

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument No. 279, 2013**

#### **Issued by authority of the Assistant Treasurer**

*Income Tax Assessment Act 1936; Income Tax Assessment Act 1997; Taxation Administration Act 1953; and the A New Tax System (Goods and Services Tax) Act 1999*

*Tax Laws Amendment (2013 Measures No. 1) Regulation 2013*

Section 177-15 of *A New Tax System (Goods and Services Tax) Act 1999* (GST Act), section 266 of the *Income Tax Assessment Act 1936* (ITAA 1936), section 909-1 of the *Income Tax Assessment Act 1997* (ITAA 1997) and section 18 of the *Taxation Administration Act 1953* (TAA 1953) (collectively, the Principal Acts) each provide that the Governor-General may make regulations prescribing matters required or permitted by the relevant Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the relevant Act.

The purpose of the *Tax Laws Amendment (2013 Measures No. 1) Regulation 2013* (Regulation) is to make a number of amendments to taxation and superannuation regulations. The Regulation makes the changes below. Further details of the amendments are provided in the Attachment.

#### Tax offsets

The Regulation makes minor technical amendments to the provisions dealing with the transferability of the Seniors and Pensioners Tax Offset (SAPTO) between members of a couple in the *Income Tax Regulations 1936* (1936 Regulations).

From the 2012-13 income year, eight existing dependency tax offsets were consolidated into a single non-refundable tax offset, the Dependant (Invalid and Carer) Tax Offset (DICTO). This offset is only available to taxpayers maintaining certain classes of dependants who are genuinely unable to work due to invalidity or carer obligations.

Consequential to the introduction of the DICTO, the Regulation specifies in the *Taxation Administration Regulations 1976* (TAA Regulations) that for the purposes of the DICTO, the Commissioner of Taxation (Commissioner) is able to incorporate into his or her annual withholding schedules<sup>1</sup> adjustments to take account an individual's eligibility to the DICTO. The adjustments to the withholding schedules would allow eligible individuals to receive some of their DICTO entitlement during the year through a reduction in amounts withheld, for example from their salary and wages,

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<sup>1</sup> Withholding schedules are legislative instruments issued by the Commissioner that specify different amounts, formulas and procedures to be used by certain payers, such as employers, for calculating amounts required to be withheld from payments to an individual during an income year.

instead of only as a refund in their annual taxation assessment. The Regulation also specifies that individuals are able to make a declaration in relation to the DICTO where they wish for the DICTO to be taken into account by an entity in calculating the amount required to be withheld from a payment.

Similarly, the Regulation also specifies in the TAA Regulations that the proportion of the low-income tax offset (LITO) that is to be taken into account in determining the amount that must be withheld from payments, under the withholding schedules issued by the Commissioner, to an individual during an income year, is 18 per cent on an on-going basis. This amendment was required because the existing regulation setting the proportion of the LITO that is to be taken into account expires at the end of the 2014-15 income year.

### Superannuation

The Regulation updates the list of constitutionally protected funds (CPFs) in the *Income Tax Assessment Regulations 1997* (1997 Regulations) to add new listings and repeal listings that are spent or redundant. Superannuation funds are subject to Commonwealth income tax, however the taxation of public sector superannuation funds applies only so far as the Commonwealth taxing power extends. Superannuation funds that the Commonwealth taxing power does not extend to are known as CPFs. Income derived by these funds is specifically exempted from income tax and they are listed in the 1997 Regulations for ease of reference.

The Regulation specifies in the 1997 Regulations the individuals who are not subject to tax under Division 293 of the ITAA 1997 in relation to certain superannuation contributions to a CPF, due to their status as a 'State higher level office holder' (an officer at a high level of government as has been determined by the High Court of Australia). Division 293 tax is a tax on the superannuation contributions of very high income earners (broadly, those with income over \$300,000). State higher level office holders, for example, State Ministers and State Governors, are not required to pay Division 293 tax in respect of contributions to CPFs, unless the contributions are made as part of a salary package. This is similar to the existing exception for determining an individual's liability for the purposes of excess contributions tax. The exception is needed to avoid inappropriate outcomes that could result from splitting an interest into parts when calculating Division 293 tax or excess contributions tax..

