



Status: **draft only – for comment**

Draft Taxation Determination

Income tax: deductions for financial advice fees paid by individuals who are not carrying on a business

❶ Relying on this draft Determination

This publication is a draft for public comment. It represents the Commissioner's preliminary view on how a relevant provision could apply.

If this draft Determination applies to you and you rely on it reasonably and in good faith, you will not have to pay any interest or penalties in respect of the matters covered, if this draft Determination turns out to be incorrect and you underpay your tax as a result. However, you may still have to pay the correct amount of tax.

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What this draft Determination is about

1. This draft Determination¹ sets out when an individual may be entitled to a deduction under sections 8-1 or 25-5 of the *Income Tax Assessment Act 1997* (ITAA 1997) for fees

¹ For readability, all further references to 'this Determination' refer to the Determination as it will read when finalised. Note that this Determination will not take effect until finalised.

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paid for financial advice. It outlines the requirements that need to be satisfied for an individual to claim a deduction for financial advice fees.

2. All legislative references in this Determination are to the ITAA 1997, unless otherwise indicated.

3. Taxation Determination TD 95/60 *Income tax: are fees paid for obtaining investment advice an allowable deduction under section 8-1 of the Income Tax Assessment Act 1997 (ITAA 1997) for taxpayers who are not carrying on an investment business?* (now withdrawn) outlines the Commissioner's view on the deductibility of fees paid by a taxpayer to an investment adviser for drawing up an investment plan, and for the ongoing management of the investments.

4. This Determination replaces TD 95/60 as a result of regulatory reforms to the financial services industry in recent years. However, it does not represent a change in the Commissioner's view on the deductibility of financial advice fees as outlined in TD 95/60.

5. This Determination does not apply to individuals carrying on a business.² It also does not consider circumstances where fees for financial advice are paid from a superannuation fund.

6. From 1 January 2022, entities that provide tax (financial) advice services for a fee or other reward must either be a qualified tax relevant provider³ registered with the Australian Securities and Investments Commission or be a tax agent registered with the Tax Practitioners Board and meet the eligibility requirements to provide tax (financial) advice services.

7. 'Tax (financial) advice service' is defined in section 90-15 of the *Tax Agent Services Act 2009*. Broadly, it includes a service that relates to advising on or ascertaining liabilities, obligations or entitlements of an entity that could arise under a taxation law where it could be reasonably expected that a person would rely on the service to satisfy liabilities or claim entitlements under a taxation law.

Ruling

8. An individual may be entitled to a deduction for fees paid to a financial adviser if they satisfy the requirements in sections 8-1 (general deductions) or 25-5 (tax-related expenses).

9. In certain circumstances, it may be necessary to apportion the deduction under sections 8-1 or 25-5 because the full amount of the fees paid may not be deductible.

Section 8-1 – general deduction

10. An individual is entitled to a deduction for fees for financial advice under section 8-1 to the extent that the loss or outgoing is incurred in gaining or producing assessable income.

11. However, an individual is not entitled to deduct any loss or outgoing under section 8-1 to the extent that:

- it is an outgoing of capital or of a capital nature

² This Determination does not consider the effect of section 40-880 as it does not apply to an entity who does not carry on a business.

³ Qualified tax relevant provider is defined in section 910A of the *Corporations Act 2001*.

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- it is an outgoing of a private or domestic nature
- it is incurred in gaining or producing a taxpayer's exempt or non-assessable, non-exempt income, or
- a provision of the Act prevents you from deducting it.⁴

12. An individual must 'incur' an expense to be deductible under section 8-1. The expense is incurred when you have a presently existing liability to pay the expense or, in the absence of such a liability, when the expense is paid.⁵

Incurred in gaining or producing assessable income

13. The term 'incurred in gaining or producing assessable income' means incurred 'in the course of'⁶ gaining or producing assessable income.⁷

14. For an expense to be incurred 'in the course of' gaining or producing assessable income, it is both sufficient and necessary that the occasion of the expense should be found in whatever is productive of assessable income.⁸ However, an expense may still be deductible even if assessable income is:

- not gained or produced in the year in which the outgoing is incurred⁹, or
- expected to be earned but is not actually earned.¹⁰

15. What is required is that there is a sufficient connection between the loss or outgoing and the activities which more directly gain or produce the assessable income.¹¹

16. Whether the connection exists between the expenses and what produces the assessable income is a question of fact having regard to all the circumstances in each case.

