the child ceased to be an associate of the Employee upon their death as they ceased to be a person.

Question 2

The ATO noted that section 318 of the ITAA 1936 provides that an associate of a natural person includes the trustee of a trust under which the natural person can benefit. The effect of this would be that the child's estate would be an associate of the Employee if the Employee is a beneficiary of the estate.

The ATO considered that there were no beneficiaries of the child's estate as the child had no will and probate had not yet been granted.

The ATO considered whether the extended meaning of associate in section 148(2) of the FBT Act could apply. Section 148(2) of the FBT Act requires that a benefit:

1. must be provided 'in respect of an employee's employment' to a person who is not the employee, or an 'associate' as defined in subsection 318(1) of the ITAA 1936
2. must be provided under an 'arrangement' between the provider, the employer or an associate of the employer on the one hand, and the employee or an 'associate' as defined on the other.

Where the above requirements are met, the recipient is deemed to be an associate of the employee.

For this provision to apply, it is necessary that the arrangement for payment of the wake expenses be between the provider (W Pty Ltd), the Employee and the Employee or the Estate.

The ATO considered it was possible that there was such an arrangement in this case.

However, the ATO noted that the payment also needed to be made 'in respect of employment'. The ATO considered the decision of *J & G Knowles & Associates Pty Ltd v Commissioner of Taxation* [2000] FCA 196 in which the Federal Court stated as follows:

> *To put the matter another way, although the process of characterising the benefit provided in a particular case can involve questions of fact and degree, it is not sufficient for the purposes of the Act merely to enquire whether there is some causal connection between the benefit and the employment: see FC of T v Rowe 95 ATC 4691 at 4703 and 4710; (1995) 60 FCR 99 at 114 and 123. Although Brennan, Deane and Gaudron JJ observed in Technical Products (at Aust Torts Reports 68,622; CLR 47), that the requisite connection will not exist unless there is 'some discernible and rational link' between the two subject matters which the statute requires to be linked, as was pointed out by Dawson J (at Aust Torts Reports 68,624; CLR 51), the connection must be 'material'.*

The ATO considered that for the payment to have a sufficient or material connection to the employment of the Employee, the payment needed to be said to be remuneration and a product or incident of the employment.

The ATO concluded that, while there was a causal link between the employment and the payment, the payment was not a reward for the services for the following reasons:

- the benefit was provided as a result of personal considerations, rather than the Employer wanting to remunerate the Employee;
- the benefit did not have a connection to the duties performed by the Employee;
- the benefit was not a product or incident of the employment;
- the payment was entirely gratuitous and not written into any employment contract;
- the Employee was not provided with the benefit at his request, and
- the Employer generally does not pay for the funeral or wake expenses of their employees or their employee's relatives

Accordingly, the benefit was not provided in respect of the employment of the Employee.

<u>Question 3</u>

As the payment was not provided in respect of the employment of the Employee it was not a fringe benefit for the Employer.

ATO reference *Private Binding Ruling Authorisation No.* 1051847024961
w https://www.ato.gov.au/law/view/document?docid=EV/1051847024961

4.7 Sale of part of duplex on capital account

Facts

A person lived in an older property on a post-CGT block of land large enough to be subdivided,that was intended to be the person's principal place of residence. No income had been derived from this property since the time of purchase. Recently you decided to demolish and build duplexes to help with the mortgage.

The person works in a managerial role and has not worked in the building industry for many years.

The aim of the person is to live in a more modern dwelling, which is only possible by building two dwellings and selling one of them.

The old property demolition and new duplex construction will be achieved by liaising with an architect, who will work with builders and other industry professionals to facilitate this arrangement. The professionals are all paid a fixed price for the build, and the person will not be onsite during the building process, temporarily living with their extended family until completion.

The contract is one where a licensed builder has been contracted to perform the work with no further involvement required by the person concerned. The person does not own any other property.

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LAWYERS

There is expected to be a gain from the sale of the duplex.

The person is not registered for GST.

Question

Are there capital gains tax consequences of the sale of one of the duplexes?

Decision and reasons

The ATO reason that there will be a capital gain and not a revenue gain from the sale.

The ATO determined that based on the information provided, the proceeds from the sale of the subdivided lot will not be ordinary income and not assessable as either:

- the carrying on of a business in accordance with the factors listed in Taxation Ruling 97/11; or
- a profit-making or commercial transaction in accordance with Taxation Ruling TR 92/3.

Any proceeds received on the disposal of the subdivided lot will represent a mere realisation of a capital asset which will be assessed under the capital gains tax provisions.