Further, the Regulation makes a technical amendment relating to the rules for treating certain superannuation interests as multiple superannuation interests. The amendment would ensure these rules do not apply for the purposes of determining an individual's liability for Division 293 tax.

### Car expenses

The Regulation inserts the annual 'cents per kilometre' rates for calculating tax deductions for car expenses for the 2013-14 income year in Part 2 of Schedule 1 to the 1997 Regulations.

## Goods and Services Tax (GST)

The Regulation amends references to payments of GST in the *A New Tax System (Goods and Services Tax) Regulations 1999* to refer to payments of ‘assessed GST’ where appropriate to reflect the recent movement of GST to a self-assessment system. This system provides that a taxpayer’s liabilities and entitlements are dependent on an assessment by the Commissioner, which is based on a taxpayer’s self-assessment of their liabilities and entitlements.

## **Consultation**

The amendments in Part 2 relating to constitutionally protected funds were prepared in consultation with the relevant State or Territory officials.

Public consultation on the amendments in Part 3, item 19 relating to State higher level office holders was undertaken between 31 May 2013 and 6 June 2013. No issues were raised during the public consultation on the proposed list of State higher level office holders.

No public consultation was undertaken in respect of the amendments in Parts 1, 4 and 5, and Part 3, item 20 because the amendments are minor and technical in nature. However, the amendments were developed in consultation with the Australian Taxation Office.

## **Conditions**

The Principal Acts do not specify any conditions that need to be met before the power to make the Regulation can be exercised.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

## **Commencement**

The Regulation commences on the day after registration. A number of the amendments have transitional arrangements as follows:

Part 1: The amendments in items 1 to 5 apply in relation to assessments for the 2013-14 income year and later income years as the amendment relates to the transferability of the SAPTO between members of a couple for an income year. The amendments in items 7 and 9 in relation to the DICTO apply from 1 July 2013 and provide for an adjustment to the PAYG system that is beneficial to the taxpayer.

Part 2: The amendment in item 17 in respect of constitutionally protected funds applies from 17 February 2001 because the schemes that operated under the *Government Employees Superannuation Act 1987* (WA) and the *Superannuation Family Benefits Act 1938* (WA) now both operate under the *State Superannuation Act 2000* (WA), which came into operation on 17 February 2001. This amendment simply updates the list of CPFs and does not disadvantage any person.

Part 3: The amendments in items 19 and 20 in respect of constitutionally protected State higher level office holders apply on or after 1 July 2012. Subsection 293-145(2) of the ITAA 1997 provides that, despite subsection 12(2) of the *Legislative Instruments Act 2003* (which provides that regulations have no effect to the extent that, amongst other things, they would impose a retrospective liability), regulations made under paragraph 293-145(1)(b) may be expressed to take effect from 1 July 2012.

## ATTACHMENT

### Details of the *Tax Laws Amendment (2013 Measures No. 1) Regulation 2013*

#### Section 1 – Name of Regulation

The title of the Regulation is the *Tax Laws Amendment (2013 Measures No. 1) Regulation 2013*.

#### Section 2 – Commencement

The Regulation commences on the day after registration.

#### Section 3 – Authority

The Regulation is made under the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) the *Income Tax Assessment Act 1936* (ITAA 1936) the *Income Tax Assessment Act 1997* (ITAA 1997) and the *Taxation Administration Act 1953* (TAA 1953).

#### Section 4 – Schedule(s)

Each instrument that is specified in a Schedule to the Regulation is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

#### Schedule 1

##### Part 1 – amendments related to tax offsets

##### *Seniors and pensioners tax offset*

The seniors and pensioners tax offset (SAPTO) is a non-refundable tax offset that is available to certain low-income aged persons, and to pensioners who are eligible to receive a taxable Australian Government pension, including certain taxpayers who are non-residents for tax purposes. The offset is generally limited to the amount of income tax otherwise payable. However, in the case of a person with a spouse, there is provision for any unused part of one partner's offset to be transferred to the other partner where both are entitled to the SAPTO.

In 2012, following changes to the tax-free threshold and tax rates, amendments were made to the method for determining the amount of SAPTO that could be transferred between one eligible member of a couple and the other member. The intention was that the maximum amount of SAPTO that one eligible member of a couple could transfer to the other would remain the same as it was in 2011-12. This was achieved by specifying the 2011-12 tax-free threshold and tax rate in the formula used to calculate the amount of SAPTO available for transfer.