17. Relevant considerations include:

- whether there is a lapse of time between incurring the loss or outgoing and the commencement of the income-producing activity. If there is a large time delay then this may suggest that the expense may have been incurred for some purpose other than the gaining or producing of assessable income.¹²
- the outgoing was entirely preliminary to the gaining or producing of assessable income.¹³

18. For example, fees for financial advice on a proposed investment prior to acquisition of the asset will not be deductible under section 8-1 because it is an expense that is

⁴ Subsection 8-1(2).

⁵ See Taxation Ruling TR 97/7 *Income tax: section 8-1 - meaning of 'incurred' - timing of deductions*.

⁶ *Commissioner of Taxation v Payne* [2001] HCA 3.

⁷ Subsection 8-1(1).

⁸ *Commissioner of Taxation v Payne* [2001] HCA 3; *Ronpibon Tin NL v Commissioner of Taxation (Cth)* [1949] HCA 15; *Commissioner of Taxation v Day* [2008] HCA 53. If no assessable income is produced, the occasion of the expense should be found in what would be expected to produce assessable income.

⁹ *Amalgamated Zinc (De Bavay's) Limited v Federal Commissioner of Taxation* [1935] HCA 81; (1935) 54 CLR 295 at [309].

¹⁰ *Ronpibon Tin NL v Commissioner of Taxation (Cth)* [1949] HCA 15; 78 CLR 47 at [57].

¹¹ *Watson as Trustee for the Murrindini Bushfire Class Action Settlement Fund v Commissioner of Taxation* [2020] FCAFC 92. See also *Healy and Commissioner of Taxation* [2013] AATA 281.

¹² See *Steele v Deputy Commissioner of Taxation* [1999] HCA 7, *The Commissioner of Taxation of the Commonwealth of Australia v Brand R.G* [1995] FCA 758 and *Temelli, Coskun & Anor v The Commissioner of Taxation of the Commonwealth of Australia* [1997] FCA 756.

¹³ See *Softwood Pulp and Paper v Federal Commissioner of Taxation* 76 ATC 4439 at [4450].

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associated with putting the income-earning investment in place. If the expenditure was not incurred then the taxpayer would not be in a position to earn income. Accordingly, we consider that the expenditure does not have a sufficient connection with earning income from the investment.¹⁴

19. Fees incurred on a regular or recurrent basis for an existing or ongoing income-producing investment are deductible under section 8-1. However, to be wholly deductible, all of the fees must relate to gaining or producing assessable income otherwise only a proportion of the fee is deductible.

Capital or of a capital nature

20. Even if the amount is incurred in gaining or producing the taxpayer's assessable income, a deduction is not available if the amount is capital or of a capital nature.¹⁵

21. Expense items that are not recurrent but, rather, are one-off expenditures that can be expected to have an enduring or lasting benefit are considered 'capital or of a capital nature'.¹⁶

22. Fees for financial advice on a proposed investment are also not deductible under section 8-1 because the amount is considered to be capital or of a capital nature. This is because the expenditure is incidental to the cost of acquiring the income-producing investment.¹⁷

Private or domestic nature

23. Even if the amount is incurred in gaining or producing the taxpayer's assessable income a deduction is not available if the amount is private or domestic expenditure.¹⁸

24. The terms 'private' and 'domestic' are not defined in the ITAA 1997 but have the ordinary meanings of 'personal' and 'relating to the home, household or household affairs' respectively.

25. Characterisation of an expense as private or domestic typically supports a conclusion that the expense does not have a sufficiently close connection to the earning of assessable income by the taxpayer.

26. For example, fees for advice incurred in relation to an individual's household budgeting are considered to be private or domestic expenditure and will not be deductible under section 8-1.