TRAP – while it may be that the transaction is a mere realisation for CGT purposes, it is not as clear that the same view would be formed as to whether the sale proceeds would be seen to be from a capital asset (therefore preventing the need to register for GST), though the outcome here suggests it would.

ATO reference *Private Binding Ruling Authorisation No.* 5010073888407
w https://www.ato.gov.au/law/view/document?docid=EV/5010073888407

4.8 Deduction for employee for legal expenses

Facts

The taxpayer was advised by their employer that their salary and benefits were to be reduced under a business restructure and that, if they did not agree, they would be made redundant.

The following day the employer commenced disciplinary action against the taxpayer. The taxpayer considered this occurred to avoid the need to make a redundancy payment.

The taxpayer sought legal advice.

The taxpayer's lawyers wrote to the employer stating:

'The obvious motivation for these baseless allegations was to engage clause X.X of the employment contract in order to circumvent XXX's severance pay liability.'

The taxpayer lodged a general protections application with the Fair Work Commission.

The matter was finalised with the taxpayer and the employer entering into a deed of release under which the taxpayer accepted a redundancy payment.

The taxpayer considered that the legal expenses were incurred 'purely to protect their right to a redundancy payment.'

Question

1. Is the taxpayer entitled to a full deduction for the legal expenses incurred?
2. Is the taxpayer entitled to a partial deduction for the legal expenses incurred?

Ruling and reasons

The ATO ruled that the taxpayer was not entitled to a full deduction but was entitled to a partial deduction.

The ATO considered that for legal expenses to constitute an allowable deduction, the expenses must be incidental or relevant to the production of the taxpayer's assessable income or business operations. Further, the advantage obtained from incurring the legal expenses cannot be capital in nature.

The ATO acknowledged that legal expenses are generally deductible if they arise out of the day-to-day activities of the taxpayer's business or employment duties subject to them not being capital in nature.

The ATO referred to the decision in *Commissioner of Taxation v. Rowe* (1995) 95 ATC 4691 where a taxpayer was suspended from normal duties and was required to show cause why he should not be dismissed after several complaints were made against him. It was accepted that the legal expenses incurred by the taxpayer in defending the manner in which he performed his duties were allowable as the claims were concerned with the day to day aspects of the taxpayer's employment. Importantly, the taxpayer was not seeking a benefit that was capital in nature.

In contrast, a redundancy payment, being compensation for the loss of the expectation of continuity of service, is a payment that is capital in nature. Redundancy payments are made assessable as employment termination payments but are still capital in nature.

The ATO stated that, if legal expenses you incurred were purely to protect a right to a redundancy payment, as claimed by the taxpayer, then none of the expenses would be deductible as all the expenses would be capital in nature.

However, despite this statement from the taxpayer, the ATO considered that the taxpayer would have received initial advice from the lawyers on a number of options with the employer, including continuing to work with them. Accordingly, the initial legal expenses would be deductible but once the taxpayer made the decision to longer work with the employer, a further legal expenses would not be deductible.

Accordingly, the ATO considered taxpayer was entitled to a part deduction.

The ATO suggested that the taxpayer use the chronologically itemised invoice from his or her lawyers to determine the amount of the legal expenses that is deductible.

ATO reference *Private Binding Ruling Authorisation No.* 1051843854449
w https://www.ato.gov.au/law/view/document?docid=EV/1051843854449

5 ATO and other materials

5.1 Impact of compensation payments on super contributions caps

On 12 August 2021, the ATO published a fact sheet explaining the impact on concessional and/or non-concessional super contribution caps where an amount of compensation is received by a taxpayer's super fund and allocated to their account. The fact sheet also sets out how to apply to the ATO to request the Commissioner to exercise a discretion in these circumstances where a taxpayer may exceed their concessional or non-concessional contributions caps.

A super fund may receive compensation from a financial services provider due to the provision of inappropriate financial advice or where fees were paid but no advice was provided. The compensation may include an amount reflecting a refund or reimbursement of adviser fees and/or an amount to compensate for lost earnings. It may also include an interest component.

Whether the compensation is a contribution and therefore counted towards a member's contribution caps will depend on the circumstances in which the compensation is received.

Circumstance	Treatment
A member's super fund engaged the financial service provider and has a right to compensation	**The amount received will not be a contribution** and does not impact a member's contribution caps.
A member personally engaged the financial services provider and the member has a right to compensation	If the compensation was paid directly by the financial service provider to the member's super fund other than at the member's direction, the compensation will be a **concessional contribution**. If the compensation has been paid to the member's super fund and allocated to the member's account and one of the following circumstances applies: 1. the compensation was paid to the member and the member subsequently contributed it as a personal contribution to their super fund, or 2. the member directed the financial service provider to pay the compensation that was payable to that member into their super fund, the compensation will be a **non-concessional contribution.**
If an amount was paid to a member's super fund and allocated to the member's account and neither the member nor the trustee of the super fund has a right to seek compensation	The amount will be a **concessional contribution.**

w https://www.ato.gov.au/law/view/document?DocID=AFS/SuperContributionCaps/00001

5.2 STP Lodgments

On 26 August 2021, PS LA 2011/15 was updated by the Commissioner to reflect changes and details of Single Touch Payroll (**STP**).