The *Income Tax Assessment Regulations 1936* (1936 Regulations) were amended again in 2013 to clarify how the SAPTO provisions operated in relation to residents and non-residents. However, this amendment created some ambiguity in the provisions, given the legislative distinction between a ‘non-resident’ for tax purposes within the meaning of the Act, and a ‘non-resident taxpayer’ within the meaning of the *Income Tax Rates Act 1986*.

Items 1 to 5 in Part 1 of Schedule 1 to the Regulation amend subregulations 150AE(12) and (13) and subregulations 150AF(9) and (10) so that it is clear that these subregulations are intended to apply in connection with the rates set out in Schedule 7 to the *Income Tax Rates Act 1986*, which sets out the general rates of tax for resident taxpayers (Part 1) and non-resident taxpayers (Part 2). These subregulations are no longer linked to the definitions in the 1936 Act that do not properly align with definitions in the *Income Tax Rates Act 1986*. This amendment reinstates the operation of regulations 150AE and 150AF in regard to those taxpayers who are subject to the non-resident tax rates, as it was prior to the 2012 amendments, which is the intended outcome.

The Regulation also corrects an incorrect reference in subregulation 150AF(10).

The Regulation commences on the day after it is registered and applies in relation to assessments the 2013-14 income year and later income years (item 6).

#### *Dependant invalid and carer tax offset*

From the 2012-13 income year, eight existing dependency tax offsets were consolidated into a single non-refundable tax offset, the Dependant (Invalid and Carer) Tax Offset (DICTO). This offset is only available to taxpayers maintaining certain classes of dependants who are genuinely unable to work due to invalidity or carer obligations.

Previously, sections 159J and 159L of the ITAA 1936 provided dependency tax offsets for taxpayers who maintained certain classes of dependants: an invalid spouse, a carer spouse, a housekeeper, a housekeeper (with child), a child-housekeeper, a child-housekeeper (with child), an invalid relative and a parent/parent-in-law. Taxpayers who are eligible to receive an amount of zone tax offset, overseas forces tax offset, or overseas civilians tax offset continue to be eligible to receive dependency offsets under these sections in the ITAA 1936, rather than an amount of DICTO.

The Pay As You Go (PAYG) withholding regime requires entities to withhold amounts from certain payments for tax purposes.

The Commissioner can make withholding schedules specifying the amounts, formulas and procedures to be used for working out the amount an entity must withhold from payments (section 15-25 in Schedule 1 to the TAA 1953). The Commissioner must take into account the matters listed in section 15-30 in Schedule 1 to the TAA 1953, which includes any prescribed tax offsets.

Item 7 in Part 1 to Schedule 1 of the Regulation adds the DICTO to the list of tax offsets prescribed for those withholding schedules in regulation 24 of the *Taxation Administration Regulations 1976* (TAA Regulations) so that the Commissioner must take into account the DICTO when making withholding schedules.

An individual who expects to receive a specified type of withholding payment from an entity may give the entity a declaration in relation to a prescribed matter that they wish to have taken into account in working out the amount to be withheld from the payment (subsection 15-50(1) in Schedule 1 to the TAA 1953). Item 9 in Part 1 to Schedule 1 of the Regulation also adds the DICTO to the list of matters prescribed for the purpose of making those declarations in subregulation 26(1) of the TAA Regulations.

Items 7 and 9 apply from 1 July 2013 (subitem 10(1)). These amendments provide for adjustment to the PAYG system that is beneficial to the taxpayer.

#### *Low-income tax offset*

A person is entitled to the full value of the low income tax offset (LITO) (\$445) where their income does not exceed \$37,000. For every dollar of income above \$37,000, the benefit is withdrawn by 1.5 cents and is completely extinguished for income above \$66,666. The LITO can only be used to reduce a person's tax liability to zero, not to provide a net tax refund.

The Commissioner can make withholding schedules specifying the amounts, formulas and procedures to be used for working out the amount that an entity must withhold from payments to a person during an income year (section 15-25 in Schedule 1 to the TAA 1953). In determining these schedules, the Commissioner must take into account the matters listed in section 15-30 in Schedule 1 to the TAA 1953, which includes any prescribed tax offsets (which are listed in regulation 24 of the TAA Regulations).

