# TEST CASE LITIGATION REGISTER
# AS AT 30 April 2026

## INFORMATION

The Test Case Litigation Register contains information about:

- Cases approved for test case funding and their impact and status.
- Cases declined for test case funding and the reasons why.
- A list of all test case funded matters and their outcomes.

The Register is published after each Panel meeting takes place where applications are considered for funding.

**Test Case Panel meeting dates and closing application dates**

- 8 July 2026 meeting:  closing date for applications is 17 June 2026
- 16 September 2026 meeting:  closing date for applications is 26 August 2026
- 25 November 2026 meeting:  closing date for applications is 4 November

For queries related to the Test Case Litigation Register or the Test Case Litigation Program more generally please contact:

- ATOLitigationFunding@ato.gov.au
- 13 28 69 and ask for the Test Case Litigation Program
- Test Case Litigation Program, GPO Box 4889, SYDNEY NSW, 2001

## APPROVED MATTERS IN PROGRESS

| ATO Reference: | 01/2025-26 |
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| Issue | 1. Whether Victorian Magistrates (other than the Chief Magistrate) have an interest in a constitutionally protected fund.<br>2. Whether superannuation contributions made under the Magistrates Court Act 1989 (Cth) are made to a constitutionally protected fund. |
| Why does the issue involve uncertainty and/ or contention? | There is uncertainty in the law regarding whether Victorian Magistrates have an interest in a constitutionally protected fund due to their entitlement to receive contributions out of consolidated revenue under the Magistrates Court Act 1989 (Cth), and whether, as a result, those contributions are contributions to a constitutionally protected fund that are exempt from Division 293 tax. |
| Impact on other taxpayers and mitigation strategies | This case will have implications for Victorian Magistrates and their liability to pay Division 293 tax. |
| Status | Objection lodged 30 May 2025 |
| **ATO Reference:** | **24/2024-25** |
| Venue | Full Federal Court of Australia |
| Issue | 1. Whether the tribunal erred in determining the occupancy expenses deductible and in doing so whether the tribunal correctly considered both limbs of s 8-1 of the Income Tax Assessment Act 1997 and the totality of facts;<br>2. Whether the tribunal erred in determining the car expenses related to home to workplace travel were deductible and not private and domestic in nature. |
| Why does the issue involve uncertainty and/ or contention? | There is some uncertainty in relation to the application of historic legal principles on the deductibility of occupancy expenses in modern working arrangements.<br>TR 93/30 Income tax: deductions for home office expenses provides that occupancy expenses are generally private in nature and not deductible unless part of the home was used for income producing activities and that part of the home has the character of a place of business. |

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| | TR 93/30 goes on to provide that whether an area of the home has the character of a place of business is a question of fact which depends on the circumstances of each case. |
| **Impact on other taxpayers and mitigation strategies** | The case may impact how the principles behind the deductibility of occupancy expenses are applied and weighted in contemporary employment arrangements. As more employers adopt hybrid work models, with employees specifically engaged to work partly or fully from home, it is important that the law is applied consistently and clearly. The case may also impact the principles behind the deductibility of associated car expenses where individuals travel between a home office and an employer-provided workplace during their work day. |
| **Status** | The Commissioner filed their notice of appeal to the Full Federal Court of Australia on 18 June 2025. |
| **ATO Reference:** | **23/2024-25** |
| **Venue** | Federal Court of Australia |
| **Issue** | 1. Properly construed, did s 8-1 of the ITAA 1997 impose an obligation on the Commissioner, or the Tribunal on review to pursue the “areas of investigation”?<br>2. Properly construed, does the test for deductibility in s 8-1 of the ITAA 1997 involve the application of a general “reasonableness” standard?<br>3. In circumstances where:<br>(a) the Tribunal found, and the Respondent gave evidence, that the Respondent did not ask his wife, and did not know, how she spent the funds transferred to her by the Respondent during the relevant income year (the Funds); and<br>(b) there was no evidence before the Tribunal from the wife,<br>was it reasonably open to the Tribunal for the purpose of apportioning private expenditure under s 8-1(2)(b) of the ITAA 1997 to conclude that the “potential private expenditure” component of the Funds was limited to $50 per transfer?<br>4. In circumstances where there was no, or no probative, evidence that:<br>a) the private expenditure component of the Funds was limited to $50 per transfer;<br>b) $300-$500 of the cash funds stored in the Respondent’s van was used for food and drink expenses; and<br>the Respondent advanced no mechanism for apportionment, was it reasonably open to the Tribunal to |

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| | find that that Respondent had established a "broad mechanism for apportionment"?<br>5. Did the Respondent have a "reasonable expectation" within the meaning of s 900-200 of the ITAA 1997 that he did not need to substantiate expenses where the sole basis for that expectation was advice provided by his tax agent that was "not supportable at law"?<br>6. Was it necessary for the Respondent to establish that the claimed expenses were deductible under s 8-1 regardless of any "reasonable expectation" within the meaning of s 900-200 of the ITAA 1997?<br>7. If the answers to Questions 5 and 6 above are, respectively No and Yes, did the Tribunal misconstrue s 8-1 by having regard to the Tribunal's erroneous construction of s 900-200 of the ITAA 1997? |
| **Why does the issue involve uncertainty and/ or contention?** | There is utility in obtaining an authoritative judicial statement on the way in which section 8-1 operates where a taxpayer relies on the exception in section 900-50, and on the proper construction of section 900-200. |
| **Impact on other taxpayers and mitigation strategies** | This case will have implications for the truck driving industry, and also for other taxpayers seeking to rely on the Commissioner's maximum reasonable daily amounts when claiming deductions under section 8-1 for meal expenses while on trips away from home. |
| **Status** | The Commissioner filed their Notice of Appeal to the Federal Court of Australia on 16 April 2025. The Respondent filed their Notice of Contention to the Federal Court of Australia on 19 June 2025. |
| **ATO Reference:** | **21/2024-25** |
| **Venue** | Full Federal Court of Australia |
| **Issue** | 1. Whether the primary judge erred in finding that the car park is not a "commercial parking station" as defined in subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986* (Cth); and<br>2. Further, and in the alternative, whether the primary judge erred in finding (as a matter of fact or by drawing an inference) that the Car Park was being operated in a manner "inconsistent with it being operated commercially for profit". |
| **Why does the issue involve uncertainty and/ or contention?** | There is uncertainty regarding the meaning of the word 'commercial' in the definition of 'commercial parking station' in subsection 136(1). Consideration of the appropriate construction |

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| | of these terms will resolve the disagreement that presently exists between the Applicant and the Commissioner in the appeal proceedings and will either confirm, or clarify, the ATO view relating to car parking fringe benefits and the meaning of ‘commercial parking station’ set out in Taxation Ruling TR 2021/2 *Fringe benefits tax: car parking benefits* (TR 2021/2). |
| **Impact on other taxpayers and mitigation strategies** | It is important to resolve the practical administrative difficulties that will arise for taxpayers in complying with the law when lodging their FBT returns. This is because one of the conditions in section 39A requires an employer to determine whether a commercial parking station is located within a 1 km radius of the car park where an employee’s car is parked. This puts employers in the difficult position of having to determine whether a third party is operating a commercial parking station that is ‘intended to make’ or ‘aimed at’ or ‘having the potential for financial success intended to make a profit.’ |
| **Status** | The Commissioner filed their notice of appeal to the Full Federal Court of Australia on 5 March 2025. The Commissioner filed their amended notice of appeal to the Full Federal Court of Australia on 2 April 2025. |
| **ATO Reference:** | **20/2024-25** |
| **Venue** | High Court of Australia |
| **Issue** | Is a “loan” as defined in s 109D(3) of the *Income Tax Assessment Act 1936* limited to circumstances where there is a transfer of an amount and an obligation to “repay” an identifiable sum, or does it include the situation where a trustee has resolved to distribute an amount to a beneficiary but the beneficiary consents or acquiesces to the amount being retained by the trustee and used for the purposes of the trust? |
| **Why does the issue involve uncertainty and/ or contention?** | The matter will test and bring certainty as to the correctness of the Commissioner's longstanding view on an important issue of interpretation of Division 7A of the ITAA 1936, first formally expressed in 2010 (in TR 2010/3W) and reconfirmed in 2022 (in TD 2022/11). Specifically, it will provide clarity on whether the Commissioner is correct in asserting that by not calling for payment of its trust entitlements, a corporate beneficiary provides "financial accommodation" to the trustee, being a transaction within the scope of the extended definition of a "loan" for the purposes of Division 7A. |

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| **Impact on other taxpayers and mitigation strategies** | The issues impact a large number of trusts engaged in business and/or trading activities. The case also raises matters of general principle and importance as to the proper scope of Division 7A, an important tax integrity regime directed at ensuring that the right amount of tax is paid on profits extracted from private companies. |
| **Status** | The Commissioner filed their application for Special Leave to the High Court on 18 March 2025. |
| **ATO Reference:** | **18/2024-25** |
| **Venue** | Full Federal Court of Australia |
| **Issue** | 1. Whether the Tribunal erred in law in its interpretation and construction of the expanded definition of 'employee' in subsection 12(3) of the *Superannuation Guarantee (Administration) Act 1992* (SGAA) by applying principles applicable to determining the ordinary, common law meaning of 'employee' and by having regard to irrelevant considerations; and<br>2. Whether the Tribunal erred in law in its application of the statutory test required by subsection 12(3) of the SGAA in deciding that, on the facts as found by the Tribunal and the evidence, the Worker was not an 'employee' of the Respondent within the meaning of subsection 12(3) of the SGAA. |
| **Why does the issue involve uncertainty and/ or contention?** | The decision issued by the AAT has created uncertainty in the operation of law, specifically in the application of the relevant indicia and principles in arriving at the decision that the Worker was not an ‘employee’ under the expanded definition in subsection 12(3). |
| **Impact on other taxpayers and mitigation strategies** | It is in the public interest to litigate this matter.<br>The decision as it stands could lead to the misapplication of the relevant indicia and principles in future decisions being made by the ART. Further, it is possible the decision could have a wider effect on the application of the tax law, for instance, the statutory rules concerning personal service income which relies in part on similar indicia and principles as those that are relevant to subsection 12(3) of the SGAA.<br>Additionally, given the appeal concerns the expanded definition of ‘employee’ for the purposes of superannuation, this is an issue |

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| | that may have implications for the superannuation entitlements of numerous workers. |
| **Status** | The proceedings are currently being heard in the Full Federal Court of Australia. |
| **ATO Reference:** | **12/2024-25** |
| **Venue** | High Court of Australia |
| **Issue** | Whether payments resulted in the Taxpayers being liable for:<br>a. royalty withholding tax under s 128B of the Income Tax Assessment Act 1936 (ITAA 1936);<br>b. or alternatively, diverted profits tax (DPT) under s 177J of Part IVA of the ITAA 1936 (Part IVA). |
| **Why does the issue involve uncertainty and/ or contention?** | There is contention in relation to the application of the royalty withholding tax provisions and the provisions of Part IVA.<br>• there is an issue of interpretative clarification in respect of when a royalty can be identified for tax purposes.<br>• there is an interpretative issue of when a royalty will be identifiable as being 'paid' to a recipient for withholding tax purposes.<br>• the diverted profits tax issue raises matters of principle concerning the operation of the taxpayer's onus when identifying a tax benefit as a step in the application of Part IVA. |
| **Impact on other taxpayers and mitigation strategies** | The decision in these proceedings will likely have relevance to the general application of the royalty withholding tax provisions to certain intellectual property arrangements.<br>Additionally, the proceedings are likely to produce legal precedent of general application about how the tax benefit enquiry in Part IVA works and how a taxpayer can discharge their onus. |
| **Status** | The matter was heard from 2-3 April 2025. The decision is reserved. |
| **ATO Reference:** | **04/2024-25** |
| **Venue** | Federal Court of Australia |
| **Issue** | 1. Whether a person is an "employee" (within the meaning of section 136 of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA) of a company (in its capacity as trustee) who holds the office of director of the company and performs the |

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| | function and duties of a director in the daily operations of the company, and engages entirely in the work and operations of the company?<br>2. Whether a person is an employee (within the meaning of section 136 of the FBTAA) who within the contemplation of the definition of "employment" in section 136 of the FBTAA:<br>a. held the office of director of the company; and/or<br>b. performed the functions and duties of director?<br>3. Whether the directors of the company did any act or thing resulting in each or any of them being treated as an employee (within the meaning of the FBTAA and the definition of "employment" in section 136 of the FBTAA) by reason of the facts found by the Tribunal and/or uncontroverted evidence before the Tribunal?<br>4. Whether on the facts found by the Tribunal, and/or the uncontroverted evidence, the three directors on whom the Respondent conferred non-cash benefits were "employees" as defined in subsection 136(1) of the FBTAA?<br>5. Whether on the facts as found by the Tribunal, and/or the uncontroverted evidence, the non-cash benefits conferred on each of the three directors were provided to the individuals "in respect of the employment of an employee" within the meaning of section 138B of the FBTAA? |
| **Why does the issue involve uncertainty and/ or contention?** | The Tribunal's decision raised issues of important principle of construction relevant to the general administration of the FBT regime. In particular, whether non-cash benefits conferred on directors of a corporate trustee who work full-time in executive management roles in the trustee's business, are subject to FBT. |
| **Impact on other taxpayers and mitigation strategies** | The effect of the decision is that non-cash benefits conferred on directors of a corporate trustee in circumstances not materially distinguishable from this case, who work full time in executive management roles in the trustee's business, may not be subject to FBT. |
| **Status** | The matter was heard on 10 February 2025. The decision is reserved. |
| **ATO Reference:** | **10/2023-24** |
| **Venue** | Federal Court of Australia |
| **Issue** | Whether, objectively, the purpose of the scheme (Div 165 Supplying Entities) and the other participants in the scheme were inextricably linked to the one dominant purpose or principal |

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| | effect of CPG Group receiving refundable input tax credits (ITCs). |
| **Why does the issue involve uncertainty and/ or contention?** | Whether, in concluding that the purpose of making taxable supplies and creating entitlements to input tax credits in the Commissioner was separate from and preliminary to an ulterior and ultimate purpose of the Fraudulent Suppliers not paying GST the Tribunal misapplied *ACN 154 520 199 Pty Ltd (in liquidation) v Federal Commissioner of Taxation* [2020] FCAFC 190; (2020) 282 FCR 455, *Federal Commissioner of Taxation v Complete Success Solutions Pty Ltd ATF Complete Solutions Trust* [2023] FCAFC 19 and *Mills v Commissioner of Taxation* (2012) 250 CLR 171. |
| **Impact on other taxpayers and mitigation strategies** | The issues give rise to matters of public importance concerning the proper application of legal precedent concerning the operation of Division 165 of *A New Tax System (Goods and Services Tax) Act 1999*. |
| **Status** | The matter was heard on 18-21 November 2024. The decision is reserved. |
| **ATO Reference:** | **12/2022-23** |
| **Venue** | Administrative Appeals Tribunal |
| **Issue** | The issue in dispute concerns the deductibility of occupancy expenses under section 8-1 of the *Income Tax Assessment Act 1997*; specifically: whether an employee working from home with no other employer provided alternative place of work should receive deductions for occupancy expenses. |
| **Why does the issue involve uncertainty and/ or contention?** | There is some uncertainty in relation to the application of settled pre-COVID work-related expense legislation in a post-COVID environment.<br>TR 93/30 *Income tax: deductions for home office expenses* provides that occupancy expenses are generally private in nature and not deductible unless part of the home was used for income producing activities and that part of the home has the character of a place of business.<br>TR 93/30 goes on to provide that whether an area of the home has the character of a place of business is a question of fact which depends on the circumstances of each case.<br>As a result of the Chief Health Officer's directions and employer's directions during the pandemic, there is some level |


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| | of contention as to how these deductibility principles should apply. |
| **Impact on other taxpayers and mitigation strategies** | The case will have a significant impact on how the principles behind the deductibility of occupancy expenses are applied and weighted in contemporary employment arrangements. Many employers are shifting, or have shifted, towards hybrid working arrangements with employees specifically engaged to work from home (entirely or partially) during the week. It is incumbent to apply the law and subsequent rules in a way that gives the public confidence that they can claim according to their entitlements and to ensure claiming is consistently managed. |
| **Status** | The matter was heard on 17-18 December 2024. The decision was handed down on 22 May 2025. |