The Commissioner also inserted new paragraphs on the review of deferral decisions to advise that a taxpayer cannot object to a decision to disallow a lodgment deferral, but can instead appeal to the Federal Circuit Court of Australia or the Federal Court of Australia for a review of the decision under the *Administrative Decisions (Judicial Review) Act 1977* if it is not satisfied with the internal review decision.

ATO reference *Practice Statement Law Administration* PSLA 2011/15
w https://www.ato.gov.au/law/view/document?docid=PSR/PS201115/NAT/ATO/00001&PiT=20210826000001

5.3 New MOU for Tax Practitioners Board and The Professional Standards Councils

The Tax Practitioners Board (TPB) and the Professional Standards Councils have signed a Memorandum of Understanding (MOU) establishing a framework for collaboration and mutual assistance between both organisations with the objective of promoting the integrity of the tax profession.

The Tax Practitioners Board regulates tax practitioners in order to protect consumers.

The Professional Standards Councils are independent State and Territory statutory bodies which through its agency, the Professional Standards Authority, work to improve professional standards and protect consumers of professional services across Australia.

w https://www.tpb.gov.au/news-media/media-releases/new-mou-tax-practitioners-board-and-professional-standards-councils

5.4 ATO reminder to report income from shares

With the onset of micro-investment platforms and exchange traded funds, the ATO has reminded share investors who reinvest their dividends or distributions that they are required to declare this income in their tax returns.

The ATO recommends that share investors:

- keep clear records of their trades and expenses;
- ensure all prefilled data in their tax return is correct; and
- include all relevant documentation (such as distribution statements showing capital gains and losses) to avoid tax refund delays.

The ATO notes that capital losses from shares when the shares have not been sold as capital losses are not available for 'paper loses'.

w https://www.ato.gov.au/Media-centre/Media-releases/ATO-is-here-to-help-first-time-share-and-ETF-investors/

5.5 ATO focus on tax scheme promoters

In the year ending 30 June 2021, the ATO reported that their Tax Avoidance Taskforce generated over $3 billion in tax from listed and private groups, multinationals and wealthy individuals involved in tax schemes.

The Tax Avoidance Taskforce will continue its work into the 30 June 2022 year, targeting advisors who promote tax avoidance schemes. The ATO announced there will also be a focus on taxpayers who exploit the use of trust structures.

The ATO noted that the Taskforce's ability to detect tax risk and target engagement will be enhanced by continued improvements to technology.

w https://www.ato.gov.au/General/Tax-avoidance-taskforce/Tax-Avoidance-Taskforce-highlights-2020-21/

5.6 Small business entities using simplified depreciation rules

The ATO has published guidance on the temporary full expensing measure for small business entities on its website that included 3 relevant examples.

Example: temporary full expensing for small business entity using simplified depreciation rules

X Co Pty Ltd has an aggregated turnover of $350,000 in its 2020–21 income year ending 30 June 2021. It has chosen to use the simplified depreciation rules.

On 30 November 2020, X Co Pty Ltd acquired a new delivery van for $35,000 and immediately used it for business purposes.

The balance of X Co Pty Ltd's small business pool as at 30 June 2021 is $200,000.

Because X Co Pty Ltd chose to use the simplified depreciation rules for the 2021 income year and acquired and used the van for a business purpose after 6 October 2020, it cannot opt out of temporary full expensing for the van. It does not add the van to its small business pool and must deduct the balance of its small business pool at the end of its 2020–21 income year, which ends between 6 October 2020 and 30 June 2022.

In its 2020–21 tax return, X Co Pty Ltd must claim:

- *an immediate deduction of $35,000 for the new delivery van*
- *a $200,000 deduction for the balance of its small business pool.*

Example: temporary full expensing for small business entity ceasing to use simplified depreciation rules

Cleaning Services Pty Ltd used simplified depreciation rules in its 2019–20 income year ending 30 June 2020. Due to a growth in business in the 2020–21 income year, it is no longer a small business entity and cannot use the simplified depreciation rules for that year.

The balance of Cleaning Services Pty Ltd's small business pool as at 30 June 2021 is $170,000.