During the 2013 election campaign, the Government committed to repealing the clean energy package. Subsequently, the Government announced that it would repeal the second round of personal income tax cuts that had been legislated to commence from the 2015-16 income year and the related changes to the LITO resulting from the increase to the statutory tax-free threshold.

As part of delivering the second round of personal income tax cuts, the TAA Regulations were amended by the *Taxation Administration Amendment Regulation 2012* (No. 2) to take account of the changes to the statutory tax-free threshold by decreasing the proportion of the LITO delivered through withholding during an income year from 70 per cent to 18 per cent for the 2012-13, 2013-14 and 2014-15 income years, and to zero from 2015-16 onward. This change meant that taxpayers would receive a smaller proportion of their LITO entitlement during the income year and the remainder of their entitlement when they lodge their tax return at the end of the income year.

As the tax cuts for the 2015-16 income year are no longer proceeding, item 8 and subitem 10(2) in Part 1 of Schedule 1 to the Regulation specify that the ongoing proportion of the LITO delivered through PAYG withholding remains at 18 per cent for the 2015-16 income years and later income years.

## Part 2 – amendments related to constitutionally protected funds (CPFs)

Superannuation funds are subject to Commonwealth income tax, however the taxation of public sector superannuation funds applies only so far as the Commonwealth taxing power extends. Income derived by these types of funds, known as CPFs, is specifically exempted from income tax. CPFs are listed in the *Income Tax Assessment Regulations 1997* (1997 Regulations) for ease of reference.

Part 2 in Schedule 1 to the Regulation updates the list of constitutionally protected funds in Schedule 4 to the 1997 Regulations. CPFs are exempt from income tax under section 50-25 of the ITAA 1997. A CPF is defined in regulation 995-1.04 of the 1997 Regulations as including a fund that is established by a State Act or a provision of a State Act mentioned in Schedule 4 to those Regulations. Item 13 includes a note to the heading referring to regulation 995-1.04.

### *Victoria*

Items 15 and 16 repeal references to the following Acts in Schedule 4 which are no longer required because they are spent or redundant:

- *County Court (Jurisdiction) Act 1968 (Vic)*;
- *Justices Act 1958 (Vic)*;
- *Magistrates (Summary Proceedings) Act 1975 (Vic)*; and
- *Mint Act 1958 (Vic)*.

Item 15 corrects the name of the *Magistrates' Court Act 1989 (Vic)* by inserting a missing apostrophe.

### *Western Australia*

Items 16 and 18 repeal references to the following Acts in Schedule 4 which are no longer required because they are spent or redundant:

- *Government Employees Superannuation Act 1987 (WA)*; and
- *Superannuation and Family Benefits Act 1938 (WA)*.

Item 17 removes the reference to section 29 of the *State Superannuation Act 2000 (WA)*. This amendment applies from 17 February 2001 (item 12) because the schemes that operated under the *Government Employees Superannuation Act 1987 (WA)* and the *Superannuation Family Benefits Act 1938 (WA)* now both operate under the *State Superannuation Act 2000 (WA)*, which came into operation on 17 February 2001.



## *Tasmania*

Item 18 repeals references to the following Acts in Schedule 4 which are no longer required because they are spent or redundant:

- *Governor of Tasmania Act 1982* (Tas);
- *Public Servants' Retiring and Death Allowances Act 1925* (Tas); and
- *Solicitor-General Act 1983* (Tas).

## Part 3 – amendments relating to sustaining the superannuation contribution concession and other measures

### *Constitutionally protected State higher level office holders*

Division 293 tax is a tax on the superannuation contributions of very high income earners and was introduced to ensure that the tax concession received by these individuals is more closely aligned with the concession received by average income earners. Broadly, this is achieved by taxing, at 15 per cent, certain superannuation contributions of individuals whose income (including concessional tax superannuation contributions) exceeds \$300,000. Division 293 tax was introduced by the *Tax and Superannuation Laws Amendment (Increased Concessional Contributions Cap and Other Measures) Act 2013*, which received Royal Assent on 28 June 2013.

Section 293-145 of the ITAA 1997 provides that the regulations may specify a list of individuals who are *not* required to pay tax under Division 293 of the ITAA 1997 (Division 293 tax) in respect of contributions to CPFs, unless the contributions are made as part of a salary package.