## *DECLINED MATTERS*

| **ATO Reference:** | **21/2025-26** |
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| **Panel Meeting Date** | 29 April 2026 |
| **Issue** | 1. Whether a taxpayer can deduct occupancy outgoings (here, rent) incurred to secure and maintain residential premises "to the extent" they are referable to an exclusively used home work area, or whether paragraph 8-1(2)(b) excludes those outgoings as being of a private or domestic nature notwithstanding:<br>I. exclusive use;<br>II. practical or legal necessity to work from home; and<br>III. the ability to apportion a single outgoing.<br>2. The proposed appeal also concerns the deductibility of car expenses that an employee incurs when travelling between a residence (at which the employee performs employment duties) and an external workplace on "hybrid" workdays, including the proper application of Division 28 (including paragraph 28-25(3)(a)) and the interaction with subsection 25-100(3) (which excludes travel between workplaces where one place is the taxpayer's residence), and whether a court can characterise such travel as being "in the course of producing" assessable income in circumstances where the employee performs distinct duties at home and at the external workplace on the same day. |

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| **Panel Reasons** | The Panel noted that funding had been provided to date but that the decision whether to continue funding was finely balanced.<br><br>While acknowledging that the Full Federal Court decision is not finally dispositive of all issues in an absolute sense, the Panel observed that the unanimous decision provides sufficient authority to resolve the uncertainty identified by the Tribunal and reaffirms settled High Court authority in this area of law.<br><br>The Panel also noted the taxpayer's advice that they do not have the financial means to pursue a special leave application. However, the Panel considered that the proposed special leave application does not identify any legal issue giving rise to broader uncertainty, and that the matter is likely to turn on its own facts.<br><br>The Panel recommended that funding be declined. The Chair accepted the recommendation and declined funding. |
| **ATO Reference:** | **12/2025-26** |
| **Panel Meeting Date** | 26 November 2025 |
| **Issue** | 1. Whether payments made from a non-resident trust to the Applicant are exempt from the operation of section 99B on the basis that the funds transferred were sourced from the corpus of the trust and do not represent amounts that would have been assessable if they had instead been derived by a hypothetical resident?<br>2. In the alternative, where the transfers from the non-resident trust are income, would a subsequent demand for repayment of the money transferred to the beneficiary who then makes the repayment trigger the application of section 59-30 of the Income Tax Assessment Act 1997 so that the original transfers are now to be treated as non-assessable, non-exempt income? |
| **Panel Reasons** | The Panel considered the facts of the matter and concluded that the issues to be tested in the proposed Court proceedings, as to the operation of section 99B and section 59-30 of the Income Tax Assessment Act 1997, will not have any |

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| | precedential value as the answers will turn on the facts of the matter with any decision being limited to the applicant.<br>In addition, the Panel discussed the issues surrounding 'what constitutes a loan' and noted that this was a question of fact.<br>For these reasons, the Panel recommended that funding be declined. The Chair accepted the recommendation and declined funding. |
| **ATO Reference:** | **11/2025-26** |
| **Panel Meeting Date** | 26 November 2025 |
| **Issue** | Whether, objectively, the purpose of the scheme (Division 165 Supplying Entities) and the other participants in the scheme were inextricably linked to the one dominant purpose or principal effect of the applicantreceiving refundable input tax credits (ITCs). |
| **Panel Reasons** | The Panel considered the application and concluded that the existence of another special leave application (SLA) on virtually the same issue and the taxpayer's conduct are factors against a conclusion for the provision of funding in respect of the SLA. |
| **ATO Reference:** | **10/2025-26** |
| **Panel Meeting Date** | 18 September 2025 |
| **Issue** | 1. Whether commitment of our client's land was subject to the process of development, subdivision and sale under the development agreement or if it was a mere realisation of a capital asset.<br>2. Whether commitment of our client's land was subject to the venturing of the land into a profit-making undertaking or plan or if it was a mere realisation of a capital asset.<br>3. As part of points 1 and 2, the characteristics of a business operation or commercial transaction.<br>4. Whether the land or any of the lots were trading stock pursuant to s 70-10 of the *Income Tax Assessment Act* 1997. |
| **Panel Reasons** | The Panel considered the issues and facts of the matter and concluded that this matter would turn on its own facts.<br>In addition, it was observed that there is no uncertainty in how the law operates as this matter involves settled areas of law.<br>For these reasons, the Panel recommended that funding be declined. The Chair accepted the recommendation and declined funding. |

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| **ATO Reference:** | **09/2025-26** |
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| **Panel Meeting Date** | 9 July 2025 |
| **Issue** | 1. What is the meaning of the terms "ultimate economic ownership" or "materially changing" in s 328-430(1)(c) of the Income Tax Assessment Act 1997 (ITAA 1997)?<br>2. What is the correct application of the wording in s 328-430(1)(c) of the ITAA 1997? |
| **Panel Reasons** | The Panel considered the facts of the matter and noted that the Administrative Review Tribunal and Federal Court are confined to the questions of law raised in the private ruling, as modified by the objection decision, where applicable. The Panel acknowledged there may be some uncertainty or contention as to how the law operates in respect of the direct application of s 328-430 in these circumstances. The Panel did not consider this matter to be a suitable vehicle to resolve any uncertainty.<br>The Chair concluded that the matter was not a suitable vehicle to test the issues concerning small business restructures and rollovers. Therefore, the Chair declined funding in this matter. |
| **ATO Reference:** | **07/2025-26** |
| **Panel Meeting Date** | 9 July 2025 |
| **Issue** | 1. Per paragraphs 6 to 9, 13 and 17 of the Notice of Appeal (**NOA**), whether the Tribunal had jurisdiction to consider a Settlement Deed dated 21 April 2009, which records the terms of a settlement between the Commissioner and the Taxpayers;<br>2. Per paragraphs 10 to 12 of the NOA, whether the Tribunal should have determined an amount of "GIC" to be an "assessable recoupment" in respect of the income year ended 30 June 2011;<br>3. Per paragraphs 16 to 18 of the NOA, whether the application of s 177EA of the Income Tax Assessment Act 1997 was correct where the stated scheme comprised only a single step of transferring shares;<br>4. Per paragraphs 14 and 15 of the NOA in QUD 617 of 2024, whether the Commissioner had power to increase a penalty assessment from a rate of 25% following an objection; and per paragraphs 1 and 2 of the NOA in QUD 618 of 2024, whether the Commissioner had power to |

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| | increase a penalty assessment from a rate of 25% following an objection. |
| **Panel Reasons** | The Panel considered the issues and facts of the matter and observed that there is no uncertainty as to how the relevant laws operate. The Panel found that the matter was likely to turn on its own facts, and did not raise a point of law requiring judicial clarification.<br>The Panel was of the view that the issue raised regarding the Settlement Deed would not be of significance to a substantial section of the public or have significant commercial implications for industry.<br>It was also noted that the matter involves the application of the anti-avoidance provisions, and does not meet the criteria and expectations of the Test Case Litigation Funding program.<br>For these reasons, the Panel recommended that funding be declined. The Chair accepted the recommendation and declined funding. |
| **ATO Reference:** | **06/2025-26** |
| **Panel Meeting Date** | 9 July 2025 |
| **Issue** | 1. Deductibility of losses under section 8-1 of the Income Tax Assessment Act 1997 from cryptocurrency trading activities, and within that clarification of tax treatment of cryptocurrencies and the lines of delineation between when cryptocurrencies are held for the purposes of carrying on a business, a profit making undertaking or scheme, or capital investment.<br>2. Whether each question asked and answered in a private ruling is a separate private ruling – section 359-5 Taxation Administration Act 1953 (**TAA**).<br>3. Whether private rulings can be about ultimate conclusions of fact – section 359-5 of the TAA.<br>4. The extent to which it is open to the Commissioner in making a private ruling to depart from the facts provided by an applicant, to reframe the questions posed and or to make comment upon other potential provisions that could apply. |
| **Panel Reasons** | The Panel considered the facts of the matter and noted that the issues before the Court as to whether the taxpayer is carrying |


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| | on a business, and whether the losses are deductible will turn on the facts of the matter, and likely be limited to the applicant.<br>The Panel also considered that the principles regarding Private Binding Rulings are well settled, and do not require judicial clarification.<br>For these reasons, the Panel recommended that funding be declined. The Chair accepted the recommendation and declined funding. |
| **ATO Reference:** | **05/2025-26** |
| **Panel Meeting Date** | 9 July 2025 |
| **Issue** | 1. Whether the excess non-concessional contributions determinations that were issued for the 2017-18 and 2018-19 income years correctly identified the amounts of excess non-concessional contributions, associated earnings amount, and the total release amount?<br>2. Whether the Commissioner was correct in refusing to exercise his discretion to disregard or reallocate the excess non-concessional contributions in the 2017-18 and 2018-19 income years?<br>3. Whether the excess concessional contributions determinations for the 2022-23 and 2023-24 income years correctly identified the taxpayer's concessional contributions, non-concessional contributions cap and non-concessional contributions?<br>4. Whether the notice of assessments correctly identified the income tax payable and excess concessional contributions tax offset?<br>5. A constitutional issue regarding the power of the Commonwealth to interfere with the essential functions of the State of South Australia and its' relationship with its key personnel, noting Clarke v Commissioner of Taxation [2009] HCA 33. |
| **Panel Reasons** | The Panel observed that the overriding issue (giving rise to the others) was a constitutional one of significant importance to the impacted population, but the Chair noted that it would not be appropriate for the Commissioner to fund a constitutional challenge to the validity of the legislation that he is tasked with administering. |


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| | For these reasons, the Panel recommend that funding be declined. The Chair accepted the recommendation and declined funding. |
| **ATO Reference:** | **04/2025-26** |
| **Panel Meeting Date** | 9 July 2025 |
| **Issue** | Is a payment received by a Material Recovery Facility Operator under the NSW Container Deposit Scheme (**CDS**) from Exchange for Change (NSW) Pty Ltd (**Scheme Coordinator**) consideration for a supply under paragraph 9-5(a) of the A New Tax System (Goods and Services Tax) Act 1999? |
| **Panel Reasons** | The application also raised issues about third-party payments as supply consideration, and the objection included two separate grounds relating to Division 142.<br>The Panel considered the issues and facts of the matter and noted that there was no legal uncertainty or contention as to the meaning of, or how Division 142 operates, and it was not in the public interest to fund issues of settled areas of law.<br>The Panel was of the view that there is sufficient legal certainty as to how third-party consideration applies that is relevant in the context of the NSW CDS, and the question of whether a payment is consideration for a supply will depend on the facts and circumstances of the particular arrangement and scheme.<br>The Panel noted that there is potential value in progressing a case to clarify the legal position on whether there is a taxable supply made by recyclers to a Scheme Coordinator. However, it considered that, as the taxpayer operates solely within NSW, any decision would lack broader relevance to taxpayers in other jurisdictions or to a significant section of the public. As such, the matter was not in the public interest to be litigated.<br>For these reasons, the Panel recommended that funding be declined. The Chair accepted the recommendation and declined funding. |
| **ATO Reference:** | **03/2025-26** |
| **Panel Meeting Date** | 9 July 2025 |
| **Issue** | Whether goodwill can continue to exist even if it is separated from the operations of the business? |
| **Panel Reasons** | The Panel considered the issues and facts of the matter and observed that this case would not provide significant precedential value as it is likely to be determined on its facts. |


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| | The Panel also noted there was a substantial body of authorities on goodwill including in the High Court.<br>The Panel considered there was little scope for the decision to have wide reaching precedential value for a substantial section of the public, nor any significant commercial implications for a specific industry.<br>Taking into account all of these, the matter does not fit the purposes of the Test Case Litigation Funding Program as outlined in the criteria and expectations.<br>For these reasons, the Panel recommended that funding be declined. The Chair of the Panel agreed with the recommendation and declined test case funding for this matter. |
| **ATO Reference:** | **02/2025-26** |
| **Panel Meeting Date** | 9 July 2025 |
| **Issue** | 1. To what extent does section 8-1 of the Income Tax Assessment Act 1997 (**ITAA 1997**) limit deductions in negative gearing scenarios?<br>2. Whether section 51AAA of the Income Tax Assessment Act 1936 applies so that the interest would only be deductible to the extent it was incurred for the purpose of gaining ordinary income?<br>3. Whether an investment for making a capital gain or a distribution of a capital gain allows the taxpayer the requisite connection to using the borrowed funds in gaining or producing assessable income for the purposes of section 8-1(1)(a) of the ITAA 1997? |
| **Panel Reasons** | The Panel considered the issues and facts of the matter and could not identify a point of law that required judicial clarification. Rather, it was considered that the issues raised in the application would turn on questions of fact only. The Panel observed that the Administrative Review Tribunal (ART) judgement was well written and found that there was no contention or uncertainty as to the law or how it operates, or how it was applied by the ART.<br>For these reasons, the Panel recommended that funding be declined. The Chair accepted the recommendation and declined funding. |
| **ATO Reference:** | **22/2024-25** |
| **Panel Meeting Date** | 30 April 2025 |

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| **Issue** | What is the scope of Goods and Services Tax (GST) law provisions about operators of electronic distribution platforms in section 84-55 of the *A New Tax System (Goods and Services Tax) Act 1999*, including the exemption in s 84-55(4)? |
| **Panel Reasons** | In considering the issue raised by the applicant, the Panel considered that the meaning of "authorise" was dealt with comprehensively by the High Court in *University of New South Wales v Moorhouse* (1975) 133 CLR 1. It was further noted that limited precedential value would result from the current proceedings in the Administrative Review Tribunal as the case would be an application of those well-established principles to a particular set of facts.<br>The Panel also observed that this matter would not have broad application to other online platforms but rather limited to the particular facts of the proceeding.<br>For the above reasons, the Panel recommended funding be declined.<br>The Chair of the Panel agreed with the recommendation and declined test case funding for this matter. |
| **ATO Reference:** | **20/2024-25** |
| **Panel Meeting Date** | 30 April 2025 |
| **Issue** | 1. Whether the Tribunal erred in concluding that the GST payable on the Applicant's supply of the Development Services was attributable to the tax period ended 30 September 2015, including because the Tribunal failed to consider or correctly construe s 33 of the *Unit Titles Act 2001* (ACT).<br>2. Whether the Tribunal erred in concluding that there was an amount of excess GST for the purposes of s 142-10 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (GST Act) for the tax period ended 30 September 2017.<br>3. Whether the Tribunal erred in concluding that the amount of non-monetary consideration for the Applicant's acquisition of the stratum units was $103,145,685.<br>4. Whether the Tribunal erred in concluding that there was an amount of excess GST that was "passed on" by the Applicant to another entity for the purposes of s 142-10 of the GST Act for the tax periods ended 30 September 2017, 31 December 2017 and 31 March 2018 and, in particular, whether in reaching that conclusion the Tribunal: |

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| | a. failed to take into account a relevant consideration, being the Applicant's belief that the cost of the Development Services was properly to be included as part of the consideration for its acquisition of the stratum units when calculating the margin for its supply of those stratum units under s 75-10(2) of the GST Act;<br>b. took into account an irrelevant consideration, being the Applicant not establishing the GST treatment of comparable and competing unit developments;<br>c. misconstrued or misapplied the concept of excess GST being "passed on" as that concept is used in s 142-10 of the GST Act;<br>d. erred in law in construing or applying the onus of proof, including because it failed to appreciate (or apply) the principle recognised in *Blatch v Archer* (1774) 1 Cowp 63 and *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* [1983] 1 NSWLR 1 and failed to apply the presumption of regularity; or 4 ME_227887464_1<br>e. engaged in legally erroneous fact-finding.<br>5. Whether the Tribunal erred in failing to be satisfied of the matter referred to in s 142-15(1)(a) of the GST Act for the tax periods ended 30 September 2017, 31 December 2017 and 31 March 2018 and, in particular, whether in reaching that conclusion the Tribunal:<br>a. misconstrued s 142-15(1) of the GST Act as involving the exercise of a discretion (c.f. Reasons [225]); or<br>b. misconstrued or misapplied the concept of a "windfall gain" as that concept is used in s 142-15(1)(a). |
| **Panel Reasons** | In considering the issues raised by the applicant, the Panel acknowledged that some of these may be important questions as to the meaning of "passed on" and "windfall gain", noting that the Federal Court had decided to refer the matter to a full bench. However, as the application of Division 142 involves questions of fact as well as of law, it was considered that the matter would result in limited precedential value. It was further noted that Division 142 has already been considered by the Administrative Review Tribunal on numerous occasions including the ART's well considered and reasoned decision in this case; and those decisions are consistent with the Commissioner's public ruling.<br>For the above reasons, the Panel recommended funding be declined. |

