

4 October 2024

Ms Bonita Tsang
Australian Taxation Office

Delivered via email to PAGSPR@ato.gov.au

Dear Ms Tsang,

Re: *Merchant and Commissioner of Taxation* [2024] AATA 1102 - ATO Decision Impact Statement (“draft DIS”)

Chartered Accountants Australia & New Zealand, CPA Australia, the Institute of Public Accountants and the Self Managed Superannuation Fund Association provide the following feedback about the draft DIS published by the ATO on 4 September 2024.

We have five comments about the draft DIS:

1. The above Administrative Appeals Tribunal (AAT) case was held concurrently with several Federal Court cases which were decided on 14 May 2024¹.

It is our understanding that the related Federal Court cases has been appealed to the Full Federal Court by Mr Merchant and a related entity².

It is our view that the outcome of that appeal may have a bearing on the implications of the AAT case. We therefore suggest that the finalisation of the draft DIS should be delayed until the outcome of the Full Federal Court is known.

2. We consider the AAT’s findings in relation to Regulation 4.09 of the *Superannuation Industry (Supervision) Regulations 1994* to be important and the DIS would benefit from discussing these findings, and their practical implication, in much greater detail than contained in the draft DIS.
3. We consider the AAT’s findings in relation to Sections 62 and 65 of the *Superannuation Industry (Supervision) Act 1993 – SIS Act* – to be important and the DIS would be improved if it discussed these findings in greater detail; we believe the draft DIS should note that these findings appear to be consistent with the Commissioner’s prior announcements, including Self Managed Superannuation Fund Rulings, about these specific areas.
4. We note that the ATO disqualified Mr Merchant from acting as a superannuation trustee under sub-sections 126(2) and 126(3) of the SIS Act. Mr Merchant then requested an administrative review of these disqualification decisions.

In time, the ATO decided that he should not be disqualified as a superannuation trustee under sub-section 126(3) but should remain disqualified under sub-section 126(2).

The AAT however decided that Mr Merchant should not be disqualified under sub-section 126(2) for the same reasons proffered by the ATO review when it decided that he should not be banned under sub-section 126(3). We consider that the outcomes of this part of the AAT matter indicate that the ATO may wish to review its administrative processes to

¹ <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/498.html>

² <https://www.comcourts.gov.au/file/Federal/P/NSD746/2024>

determine if a person should be disqualified from acting as a superannuation trustee. The DIS should discuss this in some detail.

5. We note that the draft DIS refers to the decision in *Coronica and Commissioner of Taxation* [2024] AATA 2592 and that the applicant had sought to apply the Merchant decision to his circumstances. This was rejected by the AAT. We believe that the overall circumstances in the Merchant AAT case and the Coronica case are very different from each other. That is, different facts have not produced similar outcomes. We ask that this be clarified in the DIS before it is finalised.

We would be happy to discuss any aspect of our feedback in relation to the draft DIS. Please contact Tony Negline if you would like to discuss.

Sincerely,

Tony Negline

Superannuation & Financial Services Leader

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