Section 25-5 – tax-related expenses

27. Fees for financial advice an individual incurs¹⁹ may be deductible under section 25-5 to the extent that the advice relates to managing their tax affairs.²⁰

¹⁴ *Commissioner of Taxation (Cth) v Maddalena* 71 ATC 4161 and the discussion of that case by Hill J in *Commissioner of Taxation v. Cooper R.J.* [1991] FCA 190.

¹⁵ Paragraph 8-1(2)(a).

¹⁶ *Sun Newspapers Limited v Federal Commissioner of Taxation* [1938] HCA 73.

¹⁷ Subsection 8-1(2).

¹⁸ Paragraph 8-1(2)(b).

¹⁹ The word 'incur' has the same meaning as in the context of section 8-1. Refer to paragraph 13 of this Determination.

²⁰ Paragraph 25-5(1)(a).

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28. 'Tax affairs' are defined in subsection 995-1(1) as affairs relating to tax.²¹ 'Tax affairs' therefore has a broad meaning. We take the view that 'tax (financial) advice' as defined in section 90-15 of the *Tax Agent Services Act 2009* would be included within the meaning of 'tax affairs'.

29. Not all advice provided by a financial adviser will be considered to be tax (financial) advice. For example, factual information about a financial product that does not involve the application or interpretation of the taxation laws to the client's personal circumstances would not be considered to be tax (financial) advice.

30. A taxpayer must be able to identify that the payment was for advice in order to assist them in managing their tax affairs.²²

31. However, a taxpayer cannot deduct a fee or commission for advice about the operation of a Commonwealth law relating to taxation, unless that advice is provided by a recognised tax adviser.²³

Capital expenditure

32. An individual cannot claim a deduction for capital expenditure under subsection 25-5(1). However, expenditure incurred in managing your tax affairs is not considered to be capital expenditure merely because the advice relates to matters of a capital nature.²⁴

33. In determining whether expenditure is capital expenditure, all the circumstances of each case must be considered.²⁵

No double deduction

34. If the financial advice fees are deductible under both sections 8-1 and 25-5, the fees can only be deducted once under the most appropriate provision.²⁶

35. For the purposes of this Determination, where financial advice fees are deductible under both sections 8-1 and 25-5, the most appropriate provision will be the specific deduction in section 25-5.

Apportionment

36. The use of the phrase 'to the extent' in sections 8-1 and 25-5 means that it will be necessary in some circumstances to establish which parts of the expenditure are deductible.

37. Expenses may be partly deductible under section 8-1 if they are incurred in gaining or producing assessable income as well as for some other purpose.²⁷ There must be a

²¹ A reference to 'tax affairs' includes affairs relating to income tax assessed under the *Income Tax Assessment Act 1936* and the ITAA 1997. Tax is also defined in subsection 995-1(1) as:

(a) income tax imposed by the *Income Tax Act 1986* as assessed under this Act; or
(b) income tax imposed as such by any other Act, as assessed under this Act.

²² See *Harvey and Commissioner of Taxation* [2008] AATA 457 which considers the application of section 25-5.

²³ Paragraph 25-5(2)(e). A 'recognised tax adviser' is defined in subsection 995-1(1).

²⁴ See subsection 25-5(4).

²⁵ *AusNet Transmission Group Pty Ltd v Federal Commissioner of Taxation* [2015] HCA 25 at [19], per French CJ, Kiefel and Bell JJ, *Clough Limited v Commissioner of Taxation* [2021] FCAFC 197.

²⁶ Section 8-10.

²⁷ *Kidston Goldmines Ltd v Commissioner of Taxation* [1991] FCA 351.

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sufficient connection between the financial advice fee and gaining or producing assessable income. Advice for other purposes will not be deductible.

38. If the financial advice received relates to managing your tax affairs and to non-tax matters, then a deduction for the full amount of the fees under section 25-5 will not be available.

39. In both these circumstances, the fees will need to be apportioned on a fair and reasonable basis.²⁸ What is fair and reasonable will depend on the facts and circumstances of the case.

40. It is up to the individual to provide evidence of a fair and reasonable method of apportionment. If sufficient evidence is not available to support the apportionment methodology used, no deduction will be allowable.²⁹

Evidentiary requirements

41. If the expenses incurred for financial advice meet the requirements of sections 8-1 or 25-5, the taxpayer must have sufficient evidence of that expenditure in order to claim the expense as a deduction.