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| | The Chair of the Panel agreed with the recommendation and declined test case funding for this matter. |
| **ATO Reference:** | **17/2024-25** |
| **Panel Meeting Date** | 19 February 2025 |
| **Issue** | 1. Whether a Luxury Car Tax (LCT) decreasing adjustment is only available under s 15-30 of the *A New Tax System (Luxury Car Tax) Act 1999* (LCT Act) where there is a change of use or change of intended use such that, absent the Commissioner's concession, the Respondent had no entitlement to an LCT decreasing adjustment under that section for any of the cars in dispute.<br>2. Whether a purchasing dealer of a luxury car has both a statutory entitlement to quote under s 9-5 of the LCT Act and to have that quote accepted by the selling dealer, as such treating the supply as not being taxable supplies under s 5-10 of the LCT Act.<br>3. Whether the Respondent had discharged their onus of proof under s 144XXKb(i) of the *Taxation Administration Act 1953* (TAA) in proving they had acquired the cars otherwise than as an agent for an undisclosed principal or a trustee.<br>4. Whether the Respondent had discharged their onus of proof under s 144XXKb(i) of the TAA in proving that each of the transactions to which the Respondent was a party, other than its acquisitions from the marque dealers, were shams.<br>5. Whether Division 165 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) should be engaged for the new cars and whether the Respondent received a GST benefit from the schemes for the purposes of s 165-5(1)(a) of the GST Act.<br>6. Whether the Respondent was entitled to rely on the safe harbour provisions in s 284-75(6) of Schedule 1 to the TAA such that no penalties apply to the claim for LCT decreasing adjustments and input tax credits on the cars. |
| **Panel Reasons** | The Panel considered the issues and facts of the matter and observed that there is no uncertainty or contention as to how the law operates, noting the Full Federal Court has already clarified the operation and application of s 15-30 of the LCT Act. Further, the issues of agency and sham are fact dependent and the application of the Division 165 anti-avoidance provision is |


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| | presently being litigated in other cases in superior courts. The Panel noted that the matter is being heard in the Administrative Review Tribunal which would not provide legal precedent.<br>The Panel considered that the matter would not be in the public interest to be litigated nor likely to be of significance to a substantial section of the public or have significant commercial implications for industry. As such, the matter was likely to turn on its own facts.<br>It was also noted that the matter involves the application of an anti-avoidance provision, and does not meet the criteria and expectations of the Test Case Litigation Funding program as the matter will not be testing the proper meaning within the legal framework of the anti-avoidance provisions.<br>For the above reasons, the Panel recommended funding be declined.<br>The Chair of the Panel agreed with the recommendation and declined test case funding for this matter. |
| **ATO Reference:** | **16/2024-25** |
| **Panel Meeting Date** | 19 February 2025 |
| **Issue** | 1. Whether the Commissioner should exercise his discretion under section 29-70 of *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) to treat a particular document as a tax invoice.<br>2. Whether penalties should be remitted (and to what extent) where discretion is not exercised. |
| **Panel Reasons** | The Panel considered the issues and facts of the matter and noted that the Commissioner's exercise of the discretion under section 29-70 of the GST Act is dependent upon the particular facts of the matter and not a question of legal principle. The Panel considered that there is no uncertainty in this area of law, with settled principles already established.<br>The Panel also noted that the case would not provide any legal precedent as the matter is being heard in the Administrative Review Tribunal.<br>For the above reasons, the Panel recommended funding be declined.<br>The Chair of the Panel agreed with the recommendation and declined test case funding for this matter. |
| **ATO Reference:** | **15/2024-25** |

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| **Panel Meeting Date** | 19 February 2025 |
| **Issue** | 1. Should the assessed superannuation guarantee shortfalls be recalculated by reducing the Commissioner's claimed required contributions by amounts overstated?<br>2. Should the assessed superannuation guarantee shortfalls be reduced by the claimed shortfall that relates to contributions made by the Applicant on or before time?<br>3. Should the assessed individual superannuation guarantee shortfalls less the reductions referred to in issues 1 to 2, be offset by contributions made by the Applicant under section 23A of the *Superannuation Guarantee (Administration) Act 1992*? |
| **Panel Reasons** | The Panel considered the issues and facts of the matter and could not find any point of law that required judicial clarification. Rather, it was considered that the issues raised in the application were questions of fact only. The Panel found that there was no contention or uncertainty as to the meaning of the law or how it operates, noting that the case would likely turn on its facts.<br>The Panel found that the matter would not provide any legal precedent as decisions of the Administrative Review Tribunal do not have precedential value.<br>For these reasons, the Panel recommended that funding be declined.<br>The Chair of the Panel agreed with the recommendation and declined test case funding for this matter. |
| **ATO Reference:** | **14/2024-25** |
| **Panel Meeting Date** | 19 February 2025 |
| **Issue** | 1. Is the contribution of Goods and Services valued at $48,000 a tax-deductible gift?<br>2. Is the taxpayer entitled to a deduction under section 8-1 of the *Income Tax Assessment Act 1997*? |
| **Panel Reasons** | The Panel considered the issues and facts of the matter and could not find any point of law that required judicial clarification. As there is no uncertainty or contention about how the law operates, the matter would not qualify for test case litigation funding. |


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| | The Panel concluded that a precedent would not be established by a decision from the Administrative Review Tribunal.<br>For these reasons, the Panel recommended that funding be declined.<br>The Chair of the Panel agreed with the recommendation and declined test case funding for this matter. |
| **ATO Reference:** | **13/2024-25** |
| **Panel Meeting Date** | 19 February 2025 |
| **Issue** | 1. Whether gifts to a private ancillary fund qualify as deductible gifts under item 2 in the table of section 30-15 of the *Income Tax Assessment Act 1997*.<br>2. Whether the assets should be considered as a whole and not dissected into individual features when considering benefaction, detriment and the materiality of that detriment.<br>3. Whether the uncalled amount on a unit/note a detriment to the unit/note or does it characterise the unit/note?<br>4. Whether there is a detriment in circumstances where, if the uncalled amount was called, the amount paid would increase the value of the unit and/or note so that the donee is not disadvantaged by paying the call? |
| **Panel Reasons** | The Panel considered the issues raised in the application and noted that the taxpayer is not contesting the correctness of *Leary v Federal Commissioner of Taxation* [1980] FCA 134 regarding what constitutes a gift, but rather relying upon established legal principles. In those circumstances, it was considered that the case is fact specific and will not clarify any law.<br>The Panel found the questions articulated in the application were very factual in nature, and the case would likely turn on its own facts.<br>The Panel also considered that for a case to be approved for test case funding, it must be in the public interest to be litigated. The nature of this matter being heavily fact reliant, limits its applicability. It also would not have an impact on a large number of taxpayers, with application only to a very niche sector of the community.<br>Accordingly, the Panel recommended that funding be declined.<br>The Chair accepted the recommendation and declined funding. |
| **ATO Reference:** | **10/2024-25** |


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| **Panel Meeting Date** | 27 November 2024 |
| **Issue** | 1. What are the rights held by a holder of a crypto token in the context of a decentralised and immutable blockchain?<br>2. Is the Commissioner's characterisation of "holding rights" in TD 2014/26 *Income tax is bitcoin a 'CGT asset' for the purposes of subsection 108-5(1) of the ITAA 1997* correct?'<br>3. In what circumstances will an ordinary university student with an interest in the internet, digital technologies and the internet-of-things be a private investor (capital), or carrying on a business of digital asset trading (revenue)?<br>4. Whether a hard-fork (where changes to a blockchain protocol are forced upon users by general consensus) or a soft-fork (where changes to a blockchain protocol are made by software updates) give rise to a taxing event?<br>5. Whether the process of 'wrapping', which usually involves an automatic process where a smart contract makes a crypto token able to be used on a different blockchain, gives rise to a taxing event (even though the ownership of the underlying crypto token does not change and can be 'unlocked' or 'reclaimed' at any time)?<br>6. Whether 'airdrops' of crypto tokens, which are primarily unsolicited and spam, constitute ordinary income?<br>7. Whether certain transactions deployed via smart contracts on decentralised finance (DeFi) protocols, give rise to a taxing event?<br>8. Whether the personal use asset exemption in Subdivision 108-C of the ITAA 1997 can apply to certain crypto tokens? |
| **Panel Reasons** | The Panel took the view that the issues raised by the applicant are largely factual and lack a clear description of any principles of law that require clarification. The Panel also thought that it was possible that the crypto currency issues would not be addressed in any decision, noting that the assessments were default assessments raised under s167 of the *Income Tax Assessment Act 1936*.<br>It was noted that the applicant previously applied for test case funding in relation to a declaratory proceeding on largely the same facts and issues which was declined.<br>For the above reasons, the Panel recommended funding be declined. |


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| | The Chair of the Panel agreed with the recommendation and declined test case funding for this matter. |
| **ATO Reference:** | **09/2024-25** |
| **Panel Meeting Date** | 27 November 2024 |
| **Issue** | 1. Whether the Applicant was or was not a "resident" of Australia under the ordinary meaning of the term (the "ordinary concepts test"); and<br>2. Whether the Applicant has a "permanent place of abode" outside Australia for the purpose of the "domicile test" set out at paragraph (a)(i) of the definition of "resident" in s 6 of the *Income Tax Assessment Act 1936*. |
| **Panel Reasons** | In considering the issues raised by the applicant, the Panel took the view that there is no question of law to be clarified with the principles in this area of law being well settled. The Panel considered that the matter is likely to turn on its own facts, and will not therefore be an appropriate case for test case funding.<br>In addition, the Panel noted that the proceedings are being heard in the Administrative Review Tribunal whose decisions do not have any precedential authority.<br>For the above reasons, the Panel recommended funding be declined.<br>The Chair of the Panel agreed with the recommendation and declined test case funding for this matter. |
| **ATO Reference:** | **07/2024-25** |
| **Panel Meeting Date** | 18 September 2024 |
| **Issue** | Whether, once the Respondent's evidence was rejected by the Tribunal, it was not possible for the Respondents to discharge their burden of proof. |
| **Panel Reasons** | In considering the issue raised by the applicant, the Panel considered that the applicable legal principles are well established with no clarification required.<br>In addition, the Panel noted that this matter is likely to turn on its own facts and the proceeding is unlikely to be of any precedential value.<br>For the above reasons, the Panel recommended funding be declined. |

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| | The Chair of the Panel agreed with the recommendation and declined test case funding for this matter. |
| **ATO Reference:** | **06/2024-25** |
| **Panel Meeting Date** | 18 September 2024 |
| **Issue** | Is the assessment of 'recklessness' for the purposes of section 284-90 of Schedule 1 to *the Taxation Administrative Act 1953* fundamentally an objective test? |
| **Panel Reasons** | In considering the issue raised by the applicant, the Panel acknowledged that the applicable principles of law are well-established and that no further clarification is required.<br>In addition, the Panel noted that this matter is being heard in the Administrative Appeals Tribunal which is unlikely to produce a decision that has any precedential value.<br>For the above reasons, the Panel recommended funding be declined.<br>The Chair of the Panel agreed with the recommendation and declined test case funding for this matter. |
| **ATO Reference:** | **05/2024-25** |
| **Panel Meeting Date** | 18 September 2024 |
| **Issue** | Whether the Primary Judge should have held that the words "market value" in the text of the relevant provisions in the ITAA 1997 properly construed, adopted not only a hypothetical test but also excluded from consideration any "special, "strategic" or "synergistic" value available to only one purchaser in the market. |
| **Panel Reasons** | In considering the issues raised by the applicant, the Panel noted that this matter is likely to turn on its own facts.<br>In addition, the Panel acknowledged that the applicable legal principles in this area of the law are already well settled and that no further clarification is required.<br>For the above reasons, the Panel recommended funding be declined.<br>The Chair of the Panel agreed with the recommendation and declined test case funding for this matter. |
| **ATO Reference:** | **04/2024-25** |
| **Panel Meeting Date** | 18 September 2024 |

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| **Issue** | 1. The proper construction of the term “dividend stripping operation” in Subdivision 207F of the ITAA 1997.<br>2. The nature of a “capital sum” and how the fifth characteristic of a “dividend stripping operation” may be satisfied when regard is had to current commercial dealings.<br>a. Whether a “tax avoidance purpose” can be found in circumstances where:<br>b. Tax was deferred as opposed to avoided.<br>c. The original shareholders received a minor portion which was applied against Division 7A loans.<br>d. The only tax conceivably avoided was the original shareholders not continuing to receive sufficient taxable income at their marginal rates.<br>3. Whether avoidance of Division 7A through legitimate alternative tax structuring options can be a “tax avoidance purpose” for the purpose of a “dividend stripping operation”.<br>4. Whether the principles concerning judicial restraint being exercised when reviewing administrative decisions depends upon the composition of the relevant review tribunal. |
| **Panel Reasons** | In considering the issues raised by the applicant, the Panel acknowledged that the applicant is seeking funding for the Special Leave Application. In those circumstances, the Panel considered that no precedent could be achieved.<br>In addition, it was considered by the Panel that this matter would require further factual findings and that it was unclear as to how it was in the public interest to be litigated.<br>For the above reasons, the Panel recommended funding be declined.<br>The Chair of the Panel agreed with the recommendation and declined test case funding for this matter. |
| **ATO Reference:** | **02/2024-25** |
| **Panel Meeting Date** | 10 July 2024 |
| **Issue** | Whether medical expenses connected to income derived from the Total and Permanent Disablement pension, can be claimed as a deduction under section 8-1 of the *Income Tax Assessment Act 1997* (ITAA 1997)*?* |

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| **Panel Reasons** | The Panel considered the facts of the matter and the law relating to the deductibility of medical expenses with respect to section 8-1 of ITAA 1997.<br>The Panel considered there to be no contentious point of law calling for resolution, noting the law in respect to the deductibility of medical expenses is clear and unambiguous.<br>For these reasons, the Panel recommended that funding be declined.<br>The Chair of the Panel agreed with the recommendation and declined test case funding for this matter. |
| **ATO Reference:** | **01/2024-25** |
| **Panel Meeting Date** | 10 July 2024 |
| **Issue** | 1. Whether the tribunal has jurisdiction in Part IVC TAA proceedings to construct and apply the A *New Tax System (Family Assistance) Act 1999* and *A New Tax System (Family Assistance) (Administration) Act 1999* (Family Assistance Legislation);<br>2. Whether the Tribunal has jurisdiction in Part IVC TAA proceedings to determine whether the Applicants, and by implication third party Educators not subject to the proceedings, have breached the Childcare legislation; and<br>3. Whether, noting the above, in such cases where the Tribunal determines there has been a breach of the Childcare Legislation, the Tribunal must then determine the taxable income of the Applicants so as to remedy the purported breach, contrary to the factual evidence and established principles of tax law. |
| **Panel Reasons** | The Panel noted the jurisdictional and agency issues raised in the taxpayer's matter.<br>The Panel agreed that the AAT was not the appropriate venue to test the jurisdictional issues and that the agency issue is a question of fact involving the application of the Family Assistance Legislation against the specific facts of the case. Accordingly, any resulting decision will turn on those facts, limiting the relevancy of the outcome to the individual taxpayers.<br>For these reasons, the Panel recommended that funding be declined.<br>The Chair of the Panel agreed with the recommendation and declined test case funding for this matter. |