The purpose of the amendments to the 1997 Regulations is to specify a list of individuals who will not be subject to Division 293 tax in relation to superannuation contributions made by State Governments to CPFs (other than contributions made at the request of the individual as part of a salary package) because they are higher level officers or higher level employees of State Governments. This exemption is necessary to avoid purporting to impose tax where this would be beyond the constitutional power of the Commonwealth. The list reflects the current jurisprudence of the High Court of Australia.

Item 19 in Part 3 to Schedule 1 specifies that the following individuals are not subject to Division 293 tax in relation to certain contributions to a CPF, due to their status as a State higher level office holder:

- State Ministers and their staff;
- Governors of States and their staff;
- members of State Parliaments;
- Clerks of Houses of State Parliament;

- heads of State public service departments and statutory office holders of equivalent seniority, including a statutory office holder who is the head of an instrumentality or agency of a State; and
- judges, justices and magistrates of the courts of a State.

The High Court of Australia has previously identified limitations on the Commonwealth's power to tax the superannuation contributions made by States to CPFs on behalf of State higher level office holders. This list exempts these individuals from tax on some contributions so that Division 293 tax is not purported to apply where this would be beyond the constitutional power of the Commonwealth.<sup>2</sup>

As the case law identified officers at the higher levels of government as including ministerial assistants and advisers, the Regulation includes staff of Ministers as State higher level office holders. Not all of the staff of a Minister would necessarily qualify as being at the higher levels of government. However, given the nature of ministerial offices, it is unlikely staff who are not at the higher levels of government would exceed the income threshold for Division 293 tax to apply (broadly, \$300,000 per annum including superannuation contributions). Consistent with case law, an individual will only be considered part of the staff of the Minister where they are directly employed by the Minister – merely being a member of the public service department for which the Minister is responsible is not sufficient.

The Regulation also includes both State Ministers and members of State Parliaments to ensure that a State Minister, who is not also a member of the State Parliament, is treated as a State higher level office holder. While generally Ministers are members of Parliament, State constitutions generally permit an individual who is not a member of Parliament to be a State Minister for at least a limited period of time.

The Regulation also refers to heads of departments and statutory officeholders of equivalent seniority. Statutory office holders of equivalent seniority include the holders of key governmental offices established under statute such as Directors of Public Prosecutions, Chief Commissioners of Police, Solicitors-General, Auditors-General, Ombudsmen and Electoral Commissioners. It does not cover the heads of government-owned business enterprises or junior officials.

#### *Minor technical amendment*

Item 20 in Part 3 of Schedule 1 to the Regulation makes a technical amendment to regulation 307-200.01 of the 1997 Regulations.

The amendment will ensure that the rules for treating certain superannuation interests as multiple interests do not apply for the purposes of determining an individual's liability for Division 293 tax. This is similar to the existing exception for determining an individual's liability for the purposes of excess contributions tax. The exception is

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<sup>2</sup> Section 6 of the *Superannuation (Sustaining the Superannuation Contribution Concession) Imposition Act 2013* provides that if Division 293 tax would be imposed where this would be beyond the legislative power of the Commonwealth, it is not so imposed in this case.

needed to avoid inappropriate outcomes that could result from splitting an interest into parts when calculating Division 293 tax or excess contributions tax.

At the same time, the Regulation will also update references to the provisions dealing with the exception for excess contributions regime to reflect the changes made to relevant provisions by the *Tax Laws Amendment (Fairer Taxation of Excess Concessional Contributions) Act 2013*.

The amendments in items 19 and 20 apply on or after 1 July 2012 (item 21). Subsection 293-145(2) of the ITAA 1997 provides that, despite subsection 12(2) of the *Legislative Instruments Act 2003* (which provides that regulations have no effect to the extent that, amongst other things, they would impose a retrospective liability), regulations made under paragraph 293-145(1)(b) may be expressed to take effect from 1 July 2012.

#### Part 4 – Amendments relating to car expenses: cents per kilometre

Motor vehicle expenses incurred in the course of deriving assessable income or carrying on a business are tax deductible under section 8-1 of the ITAA 1997. Division 28 of the 1997 Act outlines the rules for calculating deductions for car expenses.

The taxpayer can calculate a deduction for car expenses using one of four specified methods. The ‘cents per kilometre method’ in section 28-25 of the ITAA 1997 is one of the four methods available to taxpayers.