42. An itemised invoice (including for example, a fee disclosure statement or an advice fee consent form) from a financial adviser which details the following will be sufficient written evidence to be entitled to claim a deduction:

- the name of the financial adviser
- the amount of the expense
- an explanation of the advice provided
- the date that the expense was incurred, and
- the date that the invoice was produced.

Example 1 – initial advice arrangement

43. *Claudio is a financial adviser authorised to provide personal advice to retail clients of a financial services company which holds a financial service licence. Claudio is a recognised tax adviser for the purposes of section 25-5.*

44. *Claudio meets with a new client Min-Ji, an Australian resident who earns salary, has savings in an interest-bearing account and who is a member of a superannuation fund. Min-Ji is seeking financial advice from Claudio to enable her to increase her regular income by generating higher investment returns.*

45. *Claudio and Min-Ji agree that Claudio will provide the financial advice for a fee. Claudio makes relevant enquiries through the completing of a fact-finding process to determine Min-Ji's needs and objectives.*

46. *Claudio assesses Min-Ji's financial situation by considering her assets and liabilities, income, risk profile and tax profile. Claudio recommends that Min-Ji invest her savings in a managed investment scheme which provides a periodic return. In providing this advice, Claudio interprets and applies the tax laws to Min-Ji's circumstances and provides advice about liabilities, obligations and entitlements when acquiring, holding and*

²⁸ *Ronpibon Tin NL v Commissioner of Taxation (Cth)* [1949] HCA 15.

²⁹ *Ronpibon Tin NL v Commissioner of Taxation (Cth)* [1949] HCA 15; *Drummond v Commissioner of Taxation* [2005] FCA 1129.

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disposing of the investment. It is reasonable to expect that Min-Ji will rely on the advice provided by Claudio.

47. *To the extent that Claudio charges Min-Ji for his work in recommending the investment and acquiring the units in the fund on her behalf, this is not deductible under section 8-1 because it is a fee incurred as part of putting the income-earning investment in place and does not have a sufficient connection with earning income from the investment. Further, it is considered to be capital or of a capital nature and may be included in the cost base of the investment for capital gains tax purposes.*

48. *Min-Ji will be able to claim a deduction under section 25-5 in relation to the tax (financial) advice provided by Claudio. This is because the advice was provided by a recognised tax adviser and was in relation to managing Min-Ji's tax affairs. The tax (financial) advice in this situation is the advice relating to the taxation implications of the investment in the specific fund nominated. As the advice is provided for multiple purposes, Min-Ji needs to apportion the total amount of the fee between the different components of the advice on a fair and reasonable basis.*

Example 2 – continuing arrangement

49. *After Min-Ji acquires the investment in the managed fund, she agrees to enter into an ongoing arrangement where Claudio will continue to provide her with advice on the suitability and performance of her investment for a fee. Claudio also agrees to provide Min-Ji with budgeting advice to enable her to increase her savings.*

50. *From time to time, Claudio suggests that Min-Ji change her mix of investments in the managed fund in order to achieve her original goals and objectives. When Min-Ji agrees with these changes, Claudio actions Min-Ji's request to modify the risk profile of her investment in the managed investment scheme. This does not result in Min-Ji acquiring or disposing of her interest in the managed fund.*

51. *In this case, the component of Claudio's fee that relates to the ongoing advice on the suitability of Min-Ji's investments is deductible under section 8-1. This is because the expenditure is incurred in the course of gaining or producing assessable income from the managed investment scheme. In this case there is a sufficient connection between the fee for the ongoing advice and the investment in the scheme which produces Min-Ji's assessable income.*

52. *The fee for the advice provided on the budgeting matters is not deductible under section 8-1 as it is not incurred in gaining or producing Min-Ji's assessable income. It is considered to be a private or domestic expense. The fee is also not deductible under section 25-5 as it is not a fee incurred in managing Min-Ji's tax affairs. As the advice is provided for multiple purposes, Min-Ji needs to apportion the total amount of the fee between the different components of the advice on a fair and reasonable basis.*