Under temporary full expensing, it must deduct the balance of its small business pool at the end of its 2020–21 income year, which ends between 6 October 2020 and 30 June 2022.

For its 2020–21 income year, Cleaning Services Pty Ltd must claim a $170,000 deduction for the balance of its small business pool.

Example: small business entity ceasing to use simplified depreciation rules

Lilian has chosen to use the simplified depreciation rules for several years and maintains a small business pool. At 30 June 2020, the balance of the pool was $180,000.

On 29 November 2020, Lilian purchased machinery for her business for $200,000 and does not wish to claim temporary full expensing for the cost of the asset in the 2020–21 income year. Lilian decides not to choose simplified depreciation for the 2020–21 income year and makes the choice to opt out of temporary full expensing for the machinery when lodging her tax return for the 2020–21 income year.

Lilian also chooses not to apply backing business investment in respect of the machinery and makes this opt-out choice in the 2020–21 tax return. Instant asset write-off will not apply to Lilian as she is not applying the simplified depreciation rules. Lilian will use the general depreciation rules to determine the decline in value of the machinery for the 2020–21 income year.

As Lilian has previously used the simplified depreciation rules and maintains a small business pool, she will deduct the balance of the pool ($180,000) at the end of the 2020–21 income year.

The guidance explains that the 'lock out' rules for entities who opted out of the simplified depreciation regime have been suspended until 30 June 2022. The rules prevented small business entities from accessing the simplified depreciation regime for five years if they opted out. This means that someone who chooses not to apply the simplified depreciation rules in 2021, so that they do not need to immediately expense assets acquired (as non-SBEs have a choice), they will be able to use the simplified regime in 2022. This opportunity is not currently available for the 2022 year.

w https://www.ato.gov.au/Business/Depreciation-and-capital-expenses-and-allowances/Temporary-full-expensing/Small-business-entities-using-simplified-depreciation-rules/

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5.7 Employees and contractors after a business restructure

On 16 August 2021, the ATO released a post in the Small Business Newsroom for people who have recently restructured their businesses.

The article emphasised that business owners should consider if their workers are employees or contractors. The correct classification of workers is important for tax, superannuation and the entitlements of workers. In order to classify workers, the whole relationships must be considered.

A key consideration is whether the worker works in the taxpayer's business (being an indication of an employee), or whether they are running their own business (being an indication of a contractor). As a general rule, apprentices, trainees, labourers and trade assistants are employees, never contractors.

The article provides links to checklists to assist business owners determine their obligations to their workers, including to a tool to create an employment contract.

w https://www.ato.gov.au/Newsroom/smallbusiness/Employers/Revamped-your-business-/

5.8 Monitoring and Maintenance Approach – Top 100 Justified Trust Program

The ATO has released guidance on its 'Monitoring and Maintenance' approach for the Top 100 Justified Trust Program. When the ATO has confidence that a Top 100 taxpayer has complied with their taxation obligations, taxpayers can attain an overall high assurance rating under the ATO's Justified Trust assurance program. In order to achieve an overall high assurance a taxpayer must be rated as stage 2 or stage 3.

Once this rating has been applied, the ATO will tailor its engagement approach with these entities, for the two income years following the overall high assurance rating. The engagement during this period will be known as the 'Monitoring and Maintenance' approach. It is only applicable to taxpayers who are subject to an annual pre-lodgment compliance review engagement.

Under the 'Monitoring and Maintenance' approach, the ATO will require confirmation that the taxpayer's tax governance framework remains the same as the last review. Once this confirmation is provided, the ATO will monitor the taxpayer's disclosures over the two years, seeking to leverage the high assurance already obtained in relation to the activities of that business. The review will consider the last Taxation Assurance Report issued to the entity, financial statements, tax return disclosures, country-by-country reporting statements and any other relevant information for a given income year.

The ATO will continue to request documentation such as financial statements, the statement of taxable income, supporting working papers and evidence supporting tax treatment of significant transactions. The ATO will also continue to regularly meet with these taxpayers.

Taxpayers are expected to engage proactively with the ATO and make disclosures of transactions or material changes before they occur. Upon disclosing certain information, the ATO may request further verification or evidence from the taxpayer.

Every third year, the ATO will reaffirm their confidence in the taxpayer's compliance. The assurance activities will resume a whole-of-business approach to reviewing the taxpayer's business activities. The ATO may also seek to 'top up' their assurance where appropriate. For the Top 100 taxpayers who have obtained an overall high level of assurance, the ATO will revert to an annual review.

w https://www.ato.gov.au/law/view/view.htm?docid=%22JTR%2FIMM-TOP100%22

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