To calculate the deduction under the ‘cents per kilometre method’, the number of kilometres the car travelled for business purposes during the year of income is multiplied by a specified number of cents. The cents per kilometre rate is determined in relation to the car’s engine capacity and is prescribed in Part 2 of Schedule 1 to the 1997 Regulations. This method can be used for the first 5,000 business kilometres only. If a taxpayer wishes to claim for more than 5,000 business kilometres, they must use one of the other methods outlined in Division 28 of the ITAA 1997.

The cents per kilometre rates are updated every year by regulation. The rates increase when there is an upward movement of the Private Motoring Subgroup (series ID A2326656J) within the Consumer Price Index (ABS catalogue number 6401.0). The rates are revised each year and the rates currently prescribed apply for the 2012-13 income year.

Item 22 in Part 4 to Schedule 1 of the Regulation provides the following rates for the 2013-14 income year:

<b>Description</b>	<b>Engine capacity of car not powered by a rotary engine (cc)</b>	<b>Engine capacity of car powered by a rotary engine (cc)</b>	<b>Rate per kilometre (cents)</b>
Small car	Not exceeding 1600cc	Not exceeding 800cc	65
Medium car	Exceeding 1600cc but not exceeding 2600cc	Exceeding 800cc but not exceeding 1300cc	76
Large car	Exceeding 2600cc	Exceeding 1300cc	77

Item 22 is also relevant for the purposes of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA 1986). The definition of ‘basic car rate’ in subsection 136(1) of the FBTAA 1986 provides that the rate is the same as that prescribed for the purposes of section 28-25 of the Act (the ‘cents per kilometre method’). The ‘basic car rate’ is used in the calculation of the taxable value of a number of fringe benefits.

#### Part 5 – Amendments relating to goods and services tax

The purpose of the Regulation is to ensure that references to payments of goods and services tax (GST) refer to payments of ‘assessed GST’ where appropriate. These follow amendments made to the GST Act by the *Indirect Tax Laws Amendment (Assessment) Act 2012* (ITLA Act), where a number of provisions in the GST Act were amended to refer to an amount after an assessment had been made (e.g. ‘assessed GST’ and ‘assessed net amount’). Similar amendments have not yet been made to the *A New Tax System (Goods and Services Tax) Regulations 1999* (GST Regulations).

The ITLA Act established a self-assessment regime for indirect taxes (goods and services tax, luxury car tax, wine equalisation tax and fuel tax credits) which is generally consistent with the self-assessment regime that exists for income tax. The new regime commenced on 1 July 2012 and applies to tax periods commencing on or after 1 July 2012.

Under the new regime, a taxpayer’s liabilities and entitlements must be assessed by the Commissioner of Taxation (Commissioner) before they are payable. For most taxpayers of indirect taxes, the lodgment of a GST return will trigger a self-assessment of an assessed amount. This means that on lodgment of the return, the Commissioner will be taken to have made an assessment of the taxpayer’s assessable amount and the return is treated as being a notice of assessment signed by the Commissioner and issued on the day the return is lodged. The process of assessment crystallises the amount that the taxpayer is required to pay to the Commissioner, or that the Commissioner must pay to the taxpayer, and gives rise to an assessed amount.

Division 33 of the GST Act sets out the obligation of the taxpayer to pay a positive assessed net amount or assessed amount of GST on a taxable importation. Section 33-15 provides the circumstances in which an importer is required to remit that amount to the Commissioner. Paragraph 33-15(1)(b) of the GST Act provides

that the regulations may specify the time and place at which certain amounts of assessed GST on taxable importations are to be paid. Division 33 of the GST Regulations contain these regulations.

Item 23 to the Regulation would amend Division 33 of the GST Regulations to ensure that the language used is consistent with the amendments made in the ITLA Act, and refers to ‘assessed’ amounts where applicable.

Under the *Intergovernmental Agreement on Federal Financial Relations*, any change to the GST base requires the unanimous approval of the States and Territories. As the amendments do not change the GST base, the agreement of the States and Territories is not required.

### **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

#### **Tax Laws Amendment (2013 Measures No. 1) Regulation 2013**

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Legislative Instrument**

The Regulation makes a number of amendments to taxation and superannuation regulations. The amendments are detailed below.