Example 3 – advice in relation to insurance policies

53. *Lara is a financial adviser and authorised to provide a comprehensive range of personal advice to retail clients as a representative of a company which holds a financial services licence. Lara is a recognised tax adviser for the purposes of section 25-5.*

54. *Lara meets with Ollie who is seeking advice on his insurance needs to protect his lifestyle and family. Ollie already has income protection insurance but now would like advice from Lara about any other insurance policies that he should take out.*

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55. *Lara makes relevant enquiries about Ollie's personal circumstances. Lara assesses Ollie's financial situation by considering his assets and liabilities, income, risk profile and tax profile. In doing so, Lara considers the costs and benefits of holding life insurance policies both inside and outside of superannuation before making any recommendations.*

56. *Lara provides advice to Ollie about how much insurance cover Ollie needs to protect his lifestyle and family. Lara advises Ollie about the tax implications of making payments for life, total and permanent disability and trauma insurance policies. She also advises Ollie about the income tax treatment of any lump sum payments received under the policies. It is reasonable to assume that Ollie will rely on Lara's advice for tax purposes.*

57. *Lara advises Ollie to apply for a number of policies provided by an insurance company and that these policies should be held outside of the superannuation system. Lara charges Ollie a fee for providing this advice.*

58. *The component of the fee that relates to the provision of advice on the life, total and permanent disability and trauma insurance policies will not be deductible under section 8-1. This is because the expenditure is considered to be capital or of a capital nature.*

59. *Ollie will be able to claim a deduction under section 25-5 in relation to the tax (financial) advice provided by Lara. This is because the advice was provided in relation to managing Ollie's tax affairs and it was provided by a recognised tax adviser. In this situation, the tax (financial) advice is the advice relating to the taxation implications of the insurance policies he has chosen to take out. As the advice is provided for multiple purposes, Ollie needs to apportion the total amount of the fee between the different components of the advice on a fair and reasonable basis.*

Example 4 – superannuation, welfare benefits advice and estate planning

60. *Nate is a financial adviser authorised to provide a comprehensive range of personal advice to retail clients as a representative of a company which holds a financial services licence. Nate is also a recognised tax adviser for the purposes of section 25-5.*

61. *Nate meets Juanita who is seeking advice on maximising her income in retirement and transferring wealth to her children when appropriate. Juanita is employed as a teacher earning \$115,000 per annum and she has \$450,000 in superannuation.*

62. *Nate agrees to provide Juanita with advice for a fee. Nate makes relevant enquiries through the completion of a thorough fact-finding process to ascertain Juanita's needs and objectives. Nate assesses Juanita's financial situation by considering her assets, liabilities, income, risk profile and tax profile.*

63. *Nate then delivers comprehensive financial advice which outlines how Juanita can establish a self-managed superannuation fund, increase contributions to the new superannuation fund by entering into a salary sacrifice arrangement with her employer and suggests that she will need to arrange for her solicitor to update her will and power of attorney.*

64. *In particular, Nate:*

- *interprets and applies the income tax laws to Juanita's circumstances*
- *gives advice about liabilities, obligations and entitlements and tax implications resulting from the establishment of a self-managed superannuation fund*

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- *provides advice on the tax implications of entering into a salary sacrifice arrangement with Juanita's employer.*

65. *The component of the fee that relates to the establishment of the self-managed superannuation fund will not be deductible under section 8-1 as it is capital or of a capital nature. However, the component of the fee that relates to advising on the tax implications of establishing the self-managed superannuation fund will be deductible under section 25-5.*

66. *The component of the fee that relates to advice on the salary sacrifice arrangement will be deductible under section 8-1. However this would not include the amount deducted under section 25-5 in relation to the tax (financial) advice provided.*

67. *The component of the fee that relates to providing advice on interpreting and applying the income tax laws to Juanita's circumstances (including entering into the salary sacrifice arrangement) will be deductible under section 25-5. This is because the advice is in relation to managing Juanita's tax affairs and it was provided by a recognised tax adviser. As the advice is provided for multiple purposes, Juanita needs to apportion the total amount of the fee between the different components of the advice on a fair and reasonable basis.*

Date of effect

68. When the final Determination is issued, it is proposed to apply to years of income commencing both before and after its date of issue. However, this Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of this Determination (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

Commissioner of Taxation

13 December 2023

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Appendix – Your comments

69. You are invited to comment on this draft Determination, including the proposed date of effect. Please forward your comments to the contact officer by the due date.

