

Thin Capitalisation – Board of Taxation Review

On 30 January 2026, Federal Treasury [announced](#) that it has asked the Board of Taxation to independently review the new thin capitalisation and debt deduction creation rules. The Board of Taxation will commence its review on 1 February 2026 and will provide a final report by 31 January 2027 (i.e., within 12 months). The review will specifically consider:

- The overall performance of the new rules in strengthening Australia’s thin capitalisation regime.
- Any drafting changes necessary for practical administration of the law.
- Whether the \$2m *de minimis* exemption threshold should be based on net debt deductions (not debt deductions).
- Whether tax EBITDA operates to appropriately reflect an entity’s economic activity.
- Whether the rules have appropriately discouraged debt creation schemes.
- The practical effect of complying with the debt deduction creation rules, including after restructures.
- Appropriate balance of complexity and tax integrity of the rules.

The Board of Taxation will undertake public consultation as part of its review and also consult with Treasury and the ATO.

Charles Apartments Case – Appeal Dismissed

The Federal Court decision in [Charles Apartments Pty Limited v Commissioner of Taxation \[2025\] FCA 461](#) was handed down on 9 May 2025 following a cross-appeal by the Commissioner. This case was based on a special purpose vehicle (“SPV”) being established to acquire, develop and sell three properties in NSW. The project was initially funded by a loan from St George Bank and thereafter refinanced via a group finance facility from Suncorp Bank. The SPV did not borrow directly from Suncorp Bank but instead borrowed debt from a group company through an undocumented loan. The SPV was however a guarantor of the loan from Suncorp Bank.

The properties of SPV were sold in a later year and the sale proceeds were used by the group to repay a portion of the loan from Suncorp Bank. A deduction was claimed by the SPV for interest on the intra-group undocumented loan.

The Commissioner denied the interest deduction on the basis that the payment was not interest in nature but rather was a guarantee payment under the Suncorp Bank loan arrangement. This position was held in the favour of the ATO on cross-appeal by the Full Federal Court on the basis that the payment lacked the necessary nexus to the income producing activities of the SPV and moreover was capital in nature. An appeal by the taxpayer to the High Court was dismissed on 12 January 2026.

The decision in this case re-confirms the following:

1. Intra-group financing arrangements should be documented to remove uncertainty on the character of intra-group payments
2. It is necessary for expenditure to have sufficient nexus to the income tax activities of the relevant taxpayer. In this regard, payments made by one entity in a group may not have sufficient nexus to the income earning activities of that entity.
3. A substance over form approach is applied when determining the character of a payment.

Sale of Minority Interest Shares – Arm’s Length

On 12 December 2025, the Full Federal Court decision in [Kilgour v Commissioner of Taxation \[2025\] FCAFC 183](#) was handed down. In this case, two taxpayers held 20% each of the shares in a company, with a third shareholder holding 60%. The three shareholders sold their shares to a third party for \$31m. The taxpayers received \$6.2m each for their 20% share. The taxpayers contended that for CGT purposes, the market value of their 20% parcels should be considered without regard to the purchaser acquiring 100% of the shares from all shareholders collectively. They argued that the value of the 20% parcels sold by them did not include advantages to the purchaser’s business of acquiring ownership and control of the target company.

The Court held that the prescription that the CGT event occurs ‘just before’ the execution of an agreement for the transfer of the CGT asset does not carry with it a requirement that an actual transaction is to be ignored when ascertaining the market value of the CGT asset at the immediately preceding point in time. Moreover, nothing compels a valuer to imagine the sale of the CGT asset devoid of the commercial considerations in fact influencing the price.

The Full Federal Court dismissed the taxpayer’s appeal of the decision and held that the sale of the shares occurred at arm’s length and therefore the market value substitution rules did not apply to reduce the sale proceeds.

CGT Main Residence Exemption – Right to Occupy Dwelling

On 28 January 2026, the ATO released Draft Tax Determination [TD 2026/D1](#) to clarify its interpretation of the phrase ‘right to occupy the dwelling under the deceased’s will’. This is relevant for the main residence exemption for beneficiaries of a dwelling under a will. The ATO’s preliminary view notes that:

- The ‘right to occupy’ must be expressly granted in the will, and to a specifically named individual.
- If the ‘right to occupy’ is provided for a specific period and the individual occupies the dwelling after that period expires, only a partial exemption is available.
- The phrase does not include a ‘right to occupy’ granted by an executor of the will under a broad discretion.
- The phrase does not include a right granted by a separate agreement.
- The phrase does not include a ‘right to occupy’ under a testamentary trust, which is considered separate to a will.
- The phrase includes a ‘right to occupy’ granted under a family provision order directed by a court.

The key takeaway for taxpayers is that if the CGT main residence exemption is intended to apply to a dwelling after death, the ‘right to occupy’ must be clearly and specifically written into the will. It will not be sufficient to rely on executor discretion, testamentary trusts, or other side agreements.

Importantly, it is noted that the main residence exemption also has other limbs that are applicable to a dwelling that is acquired from a deceased estate (including the 2-year sale rule whereby the exemption can apply if the residence is sold within 2 years of the deceased’s death).

Private Company Benefits

The ATO has updated its guidance on its focus on the types of arrangements used by taxpayers to extract wealth from private companies. These focus areas include:

- Directors or employees who are shareholders in private companies who report low levels of salary and wages.
- Using dividend access shares as part of a scheme to enable dividend stripping, including distributing profits in a tax-free or lower tax form to an associate of the ordinary shareholders of a company.
- Taking funds from a company that are not repaid within a short period of time.
- Use of company funds for private purposes.
- Complying Division 7A loan agreements are not in place.
- Minimum yearly repayments not being made on a complying loan.
- Making repayments on a complying loan from amounts borrowed under a separate loan from the same company.
- Private companies not receiving assessable trust distributions before the due date for lodgement of the relevant return.

Amended Assessment by Commissioner Allowed

In December 2025, the Federal Court handed down a decision in [Sunna v Commissioner of Taxation \[2025\] FCA 1499](#) allowing the Commissioner to amend a 2019 assessment of a taxpayer to retrospectively impose a CGT liability despite the existence of a 2020 assessment based on the erroneous disclosure in that year of the same underlying CGT event. The 2019 amendment was permitted for the purpose of giving effect to CGT event A1. However, the court also confirmed that the Commissioner did not have the power to amend the 2020 assessment of the taxpayer because the Commissioner’s powers of amendment did not extend to correcting errors in the 2020 assessment other than for the purpose of giving effect to the CGT event A1 transaction. The taxpayer has filed a notice of appeal against the Federal Court’s decision.

Contrived Property Development Arrangements – Taxpayer Alert

On 14 January 2026, the ATO released Taxpayer Alert [TA 2026/1](#) noting that it is reviewing property development arrangements between related parties that involve long-term construction contracts where there is a deferral of income. The Taxpayer Alert outlines a circumstance where a related developer entity is interposed between the landowner entity and the builder. This separates the land ownership and development activity of the group and can result in an artificial mismatch between the income from the property development activity and the costs of development. Accordingly, the profits of the developer entity may be deferred allowing for the utilisation of losses within the group against other income. Moreover, such activity may be repeated to coordinate the timing of income and development of projects from the broader economic group such that there is a long-term deferral of tax on the development income.

Contact

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