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| **ATO Reference:** | **15/2023-24** |
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| **Panel Meeting Date** | 1 May 2024 |
| **Issue** | 1. Whether the ATO applies trust law inconsistently for businesses and individuals?<br>2. What is the meaning of the term 'absolutely entitled' as discussed in Draft Taxation Ruling 2004/D25 *Income tax: capital gains: meaning of the words 'absolutely entitled to a CGT asset as against the trustee of a trust' as used in Parts 3-1 and 3-3 of the Income Tax Assessment Act 1997*? |
| **Panel Reasons** | In considering the issues raised by the applicant, the Panel acknowledged that those issues cannot be determined in the current Administrative Appeals Tribunal proceeding.<br>Furthermore, the Panel considered that the law is well established with no clarification required. It was therefore considered by the Panel that the current AAT proceeding is unlikely to result in any new legal precedent being established.<br>For the above reasons, the Panel recommended funding be declined.<br>The Chair of the Panel agreed with the recommendation and declined test case funding for this matter. |
| **ATO Reference:** | **14/2023-24** |
| **Panel Meeting Date** | 1 May 2024 |
| **Issue** | 1. Whether the Commissioner can exercise a discretion in respect of concessional contributions to reduce tax liability under Division 293 of the *Income Tax Assessment Act 1997* (ITAA 1997)?<br>2. Whether a taxpayer can choose the application of concessional contributions based on the term 'can' in Division 291 of the ITAA 1997 and guidance provided by the ATO website? |
| **Panel Reasons** | In considering the issues raised in your application, the Panel acknowledged that the law in this area is already clear and that no further clarification is required.<br>In addition, it was considered by the Panel that this matter will be unlikely to produce a decision that has any precedential value.<br>For the above reasons, the Panel recommended funding be declined. |

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| | The Chair of the Panel agreed with the recommendation and declined test case funding for this matter. |
| **ATO Reference:** | **11/2023-24** |
| **Panel Meeting Date** | 25 March 2024 (out of session) |
| **Issue** | Whether in making the Decision the Tribunal erred in its application of ss 284-75, 284-90, and 298-20 of Schedule 1 of the *Taxation Administration Act 1953* (TAA). |
| **Panel Reasons** | In considering the application, the Panel observed that the issues and facts in both the Commissioner's appeal and the taxpayer's own cross-appeal appear to be related and, in any event, the cross-appeal is likely to turn on the facts.<br>Further, the Panel considered that the taxpayer's own cross-appeal does not involve any issues where there is uncertainty or contention about the operation of law and thus no new law clarification would result in addition to those already raised in the Commissioner's appeal.<br>For the above reasons, the Panel recommended funding be declined.<br>The Chair of the Panel agreed with the recommendation and declined test case funding for this matter. |
| **ATO Reference:** | **09/2023-24** |
| **Panel Meeting Date** | 21 February 2024 |
| **Issue** | In regard to section 170(1) of the *Income Tax Assessment Act 1936*, whether the issue of coercion, within a prolonged coercively controlling domestically violent relationship, needs consideration where the Commissioner seeks to make or does make a finding of evasion with respect to access to funds held within a Self-Managed Superannuation Fund (SMSF). |
| **Panel Reasons** | The Panel acknowledged the Applicant's difficult and challenging personal circumstances, as raised in the funding application. However, with respect to the application, the Panel agreed that the facts of the matter were clear and not in dispute but were of the view that the matter did not fit the Test Case Litigation Funding criteria. The Panel concluded that a precedent would not be established by a decision from the intended jurisdiction of the Administrative Appeals Tribunal.<br>For the above reasons, the Panel recommended funding be declined. |

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| | The Chair of the Panel agreed with the recommendation and declined test case funding for this matter. |
| **ATO Reference:** | **08/2023-24** |
| **Panel Meeting Date** | 29 November 2023 |
| **Issue** | Whether the Commissioner has erred in concluding that there is a constraint on the exercise of the discretion in section 298-20 of Schedule 1 to the *Tax Administration Act 1953*, such that the Commissioner cannot take into account the size of a Significant Global Entities local Australian operations in applying the discretion. |
| **Panel Reasons** | The Panel discussed the proceedings in the Administrative Appeals Tribunal and considered that this matter was not an appropriate avenue for funding as it is fact specific only.<br>Furthermore, the Panel considered that there was no discrete or distinct principle that warrants consideration.<br>For the above reasons, the Panel recommended funding be declined.<br>The Chair of the Panel agreed with the recommendation and declined test case funding for this matter. |
| **ATO Reference:** | **07/2023-24** |
| **Panel Meeting Date** | 29 November 2023 |
| **Issue** | 1. Who is the operator of an electronic distribution platform?<br>2. Who makes supplies to whom, and what are these supplies, when there are multiple parties in electronic commerce?; and<br>3. The applicant contends that the case law deriving from *Customs and Excise Commissioners v Redrow Group Plc* [1999] 2 All ER 1 will need to be clarified. |
| **Panel Reasons** | The Panel considered the above issues in light of the proposed proceedings in the Administrative Appeals Tribunal, noting that these issues have previously been considered in other cases.<br>The Panel considered that it is a settled area of law and there was no clear point of law in this matter to be clarified.<br>Furthermore, the Panel considered that the facts in this matter were not clear and were not a good vehicle to test any point of law.<br>For the above reasons, the Panel recommended funding be declined. |

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| | The Chair of the Panel agreed with the recommendation and declined test case funding for this matter. |
| **ATO Reference:** | **06/2023-24** |
| **Panel Meeting Date** | 29 November 2023 |
| **Issue** | Whether the Commissioner has appropriately reasoned the decision in regard to the Applicant's home office expenses under section 8(1) of the *Income Tax Assessment Act 1997* and the associated Taxation Ruling 93/30 *Income tax: deductions for home office expenses* in the income year ending 30 June 2022. |
| **Panel Reasons** | The Panel discussed the proceedings in the Administrative Appeals Tribunal and observed that the matter would likely turn on its own facts as there is no issue of law requiring clarification. For these reasons, the Panel recommended funding be declined.<br>The Chair of the Panel agreed with the recommendation and declined test case funding for this matter. |
| **ATO Reference:** | **02/2023-24** |
| **Panel Meeting Date** | 20 September 2023 |
| **Issue** | The matter relates to the Applicant's appeal to the Administrative Appeals Tribunal of an objection decision, in relation to section 345(5) of the *Taxation Administration Act 1953* (TAA), concerning debt relief on the basis of serious hardship, whether the objective test of granting relief should consider the subjective circumstances of the taxpayers' mental health issues. |
| **Panel Reasons** | The Panel observed that the question of whether debts may be released on the grounds of serious hardship, will be limited to the facts of each case. The Panel noted that there may be many cases of individuals applying for debt relief on grounds of serious hardship, who have mental or other health issues. However, these would each need to be considered on their own set of facts, as will this case, making this matter of limited application.<br>The Panel discussed the Tribunal proceedings, noting that the matter ultimately relates to debt collection. The Panel noted that the proceeding raises no area of law which requires clarification. |


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| | The Panel also noted that, as the matter is currently in the Administrative Appeals Tribunal, a decision from that jurisdiction will not establish a precedent.<br>For the above reasons, the Panel recommended funding be declined. The Chair of the Panel agreed with the recommendation and declined test case funding for this matter. |
| **ATO Reference:** | **01/2023-24** |
| **Panel Meeting Date** | 12 July 2023 |
| **Issue** | 1. Whether the Commissioner is entitled to rely on the conclusive evidence provision in section 350-10(1) of Schedule 1 of the *Taxation Administration Act 1953* (TAA).<br>2. What constitutes the making (or lodgement) of a valid family trust election (FTE) and whether a valid election was made in this case? In particular:<br>a. Whether that can be done informally without specifying all the information required by section 272-80 of Schedule 2F of the *Income Tax Assessment Act 1936* (ITAA 1936) and lodging the approved form as required under section 388-50 of Schedule 1 to the TAA.<br>b. Can the Commissioner infer that an FTE has been made?<br>c. Must an FTE specify the test individual for determining the family group? If not, can the Commissioner infer who that individual is?<br>d. Whether the Commissioner is bound by his published instructions, NAT 2787, and NAT 2297.<br>3. Whether in obtaining freezing orders, there had been material non-disclosure because the Commissioner failed to disclose to the Court that no FTE had been made by the Trustee. |
| **Panel Reasons** | The Panel discussed the proceedings, noting that the litigation concerns the recovery of tax debts and that the issues raised in the funding application cannot be run through the recovery process. The Panel also noted that the taxpayer is questioning the substantive liability on the merits and the proceedings will not provide any clarification about the operation of the provisions concerning Family Trust Elections.<br>The Panel observed that on the question of whether the freezing order should be set aside, a decision on the issue |

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| | would only provide answers to questions on practice and procedure and will be strictly limited to the facts of the case. The Panel also noted that the matters relate to interlocutory proceedings, and that the only outcomes would be that the freezing orders would be undone, the funds in court paid out, or a contested interparty hearing and none of these conclusions would resolve any question of taxation law or have any large-scale impact.<br>For the above reasons, the Panel recommended funding be declined.<br>The Chair of the Panel agreed with the recommendation and declined test case funding for this matter. |
| **ATO Reference:** | **14/2022-23** |
| **Panel Meeting Date** | 3 May 2023 |
| **Issue** | The matter relates to current Administrative Appeals Tribunal (AAT) proceedings with the issue in dispute concerning the interpretation and application of section 8-1 of the *Income Tax Assessment Act 1997* (ITAA 1997) and the associated Taxation Ruling 93/30 to the Applicant's home office expenses in the income years ending 30 June 2020 and 30 June 2021. |
| **Panel Reasons** | The Panel identified that the facts of the case have not been well articulated and therefore lack clarity. The Applicant has not identified any issue of law that requires clarification, instead relying upon settled principles. Thus, the case would simply turn on applying the law to the facts.<br>The Panel observed that there are substantiation issues surrounding the occupancy and travel expenses claimed by the Applicant, noting also that the occupancy expenses are minimal.<br>Based on the circumstances of the matter, the main issue identified by the Panel was that the Applicant has not substantiated their expenses under Division 900 of the ITAA 1997. Had the taxpayer been able to comply with the substantiation of overseas travel requirements and provide evidence that they had not been reimbursed by their employer, then most of the travel expenses may be deductible.<br>For the above reasons, the Panel recommended funding be declined. The Chair of the Panel agreed with the |

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| | recommendation and declined test case funding for this matter. |
| **ATO Reference:** | **13/2022-23** |
| **Panel Meeting Date** | 3 May 2023 |
| **Issue** | 1. In regards to section 160-30 of the *Income Tax Assessment Act 1997* (ITAA 1997), the definition of trustee in section 6 of the *Income Tax Assessment Act 1936* (ITAA 1936) and at law, section 254 of the ITAA 1936, whether or not an individual appointed as a trustee of a sequestrated estate pursuant to the *Bankruptcy Act 1966* is an "agent" or "trustee" for the purposes of section 254 of the ITAA 1936 and hence answerable as taxpayer for the doing of all such things as required to be done by virtue of the ITAA 1936 in respect of income, or any profits or gains of a capital nature, derived by him or her in that capacity or derived by the principle by virtue of his/her agency.<br>2. Whether or not a trustee in bankruptcy is considered an agent or trustee for the purposes of the general law which may also impart upon clarifying the duties and obligations that such a person may have in that role more broadly. |
| **Panel Reasons** | The Panel considered the main question in the application to be 'whether a trustee in bankruptcy is a trustee for the purposes of s254(1)(a) of the ITAA 1936', with every other issue raised being ancillary to this. It was noted that this is a settled area of law with longstanding case law and thus presenting no confusion or conjecture. In the circumstances, the Panel agreed that the taxpayer is a trustee and not an agent.<br>The Panel acknowledged the applicant's claims regarding industry wide concerns with the ATO view of the tax obligations on bankruptcy trustees, however it was noted that the issue has not been raised with the ATO widely by other taxpayers and industry bodies.<br>The Panel concluded that there is already established ATO guidance on the issues raised in the application which have been provided to the Trustee and thus test case funding is not an appropriate avenue to fund the matter.<br>For these reasons, the Panel recommended that funding should not be approved.<br>The Chair accepted the recommendation and declined funding. |

| **ATO Reference:** | **11/2022-23** |
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| **Panel Meeting Date** | 22 February 2023 |
| **Issue** | Whether an asset whose main use is to carry on a business of renting/leasing property and subject to the small business relief under Division 152 *Income Tax Assessment Act 1997* (ITAA 1997), is excluded as an active asset by the operation of subsection 152-40(4)(e) ITAA 1997 because the business income derived comprises of rental income. |
| **Panel Reasons** | In considering the issue, the Panel noted the main use of the property was to derive rental income. Acknowledging this use, the Panel concurred that the legislation relating to the exclusion of an asset that is primarily used to derive rental income from the small business capital gains tax concessions is clear. Panel members unanimously agreed there is no uncertainty as to how the law operates in these circumstances and an established view on this point exists in *JakJoy Pty Ltd v Commissioner of Taxation* [2013] AATA 526.<br>For these reasons, the Panel took the view that there are no issues requiring law clarification and there is unlikely to be any broad effect on the community such that it is necessary to litigate the issue.<br>Accordingly, the Panel recommended that funding be declined.<br>The Chair of the Panel agreed with the recommendation and declined test case funding for this matter. |
| **ATO Reference:** | **10/2022-23** |
| **Panel Meeting Date** | 22 February 2023 |
| **Issues** | 1. The definition of 'payment' for the purposes of Division 7A of the *Income Tax Assessment Act 1936* (ITAA 1936).<br>2. Whether the words 'credit an amount to, or on behalf of, or for the benefit of' in s109C(3)(b) of the ITAA 1936 were intended to capture a 'crediting' (the receipt of one asset – such as the assignment of a loan receivable) as a replacement for another asset – (the Division 7A loan receivable).<br>3. The application of section 45B of the ITAA 1936 and the relevant circumstances to be given regard to determine whether the capital reduction was carried out for the purpose of obtaining a tax benefit. |

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| | 4. The application of Part IVA of the ITAA 1936 and what may be considered a reasonable alternative to the transactions alleged to form the scheme. |
| **Panel Reasons** | In considering the issues, the Panel noted that the matter relies on a set of facts that are particular to the taxpayer and in applying these facts to the relevant provisions, a decision on the issues would have limited application. The Panel also acknowledged that the matter involves issues relating to Part IVA of the ITAA 1936 and that the specific funding expectation precluding matters from funding includes those involving a tax avoidance scheme.<br>For these reasons, the Panel recommended that funding be declined.<br>The Chair of the Panel agreed with the recommendation and decided to decline test case funding for this matter. |
| **ATO Reference:** | **09/2022-23** |
| **Panel Meeting Date** | 22 February 2023 |
| **Issue** | 1. The ordinary meaning of 'employee' in section 12(1) of the *Superannuation Guarantee (Administration) Act 1992* (SGAA) or the extended definition under section 12(3) SGAA.<br>2. Whether the worker had a right of delegation under his written contract; and<br>3. Whether the contract was "wholly or principally for" the worker's labour or whether the worker's labour was directed towards himself in producing the result that he was contracted to produce. |
| **Panel Reasons** | The Panel discussed the recent High Court decisions in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 *and ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.<br>When discussing these decisions, the Panel noted that the High Court established the meaning of 'employee' and agreed that the decisions provided clarification on the issues highlighted in the funding application. As such, the Panel agreed there is no general uncertainty or contention about the legal test. |

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| | Accordingly, the Panel agreed that the matter is an application of established principles to the facts and recommended funding be declined.<br>The Chair agreed with the recommendation and declined funding. |
| **ATO Reference:** | **08/2022-23** |
| **Panel Meeting Date** | 22 February 2023 |
| **Issue** | 1. Can the Commissioner treat the loan as contingent due to the inclusion of an explicit term that it need not be repaid if the services to which it relates are not delivered and/or<br>2. Can the loan be treated as not being genuine in circumstances where the Commissioner is not alleging sham? |
| **Panel Reasons** | The Panel discussed the legal test for determining whether expenditure had been incurred from the Federal Court decision in *Commissioner of Taxation v Desalination Technology Pty Ltd* [2015] FCAFC 96. The Panel agreed that the decision established clear principles in respect of claiming research and development expenditure in the Applicant's circumstances. As such, the Panel agreed that the application for review may not achieve any further guidance on the issues.<br>Additionally, the Panel noted the issues in this matter are narrow and any Tribunal decision may turn on the particular facts. In these circumstances, a resulting decision would have limited application.<br>For the above reasons, the Panel recommended funding be declined.<br>The Chair accepted the recommendation and declined funding. |
| **ATO Reference:** | **07/2022-23** |
| **Panel Meeting Date** | 22 February 2023 |
| **Issue** | Is the interest expense deductible under section 8-1 of *the Income Tax Assessment Act 1997* (ITAA 1997)? |
| **Panel Reasons** | The Panel observed that the facts appeared at odds with a typical unit trust structure and the distributions were not commensurate to the funding applicant's holdings which appeared to be a hybrid trust. The Panel also noted the |