70. A compendium of comments is prepared when finalising this Determination, and an edited version (names and identifying information removed) is published to the Legal database on ato.gov.au

71. Please advise if you do not want your comments included in the edited version of the compendium.

Due date: **2 February 2024**

Contact officer details have been removed following publication of the final determination.

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References

Related Rulings/Determinations:

TR 2006/10

Previous Rulings/Determinations:

TD 95/60

Legislative references:

- ITAA 1997 8-1
- ITAA 1997 8-1(1)
- ITAA 1997 8-1(2)
- ITAA 1997 8-1(2)(a)
- ITAA 1997 8-1(2)(b)
- ITAA 1997 8-10
- ITAA 1997 25-5
- ITAA 1997 25-5(1)
- ITAA 1997 25-5(2)(e)
- ITAA 1997 25-5(4)
- ITAA 1997 40-880
- ITAA 1997 995-1(1)
- Corporations Act 2001 910A
- Tax Agent Services Act 2009 90-15

Cases relied on:

- Amalgamated Zinc (De Bavay's) Limited v Federal Commissioner of Taxation [1935] HCA 81; 54 CLR 295; 9 ALJR 342; 3 ATD 288; [1936] ALR 67
- AusNet Transmission Group Pty Ltd v Federal Commissioner of Taxation [2015] HCA 25; 255 CLR 439; 89 ALJR 707; 2015 ATC 20-521; 99 ATR 816
- Commissioner of Taxation v Cooper R.J. [1991] FCA 190; 91 ATC 4396; 21 ATR 1616
- Commissioner of Taxation v Day [2008] HCA 53; 236 CLR 163; 2008 ATC 20-064; 70 ATR 14; 250 ALR 388
- Commissioner of Taxation v Payne [2001] HCA 3; 202 CLR 93; 177 ALR 270; 2001 ATC 4027; (2001) 46 ATR 228
- Clough Limited v Commissioner of Taxation [2021] FCAFC 197; 2021 ATC 20-805; 114 ATR 1
- Drummond v Commissioner of Taxation [2005] FCA 1129; 2005 ATC 4783; 60 ATR 356; 220 ALR 691; [2006] ALMD 730

- The Commissioner of Taxation of the Commonwealth of Australia v Brand R.G [1995] FCA 758; 95 ATC 4633; 31 ATR 326
- Commissioner of Taxation (Cth) v Maddalena 71 ATC 4161; 2 ATR 541; 45 ALJR 426
- Harvey and Commissioner of Taxation [2008] AATA 457; 2008 ATC 10-030; 72 ATR 541
- Healy and Commissioner of Taxation [2013] AATA 281; 2013 ATC 10-311; 60 AAR 225; 96 ATR 123
- Kidston Goldmines Ltd v Commissioner of Taxation [1991] FCA 351; 30 FCR 77; 91 ATC 4538; 22 ATR 168
- Ronpibon Tin NL v Commissioner of Taxation (Cth) [1949] HCA 15; 78 CLR 47; [1949] ALR 785; 8 ATD 431
- Sun Newspapers Limited v Federal Commissioner of Taxation [1938] HCA 73; 61 CLR 337; 5 ATD 87
- Softwood Pulp and Paper v Federal Commissioner of Taxation 76 ATC 4439; 7 ATR 101
- Steele v Deputy Commissioner of Taxation [1999] HCA 7; 197 CLR 459; 77 ALJR 437; 99 ATC 4242; 41 ATR 139
- Temelli, Coskun & Anor v The Commissioner of Taxation of the Commonwealth of Australia [1997] FCA 756; 97 ATC 4716; 36 ATR 417
- Watson as Trustee for the Murrindini Bushfire Class Action Settlement Fund v Commissioner of Taxation [2020] FCAFC 92; 277 FCR 253; 2020 ATC 20-748; [2021] ALMD 2127; [2021] ALMD 2126

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