##### *Tax offsets*

The Regulation makes minor technical amendments to the provisions dealing with the transferability of the Seniors and Pensioners Tax Offset (SAPTO) between members of a couple in the *Income Tax Regulations 1936* (1936 Regulations).

The Regulation also specifies in the *Taxation Administration Regulations 1976* (TAA Regulations) that for the purposes of the Dependant (Invalid and Carer) Tax Offset (DICTO), the Commissioner of Taxation (Commissioner) is able to adjust schedules to specify different amounts, formulas and procedures to be used for working out amounts required to be withheld from payments to an individual during an income year, to take account of entitlements to the DICTO. The Regulation also specifies that individuals are able to make a declaration in relation to the DICTO where they wish for the DICTO to be taken into account by an entity in calculating the amount required to be withheld from a payment.

The Regulation also specifies in the TAA Regulations the ongoing proportion of the low income tax offset (LITO) that is to be taken into account in determining the

amount that must be withheld from payments to an individual during an income year, is 18 per cent.

### Superannuation

The Regulation updates the list of constitutionally protected funds (CPFs) in the *Income Tax Assessment Regulations 1997* (1997 Regulations) to add new listings and repeal listings that are spent or redundant. Superannuation funds are subject to Commonwealth income tax, however the taxation of public sector superannuation funds applies only so far as the Commonwealth taxing power extends. Superannuation funds that the Commonwealth taxing power does not extend to are known as CPFs. Income derived by these funds is specifically exempted from income tax and they are listed in the 1997 Regulations for ease of reference.

The Regulation also specifies in the 1997 Regulations the individuals who are not subject to tax under Division 293 of the ITAA 1997 in relation to certain superannuation contributions to a CPF, due to their status as a state higher level office holder. Division 293 tax is a tax on the superannuation contributions of very high income earners (broadly, those with income over \$300,000). State higher level office holders, for example, State Ministers and State Governors, are not required to pay Division 293 tax in respect of contributions to CPFs, unless the contributions are made as part of a salary package. This reflects the jurisprudence of the High Court.

Further, the Regulation makes a technical amendment relating to the rules for treating certain superannuation interests as multiple superannuation interests. The amendment would ensure these rules do not apply for the purposes of determining an individual's liability for Division 293 tax.

### Car expenses

The Regulation inserts the annual 'cents per kilometre' rates for calculating tax deductions for car expenses for the 2013-14 income year in Part 2 of Schedule 1 to the 1997 Regulations.

### Goods and Services Tax (GST)

The Regulation amends references to payments of GST in the *A New Tax System (Goods and Services Tax) Regulations 1999* to refer to payments of 'assessed GST' where appropriate to reflect the recent movement of GST to a self-assessment system. This system provides that a taxpayer's liabilities and entitlements are dependent on an assessment by the Commissioner, which is based on a taxpayer's self-assessment of their liabilities and entitlements.

## **Human rights implications**

Part 3, item 19 of the Regulation engages the following human right:

### *Right to equality and non-discrimination*

The provision of preferential tax treatment to certain individuals based on their status as a State higher level office holder engages Article 26 of the International Covenant on Civil and Political Rights. Article 26 guarantees equality before the law and equal protection of the law without any discrimination on a range of grounds. Status as a State higher level office holder is not mentioned explicitly as a ground of discrimination, but may fall within the ‘other status’ category mentioned in the Article.

The Regulation limits the right to equality and non-discrimination by providing preferential tax treatment on the grounds of whether an individual is a State higher level office holder.

This objective of this limitation is to ensure that the Commonwealth can legislate to improve the fiscal sustainability of the superannuation tax concessions it provides, in a way that is consistent with the implied constitutional restriction that the Commonwealth may not act so as to call into question the continued capacity of the states to function as governments.

The limitation is reasonable, proportionate and necessary because the preferential treatment given is the minimum necessary to ensure that the Commonwealth does not exceed its constitutional powers. It is only available for certain superannuation contributions for individuals that have been identified as State higher level office holders in the case law, and equivalent positions.

### **Conclusion**

This Regulation is compatible with human rights because to the extent that it may limit the right to non-discrimination, that limitation is reasonable, necessary and proportionate, and is aimed at achieving the legitimate objective of ensuring that the superannuation tax concessions are fiscally sustainable.