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| | funding applicant was claiming interest deductions when they were not deriving income and that to expend in the hope of deriving income is not sufficient.<br>It was noted that the trust structure in this matter is not novel. This arrangement has been well ventilated, with legal precedent already established. As such, any decision in these proceedings would provide little precedential value.<br>The Panel noted the principle in *Fletcher v Commissioner of Taxation* (1991) 173 CLR 1 had been applied in the objection decision to limit the interest deductions to the amount of income received.<br>For these reasons, the Panel recommended funding be declined.<br>The Chair of the Panel agreed with the recommendation and decided to decline test case funding for this matter. |
| **ATO Reference:** | **06/2022-23** |
| **Panel Meeting Date** | 30 November 2022 |
| **Issue** | 1. What constitutes a 'foreign transaction' in section 14 of the *Income Tax Assessment (1936 Act) Regulation 2015*, which is not a defined term.<br>2. What is required for income to come 'from' the foreign transaction identified.<br>3. What is required to satisfy that a foreign transaction has been 'identified'. |
| **Panel Reasons** | The Panel observed that for a 4-year period of review to apply, there needs to be a foreign transaction, which is not a defined term. Here, it seems clear that the transaction is a foreign transaction given the platform is located overseas, and the identity of the acquirer is unknown.<br>The Panel acknowledged there may be situations where this issue is more nuanced, such as if you have an Australian buyer and seller but that transaction is executed on a foreign exchange, or if a payment originates from an offshore entity for work done in Australia. In those situations, it may be argued that those are not foreign transactions.<br>The Panel noted that the underlying question is not of sufficient contention. Most of the considerations in favour of funding in this matter are about sending a compliance message to the community, which is not within the remit of |


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| | test case funding. This will be achieved in any event if the applicant does proceed to litigate.<br>Further, it was unclear on what basis the applicant sought to argue that the transaction was not a foreign transaction. For example, he has not argued that he believes the transaction did not take place on a foreign exchange, or that the transaction was completed on a computer in Australia. Instead, the applicant's submissions are about the lack of guidance provided by the Commissioner.<br>The Panel also observed there is nothing particularly novel about this transaction. Foreign exchanges or servers are utilised every day to conduct millions of transactions.<br>The Panel also drew analogies to contract law: acceptance takes place where the transaction is received, and defamation law: the defamation occurs where the defamatory material is read. Similarly, in the OECD's work in taxing digital transactions, the source of income is based on where the platform that processes the transaction is located. Accordingly, it does not seem controversial to say that a transaction that took place on a foreign exchange is a foreign transaction.<br>For these reasons, the Panel recommended that funding should not be approved.<br>The Chair accepted the recommendation and declined funding. |
| **ATO Reference:** | **04/2022-23** |
| **Panel Meeting Date** | 29 September 2022 |
| **Issue** | 1. What constitutes the private ruling under review when the objection has been allowed in part and the objection decision purports to have provided two distinct documents being a:<br>a. notice of objection decision; and<br>b. reason for decision.<br>2. Can additional documents not mentioned in the original private ruling material be relied upon to interpret the terms of a contract where the scheme in the private ruling is inclusive of the terms of that contract and there is a dispute about the interpretation of the terms of agreement: |


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| | a. where that additional material was not before the Commissioner; or<br>b. where that additional material was before the Commissioner but not mentioned in the private ruling or the objection decision; and/or<br>c. where that material was mentioned under "we looked at this information" in relation to issue a.<br>3. Can an attachment to a document be relied upon by the applicant where the document and selected attachments have been considered by the Commissioner and the attachment the applicant wishes to rely upon was provided at the same time attached to the same document but not listed amongst the attachment by the Commissioner.<br>4. Concerns an interlocutory application to stay the Commissioner's objection decision. That stay application has now been withdrawn. However, for completeness issue 4 relates to validity of the objection decision. |
| **Panel Reasons** | The Panel noted that the application is more about the legal technicalities in relation to process and not related to a question of substantive law that would arise before the AAT and will not impact upon how a private ruling is approached.<br>The Panel found it difficult to identify the error of law put forward by the applicant and noted the issue being advanced in the funding application appeared to be procedural in nature and confined towards the factual circumstances.<br>For these reasons, the Panel recommended that funding should not be approved. The Chair accepted the recommendation and declined funding. |
| **ATO Reference:** | **05/2022-23** |
| **Panel Meeting Date** | 29 September 2022 |
| **Issue** | 1. What constitutes payment or constructive payment under section 11-5 of Schedule 1 to the *Taxation Administration Act 1953* (TAA)?<br>2. Whether a journal entry constitutes payment or constructive payment under section 11-5 of Schedule 1 to the TAA?<br>3. What other conditions, circumstances, and/or evidence is required for a journal entry to constitute payment or constructive payment under section 11-5 of Schedule 1 to the TAA? |


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| | 4. Can you have a sole or dominant tax avoidance purpose under an anti-avoidance provision where you seek to avoid a different anti-avoidance provision? |
| **Panel Reasons** | The Panel noted that the matter turns on its own facts and would not be suitable for funding.<br>The Panel also considered that this case does not require consideration as to the substantive law in relation to the anti-avoidance provisions. The way the issues have been identified are in general terms.<br>The Panel noted that the taxpayer appears to have been vague as to the historical events and did not discharge the burden proof during AAT proceedings. The Panel agreed that this appeared to demonstrate an unwillingness to progress the issues in a timely manner to avoid delays. The Panel considered that there also appears to be contrived arrangements to rewrite accounting history which may result in a benefit that is contrary to the law.<br>The Panel considered that there are uncertainties and curiosities as to the facts of the case, but the matter has limited use as to the application of the substantive law.<br>For these reasons, the Panel recommended that funding should not be approved. The Chair accepted the recommendation and declined funding. |
| **ATO Reference:** | **02/2022-23** |
| **Panel Meeting Date** | 13 July 2022 |
| **Issue** | 1. Whether the Commissioner has discretion to remit penalties imposed pursuant to the *Superannuation Guarantee (Administration) Act 1992* (SGAA) below 100% of the superannuation guarantee charge (SGC)<br>2. Whether the Commissioner has discretion to remit penalties below the level of 100%, and whether the correct or preferable decision is to remit the penalties in full to nil<br>3. Whether the Commissioner's audit should have been formally put on hold<br>4. Whether the COVID-19 pandemic materially reduced the capacity of the taxpayer to lodge SG statements and make disclosures<br>5. Whether the discretion to remit SGC was narrowly applied<br>6. Whether the principles in the Taxpayer's Charter were applied. |

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| **Panel Reasons** | The Panel acknowledged the taxpayer's circumstances and, in view of the information provided, expressed an understanding of the taxpayer's position regarding the impact of COVID-19 on the business.<br>The Panel acknowledged and discussed an inconsistency in the application regarding the 'nudge' letter and whether it was received by the taxpayer. The Panel concluded it was received based on the taxpayer's written response, that the process is clear with respect to the limitation of the Commissioners discretion if a 'nudge' letter is received by the taxpayer and it was incidental that the letter was received prior to the start of the COVID-19 pandemic as the issues relate to prior periods.<br>The Panel noted that the fundamental issue pertains to the Commissioner's ability to remit the penalties imposed to less than 80% due to the exceptional circumstances experienced by the taxpayer at that time. On this point, the Panel noted that there is sufficient judicial instruction regarding exceptional circumstances and agreed that the issue did not require further judicial clarification.<br>The Panel also observed that the matter is likely one which will rely on an evaluation of facts that are particular to the taxpayer and that the penalty remission powers were altered in 2018. Accordingly, the Panel agreed both elements would further limit any potential law clarification for other cases dealing with similar issues and recommended that funding be declined.<br>The Chair accepted the recommendation and declined funding. |
| **ATO Reference:** | **17/2021-22** |
| **Panel Meeting Date** | 4 May 2022 |
| **Issue** | 1. In a dispute already determined by the Federal Court, the issue was the interaction between:<br>a. the Commissioner of Taxation's obligation under s 166 of the *Income Tax Assessment Act 1936* (ITAA 1936) to use all information in his possession to make an assessment of a taxpayer's taxable income and the amount of tax payable by the taxpayer; and |

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| | b. the Commissioner's implied undertaking, commonly referred to as a *Harman* undertaking in reference to the decision in *Harman v Secretary of State for the Home Department* [1983] 1 AC 280, in relation to documents and information obtained through the curial processes not to make use of such documents and information other than in the litigation. |
| **Panel Reasons** | The Panel discussed the retrospectivity of the application. It was noted that this was a decision on an interlocutory application and not binding precedent, however it may be influential. It was noted that the terms of the order were unusual as the terms were: 'Leave be granted to the respondent (The Commissioner) to inspect the documents' which was not an issue. Rather, the issue was whether the Commissioner was entitled to go further and to use the information obtained as a basis for the s166 assessment. This was an anodyne order granted to inspect the documents and not a declaration for leave.<br>The Panel noted that the issues had previously been determined in the cases of *Deputy Commissioner of Taxation v Rennie Produce (Aust) Pty Ltd (in liq)* [2018] FCAFC 38 and *Deputy Commissioner of Taxation v Shi* [2021] HCA 22. It was considered that the matter does not relieve any ambiguity in those cases and is not entirely new or novel. Further, the matter does not narrow the application or does not contribute anything by way of precedent.<br>Accordingly, the Panel recommended that the funding application be declined. The Chair accepted the recommendation and declined funding.<br>The Chair noted that in these circumstances retrospective funding could set a difficult precedent and may expand the operation of the Test Case Funding Program. It was further noted that had the application been considered before the proceeding, that funding would have been declined. |
| **ATO Reference:** | **18/2021-22** |
| **Panel Meeting Date** | 4 May 2022 |
| **Issue** | 1. Whether a home can be treated as a place of work by means of the following, that: |


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| | a. there is a direct link between income and expense for the maintenance of dogs/live animals from home.<br>b. a 3m x 2m concrete area, which was paid and installed by the applicant's employer at the applicant's home for the maintenance of the dogs/live animals, be considered a place of work.<br>c. 2 dog kennels owned by the South Australian (SA) Government housing dogs/live animals daily at the applicant's home, be considered a place of work.<br>d. 2 live dogs, being SA Government assets and stored at the applicant's home, be considered as a place of work.<br>e. a SA Government owned gun safe installed in the applicant's home for storage of SA Government guns and ammunition be considered a place of work.<br>f. section 900-115(3) should have been applied to this matter rather than section 900-195 of the *Income Tax Assessment Act 1997*. |
| **Panel Reasons** | On review of the issues raised in the funding application, the Panel noted there were matters raised in the application that did not form part of the objection decision and therefore, were not issues before or decided on by the Administrative Appeals Tribunal.<br>Notwithstanding these observations, the Panel also noted that the matters pursued in the application did not raise any novel issues requiring law clarification but rather issues that already have clear and established case law principles.<br>Accordingly, the Panel unanimously recommended funding application be declined.<br>The Chair accepted the recommendation and declined funding. |
| **ATO Reference:** | **13/2021-22** |
| **Panel Meeting Date** | 23 February 2022 |
| **Issue** | The adequacy and sufficiency of the Taxpayer's supporting evidence in relation to its net fuel amount claims for the purposes of discharging its burden of proof under section 14ZZK of the *Taxation Administration Act 1953*. |
| **Panel Reasons** | During opening discussions, the Panel noted, a Tribunal decision in the Tribunal on the adequacy of supporting evidence would not establish a precedent as s 33(c) of the *Administrative Appeals Tribunal Act 1975* states 'the Tribunal is not bound by |


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| | the rules of evidence but may inform itself on any matter in such matter in such manner as it thinks appropriate'. Accordingly, the parties would not receive a decision on the evidentiary issue.<br>The Panel noted that funding decisions need to be made with reference to the funding criteria and expectations. Particularly, a case "must be likely to provide legal precedent as a principle of law, capable of being used to decide other cases with similar facts, giving certainty and clarity for taxpayers". Accordingly, it was agreed that the matter was more a question of fact rather than a question of law.<br>The Panel observed that as the issue identified in the application was likely to turn on its specific facts, consequently, it was unlikely to lead to a legal precedent in an area of legal uncertainty. The Panel further added that the way in which different taxpayers evidence their claims and what is considered 'sufficient' evidence in a particular instance depends on the facts and circumstances of each matter.<br>Accordingly, the Panel recommended that funding be declined. The Chair accepted the advice of the Panel and declined funding. |
| **ATO Reference:** | **14/2021-22** |
| **Panel Meeting Date** | 23 February 2022 |
| **Issue** | Whether the position of Chief Executive Officer (CEO) of a company is a declared individual under paragraph 293-145.01(g) of the *Income Tax Assessment Regulations 1997* (ITAR 1997). |
| **Panel Reasons** | During opening discussions, the Panel noted that is it unlikely that the issue will be significant to a substantial section of the public, due mainly to the expectation that the decision will be made having regard to circumstances particular to the taxpayer. It was considered that those circumstances would have quite limited relevance to other members of the public.<br>The Panel noted that there is a lack of sufficient uncertainty or contention about how the law operates because the law is already clearly determined. It was considered that this matter was more a question of fact rather than a question of law.<br>The Panel conceded that whilst the matter may add to established case law, it would not provide a precedent for future cases.<br>Accordingly, the Panel recommended that funding be declined. |

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| | The Chair accepted the recommendation and declined funding. |
| **ATO Reference:** | **15/2021-22** |
| **Panel Meeting Date** | 23 February 2022 |
| **Issue** | 1. Whether the definition of a "Pension" in the *Superannuation Industry (Supervision) Act 1993* (SISA) relating to pre-20 September 2007 recipients of a "disability superannuation benefit", does not comply with the rules of the sub-regulations of the *Superannuation Industry (Supervision) Regulations 1994* (SISR), pertaining to a pension according to the respective SISR Reg:1.06; specifically, Sub-Reg:1.06(1A).<br>2. Whether Commonwealth and Military superannuation entitlements are unfunded public sector "defined benefit interests", as provisioned by the Commonwealth Superannuation Corporation (CSC). |
| **Panel Reasons** | The Panel acknowledged the concerns raised by the taxpayer in the funding application and the challenges he had faced. However, with respect to the issues in dispute, the Panel noted that there is no uncertainty or contention as to the operation of the law and that the issues had received law clarification in the previous case of *Commissioner of Taxation v Douglas* [2020] FCAFC 220.<br>The Panel also noted that the matter is unlikely to provide precedent as a principle of law as the Tribunal's decision on this matter is likely to turn on a full evaluation of the facts.<br>The Panel was unanimous in the recommendation that funding should be declined. The Chair accepted the recommendation and declined funding. |
| **ATO Reference:** | **07/2021-22** |
| **Panel Meeting Date** | 22 November 2021 |
| **Issue** | licant's burden of proof under subsection 14ZZK(b) of the *istration Act 1953* will be satisfied:<br>a. by adducing evidence suggesting that all or part of the Commissioner's methodology in making an assessment may have been flawed;<br>b. by adducing evidence that the Commissioner may have been mistaken as to relevant facts when making an assessment. |

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| **Panel Reasons** | The applicant applied for funding for the re-hearing of the substantive dispute by the Administrative Appeals Tribunal (AAT) following a test case funded decision of the Federal Court.<br>The Panel noted that questions identified in the application will not deal with the onus of proof issue initially raised by the applicant. It was further noted that a re-hearing by the AAT will not finalise those questions raised. Rather, they would need to be determined by the Federal Court.<br>The Panel noted that because the applicant's matter is now back before the AAT for a fresh review of the objection, she is seeking funding for a fresh merits review of the objection decision. However, the Panel observed that Test Case Funding is not usually granted to fund such matters in the AAT.<br>The Panel remarked that there is no matter of contention or uncertainty which would warrant funding, as the AAT reconsideration of this matter would turn on its own facts.<br>Accordingly, the Panel recommended that funding be declined.<br>The Chair accepted the recommendation and declined funding. |
| **ATO Reference:** | **10/2021-22** |
| **Panel Meeting Date** | 22 November 2021 |
| **Issue** | 1. The Applicant applied for funding to test the constitutional validity of an Excess Transfer Balance determination under s 136-10(1), s 136-55 and s 136-80(1) of Sch 1 to the *Taxation Administration Act 1953*, namely:<br>a. Whether the above-mentioned sections are laws with respect to the acquisition of property other than on just terms contrary to s 51(xxxi) of the Constitution and not supported by any other head of power, and therefore constitutionally invalid.<br>b. If the provisions are valid, whether s 136-10(1) confers a discretion on the Commissioner to issue an excess transfer balance determination and if so, what are relevant considerations the Commissioner should take into account.<br>c. If s 136-10(1) does confer a discretion on the Commissioner, whether the Commissioner's decision to issue the excess transfer balance determination (and to disallow the objection) was the correct decision on the merits. |

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| **Panel Reasons** | In discussing the second and third issues, the Panel did not consider that there was a point of law that was uncertain. The issues are directed to actions that were more of an administrative nature, with no real aspects of broad public interest or uncertainty. The determination is more in the nature of a certification of the excess balance which already exists. These issues turn on their facts and would be akin to a merits review, which is not an appropriate matter for test case funding.<br>The Panel also discussed the issue of constitutional validity and noted that a challenge to constitutional validity is not an issue that the Panel would recommend for funding.<br>The Panel observed that as the first issue on constitutional validity was not a matter to which funding should apply, as framed, the other issues fall away.<br>Accordingly, the Panel recommended that funding be declined.<br>The Chair accepted the recommendation and declined funding. |
| **ATO Reference:** | **09/2021-22** |
| **Panel Meeting Date** | 22 November 2021 |
| **Issue** | 1. Was a Lump Sum Payment in Arrears (LSPIA) paid to taxpayers under each Deed of Acknowledgement and Assignment, ordinary income within the meaning of section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997)?<br>2. Did CGT event A1 (see section 104-10 of the ITAA 1997) happen for the taxpayers in respect of each Deed of Acknowledgment and Assignment entered into by them and that company?<br>3. If CGT event A1 did happen in respect of each Deed of Acknowledgment and Assignment, then:<br>a. did the taxpayers make a capital gain and, if so, what was the quantum of the capital gain; and<br>b. was the capital gain made by the taxpayers a 'discount capital gain' within the meaning of Division 115 of the ITAA 1997? |
| **Panel Reasons** | The Panel noted that there is no uncertainty or contention as to the operation of the law. Rather, the issue is simply one of application of the established principles to the facts. There are no competing lines of authority in this circumstance, but rather the question is which authority applies to the set of facts, and the facts would not be considered novel. |

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| | The Panel also agreed that there is no plausible argument that the amount in question constitutes capital as opposed to revenue income.<br>Accordingly, the Panel recommended that funding be declined. The Chair accepted the recommendation and declined funding. |

## *FINALISED APPROVED MATTERS*

| **Name** | ***Commissioner of Taxation v SEPL Pty Ltd as Trustee of the SFT Trust SAD 83/2024*** |
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| **Venue** | Federal Court of Australia |
| **Issue** | 1. Whether a person is an "employee" (within the meaning of section 136 of the Fringe Benefits Tax Assessment Act 1986 (FBTAA)) of a company (in its capacity as trustee) who holds the office of director of the company and performs the function and duties of a director in the daily operations of the company, and engages entirely in the work and operations of the company?<br>2. Whether a person is an employee (within the meaning of section 136 of the FBTAA) who within the contemplation of the definition of "employment" in section 136 of the FBTAA:<br>a. held the office of director of the company; and/or<br>b. performed the functions and duties of director?<br>3. Whether the directors of the company did any act or thing resulting in each or any of them being treated as an employee (within the meaning of the FBTAA and the definition of "employment" in section 136 of the FBTAA) by reason of the facts found by the Tribunal and/or uncontroverted evidence before the Tribunal?<br>4. Whether on the facts found by the Tribunal, and/or the uncontroverted evidence, the three directors on whom the Respondent conferred non-cash benefits were "employees" as defined in subsection 136(1) of the FBTAA?<br>5. Whether on the facts as found by the Tribunal, and/or the uncontroverted evidence, the non-cash benefits conferred on each of the three directors were provided to the individuals "in respect of the employment of an employee" within the meaning of section 138B of the FBTAA? |


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| **Decision or Outcome** | The Federal Court (Court) allowed the appeal and made orders for the Administrative Appeals Tribunal (Tribunal) decision to be set aside, affirmed the objection decision and dismissed the Taxpayer's application for review.<br>In allowing the appeal, the Court determined that:<br>- the Tribunal erred in law by finding that the directors were not employees of the trustee company within the meaning of the FBTAA, with the Tribunal having relied on erroneous concepts in coming to the decision; and<br>- the Tribunal erred in law by concluding that the car benefit was not provided in respect of employment within the meaning of the FBTAA. |
| **Why does the issue involve uncertainty and/ or contention?** | The Tribunal's decision raised issues of important principle of construction relevant to the general administration of the Fringe Benefits Tax (FBT) regime. These issues included whether non-cash benefits conferred on directors of a corporate trustee, who work full-time in executive management roles in the trustee's business, are subject to FBT. |
| **Status** | The matter was heard on 10 February 2025. A decision was handed down on 5 June 2025. |
| **ATO Reference:** | ***Hall and Commissioner of Taxation No. 2022/8986*** |
| **Venue** | Administrative Appeals Tribunal |
| **Issue** | 1. During the 2021 income tax year and the COVID pandemic, whether the taxpayer, who resided in Melbourne and was subject to stay-at-home directions ordered by Chief Health Officer, could claim deductions pursuant to s 8-1 of the Income Tax Assessment Act 1997 for:Occupancy expenses (rent) – as he was required to work from home with a bedroom in his home used as a space to perform his employment duties<br>2. Associated car expenses referable to travel between his home and his usual workplace to perform some of his duties. |
| **Decision or Outcome** | The Tribunal found in favour of the Taxpayer with the decision of the Commissioner set aside. It was found that the requirements imposed by the government and the employer meant that the apartment was both the taxpayer's home and his workplace. It was highlighted that the taxpayer had one employer with two distinct aspects to his job - one which |


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| | required him to work from home and the other which required him to work from the employer's Southbank Studios. |
| **Why does the issue involve uncertainty and/ or contention?** | There is some uncertainty in relation to the application of historic legal principles on the deductibility of occupancy expenses in modern working arrangements.<br>TR 93/30 Income tax: deductions for home office expenses provides that occupancy expenses are generally private in nature and not deductible unless part of the home was used for income producing activities and that part of the home has the character of a place of business.<br>TR 93/30 goes on to provide that whether an area of the home has the character of a place of business is a question of fact which depends on the circumstances of each case. |
| **Status** | The matter was heard on 17-18 December 2024. The decision was handed down on 22 May 2025. |
| **Name:** | ***Charles Apartments Pty Limited v Commissioner of Taxation* [2025] FCA 461** |
| **Venue** | Federal Court of Australia |
| **Issue** | 1. Whether the Tribunal fell into error when it applied a "but for" test when finding a deductible purpose for the payment of interest for the purposes of s 8-1(1) of the ITAA 1997, instead of tracing the use to which borrowed funds were put as required (**Issue 1**).<br>and<br>2. Whether (Issue 1) effected a denial of procedural fairness because had the Tribunal's proposed approach been notified to the parties, the Commissioner would have made further submissions, including that the relevant payment to Suncorp was not in the character of a loan repayment but a forced payment under a guarantee (**Issue 2**). |
| **Decision or Outcome** | **Issue 1**<br>The Tribunal's reasons disclosed it was aware of the importance of satisfying the 'nexus' requirement for the purposes of s 8-1(1) of the ITAA 1997 and the need to trace the use of borrowed funds when refinancing occurs. However, the Federal Court found that the Tribunal's reasons merely 'presumed' an amount and calculation of interest rather than making a proper finding regarding these amounts. The Court held that the Tribunal in |


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| | doing so applied the incorrect test and fell into error. Further, the Court held that the proper characterisation of the payment was under a guarantee and on capital account and hence not deductible.<br>**Issue 2**<br>The Court held that *had* the Tribunal afforded the parties an opportunity to be heard on its proposed approach to nexus, by way of this “but for” test, the Commissioner (and likely the Applicant) would have advanced additional submissions which may have led to a different decision. As such, it was held that the Tribunal denied the parties procedural fairness. |
| **Why does the issue involve uncertainty and/ or contention?** | There was contention regarding the correct application of how ‘nexus’ for the purposes of s 8-1(1) of the ITAA 1997 is to be considered when refinancing occurs. The Tribunal’s decision diverted from the established principles governing deductibility of interest expenditure and there were concerns the Tribunal’s decision denied procedural fairness to the parties. |
| **Status** | Both the Applicant’s appeal and the Commissioner’s cross-appeal were heard together on 18 February 2025. On 9 May 2025, the Federal Court found in favour of the Commissioner, allowing the Commissioner’s cross-appeal, affirming the decision at objection. |
| **Name:** | ***Commissioner of Taxation v Bendel* [2025] FCAFC 15** |
| **Venue** | Federal Court of Australia |
| **Issue** | The primary issue that was in dispute was whether an entitlement to trust income that was conferred on an associated private company, but remained substantially unpaid, gave rise to a loan within the meaning of that term in subsection 109(3) of the *Income Tax Assessment Act 1936* (ITAA 1936) from the private company to the trustee of the trust resulting in the making of a deemed dividend under subsection 109D(1). |
| **Decision or Outcome** | The Court ruled in favour of the taxpayer, finding that an unpaid present entitlement owed by a trust to a corporate beneficiary was not a “loan” for the purposes of Division 7A. |
| **Why does the issue involve uncertainty and/ or contention?** | There was uncertainty as to the correctness of the Commissioner’s longstanding view on an important issue of interpretation of Division 7A of the ITAA 1936, first formally expressed in 2010 (in TR 2010/3W *Income tax: Division 7A loans: trust entitlements*) and reconfirmed in 2022 (in TD 2022/11 *Income tax: Division 7A: when will an unpaid present* |


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| | *entitlement or amount held on sub-trust become the provision of 'financial accommodation'?*). Specifically, the contention on whether the Commissioner is correct in asserting that by not calling for payment of its trust entitlements, a corporate beneficiary provides "financial accommodation" to the trustee, being a transaction within the scope of the extended definition of a "loan" for the purposes of Division 7A. |
| **Status** | The matter was heard by the Full Court on 22-23 August 2024. The decision was handed down on 19 February 2025. |
| **Name:** | ***Commissioner of Taxation v Patrix Prestige Pty Ltd* [2024] FCAFC 148** |
| **Venue** | Federal Court of Australia |
| **Issue** | 1. Whether a Luxury Car Tax (LCT) decreasing adjustment is only available under s 15-30 of the *A New Tax System (Luxury Car Tax) Act 1999* (LCT Act) where there is a change of use or change of intended use such that, absent the Commissioner's concession, the Respondent had no entitlement to an LCT decreasing adjustment under that section for any of the cars in dispute.<br>2. Whether a purchasing dealer of a luxury car has both a statutory entitlement to quote under s 9-5 of the LCT Act and to have that quote accepted by the selling dealer, as such treating the supply as not being taxable supplies under s 5-10 of the LCT Act.<br>3. Whether the Respondent had discharged their onus of proof under s 144XXKb(i) of the *Taxation Administration Act 1953* (TAA) in proving they had acquired the cars otherwise than as an agent for an undisclosed principal or a trustee.<br>4. Whether the Respondent had discharged their onus of proof under s 144XXKb(i) of the TAA in proving that each of the transactions to which the Respondent was a party, other than its acquisitions from the marque dealers, were shams.<br>5. Whether Division 165 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) should be engaged for the new cars and whether the Respondent received a GST benefit from the schemes for the purposes of s 165-5(1)(a) of the GST Act.<br>6. Whether the Respondent was entitled to rely on the safe harbour provisions in s 284-75(6) of Schedule 1 to the TAA |

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| | such that no penalties apply to the claim for LCT decreasing adjustments and input tax credits on the cars. |
| **Decision or Outcome** | On 14 November 2024, the Full Court of the Federal Court of Australia in a joint judgment allowed the Commissioner's appeal and the Respondent's cross-appeal and ordered that the matter be remitted to the Tribunal to be reheard according to law. |
| **Why does the issue involve uncertainty and/ or contention?** | There was some uncertainty regarding the application of the LCT Act. Specifically, s 15-30 regarding a purchasing motor dealer's entitlement to a LCT decreasing adjustment when buying a car for trading stock and s 9-5 regarding a purchasing motor dealer's entitlement to quote. In addition, having regard to the factual circumstances of the case, whether Division 165 of the GST Act is engaged and should be applied. |
| **Status** | The Full Court of the Federal Court of Australia handed down its decision on 14 November 2024. The matter has been remitted to the Tribunal. |
| **Name:** | ***Commissioner of Taxation v Tan* [2024] FCA 406** |
| **Venue** | Federal Court of Australia |
| **Issue** | 1. Whether in making the Decision, the Tribunal erred in its interpretation and purported application of s33(1)(c) of the *Administrative Appeal Tribunal Act 1975* (AAT Act) by misapplying the onus of proof;<br>2. Whether an Australian resident applicant's burden of proof under subsection 14ZZK(b)(i) in proving his actual taxable income, can be satisfied by the provision of a Forensic Accountant's report that fails to consider income received from sources outside of Australia.<br>3. Whether in making the Decision, the Tribunal erred in its interpretation and purported application of s 170 of the *Income Tax Assessment Act 1936* (ITAA 1936) or s 284-90 of Schedule 1 of the *Taxation Administration Act 1953* (TAA) by conflating a 'fraud or evasion' finding (which is required before the Commissioner can amend an assessment that is outside the period of review) with an allegation of fraud. In this case, the period of review had not expired and no 'fraud or evasion' finding was necessary or relevant;<br>4. Whether in making the Decision, in which the Tribunal accepted the Applicant's correct taxable income was less than that assessed (but more than the original assessment), the penalty amount should: |


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| | a. remain at the same percentage assessed but be recalculated on the reduced shortfall amount; or<br>b. have the percentage reduced and then applied to the reduced shortfall amount. |
| **Decision or Outcome** | The parties agreed to resolve the test case issues in dispute prior to hearing. The Court set aside the decision of the Tribunal and held that the Tribunal had failed to:<br>a. correctly apply the requirements of s 14ZZK(b) of the TAA;<br>b. correctly apply s 170 of the ITAA 1936 or s 284-90 of the TAA; and<br>c. correctly apply ss 284-75 and 284-90 of Schedule 1 of the TAA. |
| **Why does the issue involve uncertainty and/ or contention?** | The Tribunal erred in its interpretation and the application of section 14ZZK of the TAA. The Tribunal should have held that the taxpayer failed to discharge the burden of proof as required by section 14ZZK of the TAA. Contrary to established legal principles, the Tribunal's fundamental error was to adopt an incorrect approach and allowed the taxpayer to discharge the onus by demonstrating errors and mistakes in the Commissioner's approach to assessment using the method of the asset betterment methodology instead of establishing the taxpayer's actual taxable income. |
| **Status** | The Federal Court of Australia has handed down its decision. |
| **Name:** | ***Commissioner of Taxation v John Hayes Trading Pty Ltd as trustee of the JPH Trading Trust & Ors* [2024] FCAFC 80** |
| **Venue** | Federal Court of Australia |
| **Issue** | Section 207-155 of the *Income Tax Assessment Act 1997* (ITAA 1997), provides that for the purposes of the franking integrity rules in Subdivision 207-F of the ITAA 1997, a distribution is made as part of a dividend stripping operation if it was made in connection with a scheme that:<br>a. was by way of, or in the nature of, dividend stripping; or<br>b. had substantially the effect of a scheme by way of, or in the nature of, dividend stripping.<br>The issue in this case concerns whether, in making the Decision, the Tribunal:<br>a. erred in its construction and purported application of s 207-155 of the ITAA 1997<br>b. failed to give effect to s 207-155 as required by the circumstances before it. |

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| **Decision or Outcome** | The Full Federal Court found in favour of the Commissioner.<br>The Court decided that the Tribunal erred in its construction of s 207-155 of the ITAA 1997 by failing to give effect to the words “by way of, or in the nature of” as words of expansion.<br>The decision emphasises that the words only require a scheme to be “by way of, or in the nature of” dividend stripping. It was noted that section 207-155 was plainly intended to capture schemes which vary from the central characteristics identified in the leading case authority.<br>The Court found that a scheme may be “by way of, or in the nature of” dividend stripping even if:<br>1. the profits are distributed to persons related to, associated with or controlled by the original shareholders; and<br>2. a compensating non-taxable receipt is not received by the original shareholder but is received by a person related to, associated with or controlled by the original shareholders.<br>The Court also found the Tribunal erred in its analysis of the dominant purpose test by hypothesising that tax might be paid at some future time, rather than addressing whether there was a dominant purpose of avoiding tax on the distribution of profits to the original shareholders.<br>Notwithstanding the above, the Court was not satisfied the facts had been fully found. The matter was remitted back to the Tribunal for redetermination at law. |
| **Why does the issue involve uncertainty and/ or contention?** | The case brings certainty to the ATO view expressed in TD 2014/1. In particular, the case clarifies the uncertainty brought about from the Tribunal's decision which suggested that the views expressed in TD 2014/1 regarding some characteristics of a dividend stripping scheme were not correct.<br>While there is a material body of Australian jurisprudence on dividend stripping operations, it is predominantly in the context of sections 260 of the *Income Tax Assessment Act 1936* (ITAA 1936) and, more recently, 177E of the ITAA 1936.<br>The application of Subdivision 207-F of the ITAA 1997 was recently considered by the Federal Court in *BBlood Enterprises Pty Ltd v Federal Commissioner of Taxation* [2022] FCA 1112, but on appeal it was determined that the issue did not need to be decided because of the court's findings on the application of section 100A of the ITAA 1936. Accordingly, there are certain |


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| | aspects regarding the scope of section 207-155 that remain unresolved. |
| **Status** | The Federal Court of Australia has handed down its decision. |
| **Name:** | ***Commissioner of Taxation v JMC Pty Ltd*** **No. S69/2023** |
| **Venue** | High Court of Australia |
| **Issue** | 1. Does the mere existence of a clause conferring upon a worker any right to sub-contract or assign, even if relevantly limited or qualified in its legal operation, produce the consequence that a worker under a contract containing such a clause is necessarily disqualified from being an “employee” under the expanded definition in s 12(3) of the *Superannuation Guarantee (Administration) Act* (SGAA)?<br>2. Where there is a wholly written contract:<br>a. which is not “for” the provision of equipment, or a result, or the labour of other persons;<br>b. which provides that the worker “will personally provide” the contracted-for services; and<br>c. in which every clause requires, or assumes, personal performance by the worker, save for one clause which provides a qualified or limited right to sub-contract or assign;<br>d. is such a contract incapable of being a contract “principally for the labour of the person”, for the purpose of s 12(3) of the SGAA? |
| **Decision or Outcome** | On 12 October 2023, the High Court dismissed the Commissioner’s special leave application from the Full Federal Court’s decision. |
| **Why does the issue involve uncertainty and/ or contention?** | This case concerned uncertainty on whether the contract between a lecturer and higher education provider was one of employment or independent contractor. The Commissioner contended in his special leave application that, contrary to the decision of the Full Federal Court, the lecturer fell within the extended definition of employee within the meaning of s12(3) of the SGAA. |
| **Status** | The Commissioner will update his public advice as required in line with the Full Federal Court’s decision |
| **Name:** | ***Chobani Pty Ltd and Commissioner of Taxation (Taxation)*** **[2023] AATA 1664** |

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| **Venue** | Administrative Appeals Tribunal |
| **Issue** | Whether the supply of the Applicant's product (Product) is GST-free under section 38-2 of the *A New Tax System (Goods and Services) Act 1999* (GST Act). |
| **Decision or Outcome** | The Tribunal found in favour of the Commissioner that the Chobani Flip Strawberry Shortcake flavoured yoghurt was subject to GST.<br>The Tribunal concluded that there was nothing in the text of the legislation considered in context or the policy of either the food provisions generally or s 38-3(1)(c) that warrants confining the provision to combination of products that could be separately acquired or which are practically, economically and commercially distinct. Rather, the exclusion from GST free treatment applies at least when a product meets the description: food that is a combination of foods that includes separately identifiable food or foods excluded from GST free treatment by the table in clause 1 of Schedule 2 or foods of that kind. |
| **Why does the issue involve uncertainty and/ or contention?** | The Product, being chosen as a representative of a line of similar products manufactured by the Applicant, was historically treated as GST-free. The Commissioner subsequently changed his view and considered that the supply of the Product was taxable.<br>The Product comprises taxable and non-taxable ingredients respectively stored in two separate compartments. The Applicant intends for these ingredients to be mixed in at the time of consumption and not to be consumed separately.<br>There is uncertainty as to whether such a supply is:<br>a. of a food that is a combination of one of more foods within the meaning of paragraph 38-3(1)(c) (at least one of which is of a kind specified in the 3rd column of the table in clause 1 of Schedule 1 to the GST Act); such that it is not GST-free pursuant to section 38-2 of the GST Act; or<br>b. not such a combination and instead a single, composite supply of one thing that is GST-free under section 38-2 of the GST Act, being made up of a dominant part and other parts that are not treated as having a separate identity as described in paragraph [21] of GSTR 2001/8. |
| **Status** | The Tribunal handed down its decision on 16 June 2023. The Applicant did not appeal. |


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| **Name:** | ***Commissioner of Taxation v Wood* [2023] FCA 574** |
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| **Venue** | Federal Court of Australia |
| **Issues** | 1. Whether the Applicant is entitled to claim a general deduction under section 8-1 of the *Income Tax Assessment Act 1997* (ITAA 1997) for a payment made to settle litigation. In particular:<br>a. Whether the expenses were incurred in gaining or producing the Applicant's assessable income under section 8-1(1)(a);<br>b. Whether the expenses were an outgoing of capital or of a capital nature or of a private or domestic nature, and accordingly not deductible under 8-1(2). |
| **Decision or Outcome** | The Court found in favour of the Respondent, reaffirming the Tribunal's decision that settlement sum was an allowable deduction under section 8-1(1)(a) of the ITAA 1997. The reasons provided by the Court for the decision were:<br>1. The occasion of the liability that was discharged was the work done by the respondent as employee. It did not matter that the liability itself was created by the Settlement Deed (after employment had ceased) because the claim that was compromised by that deed arose directly out of the respondent's employment.<br>2. The respondent's conduct in his employment was at once the source of income and the cause of the risk of liability.<br>3. The respondent's agreement to pay, and then payment, to bring allegations about his conduct in his employment to an end is similarly characterised – it is a loss or outgoing that reduces his income from his employment.<br>Further the Court held that the Settlement Sum was not an outgoing of capital or of a capital nature because:<br>1. It was to be characterised as bringing to an end the litigation risk arising from the respondent's conduct in his employment years previously, rather than as in the protection of his reputation in the future.<br>2. It did not involve the acquisition of any tangible asset, but rather arose out of the very activities the respondent performed in gaining assessable income. The discharge of the liability that arose out of those activities cannot sensibly be characterised as a loss or outgoing of capital or of a capital nature – it was not to protect goodwill or widespread |


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| | or general reputation, or to secure habitual patronage by clients or customers. |
| **Why does the issue involve uncertainty and/ or contention?** | This case introduces some uncertainty around the application of Section 8-1 of the ITAA 1997 in the context of employee legal expenses. In particular, the decision handed down is of strategic importance. Although in situations where an employment relationship ends the occasion of a loss or outgoing will not usually relate to the former employment, the case has clarified that, depending on the particular facts, there are circumstances where it is possible to establish a nexus between the loss or outgoing and the past employment activity. |
| **Status** | The Federal Court handed down its decision on 2 June 2023. |
| **Name:** | ***Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust* [2023] FCAFC 3** |
| **Venue** | Federal Court of Australia, Full Court. |
| **Issue** | This matter concerns appeals to the Full Court against 2 first instance decisions of the Federal Court of Australia.<br>1. In respect of the first appeal, the issues raised are:<br>a. Whether a present entitlement of a beneficiary to a share of the income of the trust arose out of a reimbursement agreement within the meaning of section 100A of the *Income Tax Assessment Act 1936* (ITAA 1936).<br>b. Whether the Commissioner's posited reimbursement agreement was entered into in the course of ordinary family or commercial dealing within the meaning of subsection 100A(13).<br>c. Whether the Commissioner's posited reimbursement agreement was entered into for the requisite tax reduction purpose within the meaning of subsection 100A(8).<br>2. In respect of the second appeal, the issues raised are:<br>a. Whether there was a scheme to which Part IVA applied.<br>b. Whether, in relation to the '2012 related scheme' and '2013 related scheme' as defined in the first instance judgment, the taxpayer obtained a tax benefit in connection with one or both schemes.<br>c. Whether, in applying section 177CB to the 2013 income year, the Commissioner's posited |

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| | counterfactual has comparable substance and achieves comparable results and consequences (other than tax consequences).<br>d. Whether one, or both schemes was carried out for the sole or dominant purpose of obtaining a tax benefit. |
| **Decision or Outcome** | In relation to the first appeal, the Court found that section 100A did not apply to the 2013 income year, as there was no reimbursement agreement within the meaning of that section, at the time the present entitlement arose. Therefore, the Court observed that it was unnecessary for it to consider issues of tax reduction purpose and 'ordinary commercial or family dealing'.<br>In relation to the second appeal, the Court held that Part IVA applied in the 2013 income year but not the 2012 income year. The Court found that:<br>a. The 2012 related scheme and 2013 related scheme were each a 'scheme' as defined in s 177A;<br>b. The taxpayer received a tax benefit in each of the 2012 and 2013 income years. In respect of the 2013 income year, this conclusion was strengthened by the application of subsection 177CB(4).<br>The Court concluded that a party entered into or carried out the 2013 related scheme for the dominant purpose of enabling the taxpayer to obtain a tax benefit. However, it found there was no such purpose in respect of the 2012 related scheme.<br>Additionally, the Court observed that following the 2013 amendments to Part IVA and introduction of section 177CB, it may not have regard to a higher tax cost of implementing an alternative postulate, in determining what might reasonably have occurred in the absence of the scheme. |
| **Why does the issue involve uncertainty and/ or contention?** | This matter concerned the operation of section 100A and new section 177CB of the ITAA 1936.<br>At the time of test case funding being approved, section 100A and in particular subsection 100A(13) had not been subject to significant recent judicial analysis. Further, the observations in the first instance decision on the operation of the purpose test in subsection 100A(8) and the meaning of 'ordinary family or commercial dealing' in subsection 100A(13) did not fully align with the Commissioner's draft public advice and guidance (PAG) in TR 2022/D1 on what agreements would be subject to section 100A. |


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| | Additionally, section 177CB had not previously been applied in any court or tribunal decisions. This case provided a precedent on the application of section 177CB to post-2012 Part IVA arrangements. It was thought that it may provide a precedent on whether or to what extent these provisions impact on the application of *RCI Pty Limited v Commissioner of Taxation* (RCI) [2011] FCAFC 104 to Part IVA schemes. Unlike in RCI however, the taxpayer did not seek to contend that nothing would have happened in the 2013 income year absent the scheme. |
| **Status** | The Full Federal Court handed down its decision on 24 January 2023, affirming in part the appeal in QUD 37 of 2022, and dismissing the appeal in QUD 36 of 2022.<br>The Commissioner issued a Decision Impact Statement on 24 April 2023. |
| **Name:** | ***Commissioner of Taxation v Landcom* [2022] FCAFC 204** |
| **Venue** | Federal Court of Australia, Full Court. |
| **Issue** | Whether, where there has been a single sale of multiple freehold interests, the margin scheme provisions in Division 75 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) apply separately to each freehold interest or collectively to the whole area of land sold. |
| **Decision or Outcome** | The Full Federal Court agreed with the conclusions of the Primary Judge Thawley J, that under Division 75, the margin is to be calculated by reference to the particular freehold interest sold, irrespective of whether or not that particular freehold interest was sold under contract for the sale of other freehold interests. The Commissioner appealed that conclusion arguing that Thawley J's construction of Division 75 was incorrect because, in applying the GST Act, it is first necessary to identify the "supply" before ascertaining how to calculate the GST payable on that supply. The Full Federal Court rejected this argument, contending that:<br>a. The Commissioner's contention focused on the word "supply" whereas the concept employed in s75-5(1) is a "taxable supply of real property";<br>b. The gateway to Division 75 is a taxable supply of real property. Once a taxable supply of real property has been identified, there is no further need to embark on an |

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| | inquiry as to whether the supply is a component of another supply;<br>c. The terms of s 75-10 direct attention to the individual freehold interest, noting in particular the language in s 75-10(2) "*the* interest, unit or lease *in question*";<br><br>This interpretation is consistent with other provisions in Div 75, such as s 75-16 and s 75-22, which are drafted by reference to the supply of the particular freehold interest. It would be a distortion of the language of the provisions as a whole to read the singular as encompassing the plural. |
| **Why does the issue involve uncertainty and/ or contention?** | Prior to the decision, there were differing views between the Commissioner and some State and Territory organisations about how Division 75 of the GST Act operates in relation to the margin scheme in situations where multiple land titles are sold as part of a single transaction (and their on-supply in the supply chain). This decision resolves the uncertainty over the quantum of GST liabilities and profit margin on these transactions. |
| **Status** | The Full Federal Court handed down its decision on 22 December 2022 and unanimously decided in favour of the taxpayer. |
| **Name:** | ***Bosanac v Commissioner of Taxation* [2022] HCA 34** |
| **Venue** | High Court of Australia |
| **Issue** | Is the presumption of advancement still good law? Should the presumption of advancement be abolished on the basis that it is 'discriminatory and anachronistic'?<br>Where spouses purchase a matrimonial home, each contributing to the purchase price and title is taken in the name of one of them only, should it be inferred in the absence of evidence to the contrary that it was intended that each the spouses would have a one-half interest in the property regardless the amounts contributed by them? |
| **Decision or Outcome** | The High Court refused the Commissioner's invitation to abolish the presumption of advancement and observed that the 'presumption' of advancement is an entrenched 'land-mark' of the law in Australia.<br>The High Court held that the presumption of resulting trust will not arise where there is evidence from which it may be inferred that the parties' objective intention is inconsistent with the person providing the purchase money obtaining an interest in a |

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| | property. Here, the inference to be drawn from the facts was that the parties objectively intended for Ms Bosanac to be the sole beneficial owner of the property, and Mr Bosanac was merely facilitating her acquisition of the same. |
| **Why does the issue involve uncertainty and/ or contention?** | This matter concerned the operation of section 100A and new section 177CB of the *Income Tax Assessment Act 1936* (ITAA 1936).<br>At the time of test case funding being approved, section 100A and in particular subsection 100A(13) had not been subject to significant recent judicial analysis. Further, the observations in the first instance decision on the operation of the purpose test in subsection 100A(8) and the meaning of 'ordinary family or commercial dealing' in subsection 100A(13) did not fully align with the Commissioner's draft public advice and guidance (PAG) in TR 2022/D1 on what agreements would be subject to section 100A.<br>Additionally, section 177CB had not previously been applied in any court or tribunal decisions. This case provided a precedent on the application of section 177CB to post-2012 Part IVA arrangements. It was thought that it may provide a precedent on whether or to what extent these provisions impact on the application of *RCI Pty Limited v Commissioner of Taxation* (RCI) [2011] FCAFC 104 to Part IVA schemes. Unlike in RCI however, the taxpayer did not seek to contend that nothing would have happened in the 2013 income year absent the scheme. |
| **Status** | The High Court handed down its decision on 12 October 2022 and unanimously allowed the taxpayer's appeal. |
| **Name:** | ***Commissioner of Taxation v Carter & Ors* [2022] HCA 10** |
| **Venue** | High Court of Australia |
| **Issue** | 1. Does a disclaimer of a gift render the gift void ab initio for all purposes?<br>2. Where a beneficiary of a trust disclaims a distribution after an income year, is it nevertheless the case that the beneficiary was "presently entitled" to the distribution at all material times for the purposes of s 97(1) of the *Income Tax Assessment Act 1936* (ITAA 1936)?<br>3. Does s 97(1) of the ITAA 1936 operate on the facts as they are at the end of the year of income, or can s 97(1) be |

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| | applied or disapplied by events occurring after the end of the year of income?<br>4. What was the nature of the beneficiary's interest in the income of the trust estate prior to their disclaimer? |
| **Decision or Outcome** | Subsection 97(1) is directed to the position existing immediately before the end of the income year for the purpose of identifying the beneficiaries who are to be assessed with the income of the trust. It looks to the right to receive an amount of distributable income, not the receipt of income. Accordingly, events occurring after the end of the income year cannot disentitle a beneficiary who was 'presently entitled' immediately before the end of the income year. The beneficiary's interest was sufficient to amount to present entitlement to the income of the trust estate despite that they did not know about their interest at the end of the income year and had never assented to the gift. The taxpayers' disclaimers were not effective to retrospectively expunge the rights of the Commissioner against them which were in existence at the end of the income year and gave rise to the assessments. |
| **Why does the issue involve uncertainty and/ or contention?** | The questions raised in relation to the effectiveness of a retrospective disclaimer by a beneficiary had not been directly considered by the Courts in relation to the operation of federal tax law, though they have been raised in past matters involving the Commissioner. The issue had been considered at the state appellate level in relation to payroll tax. |
| **Status** | The High Court handed down its decision on 6 April 2022 and unanimously allowed the Commissioner's appeal.<br>The Commissioner issued a Decision Impact Statement on 10 June 2022. |
| **Name:** | ***Addy v Commissioner of Taxation* [2021] HCA 34** |
| **Venue** | High Court of Australia |
| **Issue** | Whether Article 25(1) of the *Convention between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains* [2003] ATS 22 (DTA) prevents the taxpayer (a UK national) from having the working holiday maker tax rates applied in full to her working holiday maker income? |


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| **Decision or Outcome** | Article 25(1) of the DTA requires a comparison between a national of the United Kingdom and an Australian national who is otherwise than with respect to nationality, "in the same circumstances, in particular with respect to residence."<br>Those "same circumstances" to be considered cannot include being or not being the holder of a working holiday visa, because that status depends on nationality. The taxpayer was an Australian resident for tax purposes but was subject to working holiday maker tax rates. However, an Australian national deriving taxable income from the same source during the same period would have been taxed at a lower rate. As the higher more burdensome taxation was imposed on the taxpayer because of her working holiday maker status it was regarded as being imposed due to her nationality and for that reason, contravened Article 25(1) of the DTA. The taxpayer should have been given the same treatment as a resident Australian national in the same circumstances, that is the lower amount of tax should have been imposed. |
| **Why does the issue involve uncertainty and/ or contention?** | This matter involves testing of provisions (inserted by the *Income Tax Rates Amendment (Working Holiday Maker Reform) Act 2016*) in respect of contentions that they are inconsistent with obligations in some of Australia's tax treaties.<br>The case had the potential to establish principles of law that go beyond the working holiday maker provisions, particularly in relation to the operation of the non-discrimination clause in those of Australia's tax treaties that include it. |
| **Status** | The High Court handed down its decision on 3 November 2021 and unanimously allowed the taxpayer's appeal.<br>The Commissioner issued a decision impact statement on 17 December 2021. |
| **Name:** | ***Commissioner of Taxation v Ross* [2021] FCA 766** |
| **Venue** | Federal Court of Australia |
| **Issue** | The case concerns section 167 *Income Tax Assessment Act 1936* (ITAA 1936) default assessments made using the asset betterment method, the correct *onus* of proof arising under s14ZZK of the *Taxation Administration Act 1953* (TAA) and the standard of proof required to discharge that onus. In particular, whether an applicant's burden of proof under subsection 14ZZK(b) of the TAA is satisfied: |


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| | 1. by adducing evidence suggesting that all or part of the Commissioner’s methodology in making an assessment *may have been* flawed; and<br>2. by adducing evidence that the Commissioner *may have been* mistaken as to relevant facts when making an assessment. |
| **Decision or Outcome** | The Court (Derrington J) delivered judgment on 9 July 2021. In allowing the Commissioner’s appeal, his Honour held that when seeking a review of a section 167 ITAA 1936 default assessment, it is not sufficient for a taxpayer to merely show that there were errors in the Commissioner’s calculations or that the methodology employed by the Commissioner was flawed. Rather, the taxpayer is required to prove the amount of the taxpayers’ true taxable income. This view is consistent with established case law. |
| **Why does the issue involve uncertainty and/ or contention?** | The AAT had set aside the objection decisions on the basis that it was satisfied that there was a possibility that the Commissioner’s audit methodology was flawed, or that part of the assessments may have been miscalculated. Those reasons were inconsistent with existing authorities, such as *Commissioner of Taxation v Dalco* [1990] HCA 3, which stand for the proposition that a taxpayer must show that a default assessment is excessive, not just by showing error on the part of the Commissioner, but by demonstrating the true amount of taxable income. |
| **Status** | On 9 July 2021 the Court allowed the Commissioner’s appeal, and allowed the taxpayer’s cross-appeal (the cross appeal was not test-case funded), finding that the taxpayers were denied proceudral fairness as a consequence of prolonged delay between the taking of evidence and the delivery of reasons. The Court orderded that the applications for review be remitted to the Tribunal without the hearing of further evidence. |
| **Name:** | ***Commissioner of Taxation v Apted* [2021] FCAFC 45** |
| **Venue** | Federal Court of Australia, Full Court. |
| **Issue** | 1. Did the applicant have an Australian Business Number (ABN) on 12 March 2020 for the purposes of s 11(6) of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2000* ('the Rules'); being a criterion for establishing his eligibility to JobKeeper payments?<br>2. If not, does the Administrative Appeal Tribunal (AAT) have jurisdiction to review the Commissioner's “later time” |

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| | discretion ('the discretion') to allow a later time for the Taxpayer to hold an ABN (ss11(6) of the Rules)?<br>3. If so, should the discretion be exercised in the applicant's circumstances? |
| **Decision or Outcome** | The Full Court handed down its decision on 24 March 2021 (Per Logan and Thawley JJ, Allsop CJ agreeing).<br>On the first issue, their Honours held that the requirement in subsection 11(6) of the Rules that an entity "had an ABN on 12 March 2020" should be construed as a point-in-time requirement. That is, a request that an inactive ABN be reinstated and backdated to before 12 March 2020 will not be effective in meeting the requirements of subsection 11(6). The appropriate enquiry is, 'if one had inspected the Australian Business Register on 12 March 2020, would the entity be recorded as holding an ABN?'<br>For the second issue, their Honours held that the exercise of the discretion forms part of a single entitlement decision rather than standing alone as a separate decision. Accordingly, the Commissioner's decision not to exercise the discretion could be objected to under section 13 of the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*, as it formed part of the reviewable decision in respect of entitlement to JobKeeper payments. The AAT is empowered to review objection decisions made by the Commissioner about entitlement decisions, encompassing the exercise of the discretion.<br>In relation to the third issue, the Court decided that the Tribunal did not err in exercising the discretion in subsection 11(6) to allow the Respondent a later time to have an ABN. The Court concluded that the discretion is constructed broadly according to its terms and its exercise is confined only by statutory purpose and context.<br>It should be noted that, while the Court did not find error in the Tribunal's decision that the discretion should be exercised in relation to the current applicant, it does not follow that the discretion should be exercised in all cases. |
| **Why does the issue involve uncertainty and/ or contention?** | The JobKeeper program is part of the broader economic stimulus response to the COVID-19 pandemic. The administration of the program and the integrity rules has wide-ranging impacts on Australian businesses and their employees. Accordingly, it was in the public interest to seek clarification of |


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| | the JobKeeper rules to resolve controversies that have emerged in the administration of the program. |
| **Status** | The decision was handed down on 24 March 2021. The Commissioner did not seek special leave to appeal the decision to the High Court.<br>The ATO issued a Decision Impact Statement in relation to this decision on 29 April 2021. |
| **Name:** | ***Slatter Building Group Pty Ltd v Commissioner of Taxation* [2021] AATA 456** |
| **Venue** | Administrative Appeals Tribunal |
| **Issue** | 1. Has an entity made a taxable supply in a tax period that applied to it that started on or after 1 July 2018 and ended before 12 March 2020 (as required under paragraph 5(6)(a) of the *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020* where:<br>a. an individual carrying on a business prior to December 2019 restructures the business to operate through the entity, which was created on 17 January 2020<br>b. the entity was registered for GST on a quarterly basis effective from 20 January 2020, and<br>c. the entity made its first taxable supplies in January 2020? |
| **Decision or Outcome** | The Tribunal (McCabe DP and Olding SM) held that the term "tax period that applied to it" in subsection 5(6) should be construed as "tax period that applied to [the entity]" rather than being a reference to a tax period that applied to a taxable supply in itself.<br>The Tribunal further held that activities of the business conducted by another entity prior to incorporation were not relevant in determining whether the corporate entity made taxable supplies in the required period. As a matter of law, business activities carried on by the company are separate and distinct from the activities carried on by the individual as a sole trader.<br>The Tribunal commented in *obiter* that the requirement to notify the Commissioner of taxable supplies for current purposes is not expressly tied to the statutory requirement that a return or Business Activity Statement be lodged. |


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| **Why does the issue involve uncertainty and/ or contention?** | This matter raised issues in relation to the proper construction of the eligibility requirements for Cash Flow Boost payments as a part of the administration of the Coronavirus Economic Relief packages. |
| **Status** | The Tribunal handed down its decision on 10 March 2021. |
| **Name:** | ***Commissioner of Taxation v Douglas* [2020] FCAFC 220** |
| **Venue** | Federal Court of Australia, Full Court |
| **Issue** | This matter involved 3 appeals brought by the Commissioner in respect of the following decisions of the Administrative Appeals Tribunal: *Burns and Commissioner of Taxation* [2020] AATA 671 (Burns); *GDGR and Commissioner of Taxation* [2020] AATA 766 (Walker – GDGR is a pseudonym for Walker); and *Douglas and Commissioner of Taxation* [2020] AATA 494 (Douglas).<br><br>Two of the decisions, Burns and Walker, concerned the taxation of invalidity benefits paid from the Military Superannuation and Benefits Scheme (MSBS) and the third, Douglas, concerned the taxation of invalidity benefits paid from the Defence Force Retirement and Death Benefits Scheme (DFRDBS).<br><br>The matter raised a significant number of issues for consideration. Central to all was whether the invalidity benefits received by the taxpayers should be taxed as superannuation income stream benefits or superannuation lump sums.<br><br>Three primary issues were identified for resolution (resolution of the other issues turned on the resolution of these issues):<br>1. Whether subregulation 995-1.01(2) of the *Income Tax Assessment Regulations 1997* (ITAR), as it was prior to the *Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2018* (2018 amendments), properly prescribed 'superannuation benefits' for the purposes of the definition of 'superannuation income stream benefit' in subsection 307-70(1) of the *Income Tax Assessment Act 1997* (ITAA 1997);<br>2. Whether the invalidity benefits paid to Burns and Walker were a superannuation income stream as defined in subregulation 995-1.01(1) of the ITAR. A sub-issue for Burns was whether the invalidity benefits paid to him were a superannuation income stream that commenced to be paid before 20 September 2007.<br>3. Whether the invalidity benefits paid to Douglas were a superannuation income stream as defined in subregulation |


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| | 995-1.01(1) of the ITAR. A sub-issue was whether the invalidity benefits paid to him were a superannuation income stream that commenced to be paid before 20 September 2007.<br>4. If the invalidity benefits were found not to be superannuation income streams the payments would not be superannuation income stream benefits and would be superannuation lump sum benefits under section 307-65 of the ITAA 1997. |
| **Decision or Outcome** | The Full Court (Griffiths, Davies and Thawley JJ) handed down its unanimous decision on 4 December 2020. The Court allowed the Commissioner's appeal in relation to Burns but dismissed the appeals in relation to Walker and Douglas.<br>In relation to issue 1, the Court raised concerns about the drafting of the definition of 'superannuation income stream benefit' in the ITAR as it read prior to the 2018 amendments, but held that the definition did properly prescribe superannuation benefits for the purposes of section 307-70 of the ITAA.<br>In relation to issue 2, the Court held that the invalidity benefits satisfied the definition of pension in section 10 of *the Superannuation Industry (Supervision) Act 1993* (SISA), but that the rules of the MSBS do not satisfy the standards set out in subregulation 1.06(2) and subparagraph 1.06(9A)(b)(iii) of the *Superannuation Industry (Supervision) Regulations 1994* (SISR) because they do not ensure the invalidity benefits are payable for the lifetime of the recipient.<br>Accordingly, the Court held that the invalidity benefits paid to Walker, which commenced to be paid after 20 September 2007, were not a superannuation income stream as they did not satisfy the requirements of subparagraph (a)(ii) of that definition in subregulation 995-1.01(1) of the ITAR.<br>Hence, the invalidity benefits paid to Walker are superannuation lump sums. However, the Court held that the invalidity benefits paid to Burns were a pension that commenced before 20 September 2007 and, hence, were a superannuation income stream as they satisfied the requirements of subparagraph (b)(i) and (ii) of that definition in subregulation 995-1.01(1) of the ITAR. Hence the invalidity benefits paid to Burns are superannuation income stream benefits.<br>In relation to issue 3, the Court held that the invalidity benefits satisfied the definition of pension in section 10 of the SISA but the rules of the DFRDBS did not satisfy the standards of subregulation 1.06(2) and subparagraph 1.06(9A)(b)(iii) of the |


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| | SISR because they do not ensure the invalidity payments are paid annually for the person's lifetime.<br>The Court further held that the invalidity benefits paid to Douglas were not a pension that commenced before 20 September 2007.<br>Accordingly, the Court held that the invalidity benefits were not a superannuation income stream as they did not satisfy the requirements of subparagraph (a)(ii) or (b)(i) and (ii) of that definition in subregulation 995-1.01(1) of the ITAR.<br>Hence, the invalidity benefits paid to Douglas are superannuation lump sums. |
| **Why does the issue involve uncertainty and/ or contention?** | Prior to the Full Court's decision, there was little in the way of existing case law on whether or not military superannuation invalidity payments are superannuation income streams or superannuation lump sums under the ITAA 1997 and ITAR. |
| **Status** | The Full Court handed down its decisions on 4 December 2020. None of the parties have sought special leave to appeal any of the decisions to the High Court. |
| **Name:** | ***N & M Martin Holdings Pty Ltd v Commissioner of Taxation* [2020] FCA 1186** |
| **Venue** | Federal Court of Australia |
| **Issue** | Whether section 855-10 of the *Income Tax Assessment Act 1997* (ITAA 1997) applies to disregard a capital gain in circumstances where a share of the net income of a resident non-fixed trust referable to a non-resident beneficiary's entitlement includes a capital gain. |
| **Decision or Outcome** | The Court (Steward J) held that the applicants had not shown that the earlier judgment of Thawley J in *Peter Greensill Family Co Pty Ltd (as trustee) v FCT* [2020] FCA 559 ('*Greensill*') was plainly wrong. Following *Greensill*, his Honour decided that the non-resident beneficiary was not entitled to rely on section 855-10 of the ITAA 1997 to disregard his capital gains. |
| **Why does the issue involve uncertainty and/ or contention?** | There has been contention whether section 855-10 of the ITAA 1997 can be construed broadly so as to apply to beneficiaries of non-fixed trusts. At the time of funding approval, this issue had not been subject to judicial consideration. This matter provided an opportunity for the Commissioner to seek clarity and resolve that contention. |

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| **Status** | The Court handed down its decision on 18 August 2020. The taxpayer subsequently appealed to the Full Federal Court in respect of the s 855-10 issue, which was heard and unanimously dismissed on 10 June 2021. The taxpayer further sought and was refused special leave to appeal to the High Court of Australia on 21 February 2022. |

If you think that you have an issue which may be an issue that the ATO seeks to test, please contact the Test Case Litigation Program at ATOLitigationFunding@ato.gov.au.
**DISCLAIMER:** There is no guarantee that a case will produce the law clarification sought and that the litigation underway may have consequences for other taxpayers.
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