

EXPLANATORY STATEMENT

SELECT LEGISLATIVE INSTRUMENT NO. 176, 2014

Issued by authority of the Treasurer

Taxation Administration Act 1953

Income Tax Assessment Act 1936

Tax and Superannuation Laws Amendment (2014 Measures No. 3) Regulation 2014

Section 18 of the *Taxation Administration Act 1953* (TAA 1953) and section 266 of the *Income Tax Assessment Act 1936* (ITAA 1936) 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.

Tax information sharing and taskforces

The *Tax and Superannuation Laws Amendment (2014 Measures No. 3) Regulation 2014* (Regulation) amends the *Taxation Administration Regulations 1976* (TAR 1976) to allow for the sharing of taxation information between the Australian Taxation Office (ATO) and other agencies for the purposes of investigations being carried out by the Phoenix Taskforce and the Trusts Taskforce. This assists the taskforces in carrying out their substantive purposes.

In the 2013-14 Budget, the Government provided \$67.9 million over four years to the ATO to establish a Trusts Taskforce to audit taxpayers who have been involved in tax avoidance and evasion using trust structures. This measure requires collaboration between the ATO and other law enforcement agencies to ensure appropriate investigations into, and sometimes referral for criminal prosecution of, the most serious matters.

The Trusts Taskforce is currently comprised of the following agencies:

Australian Taxation Office (ATO)
Australian Federal Police (AFP)
Australian Crime Commission (ACC)
Director of Public Prosecutions (DPP)
Australian Securities and Investments Commission (ASIC)
Australian Government Solicitor (AGS)
Attorney-General's Department (AGD)
AUSTRAC
Australian Competition and Consumer Commission (ACCC)
Australian Business Register (ABR)
Australian Prudential Regulation Authority (APRA)

The role of the Phoenix Taskforce is to identify, design and implement cross agency strategies to mitigate and deter fraudulent phoenix activity.

Fraudulent phoenix activity involves the evasion of tax and other liabilities, such as employee entitlements, through the deliberate, systematic and sometimes cyclic liquidation of related corporate trading entities. This involves intentionally placing a company into administration or liquidation to avoid payment of taxes, the superannuation guarantee or other employee entitlements. A new company is then created to carry on the same or similar business, typically with the same ownership.

Fraudulent phoenix activity is a risk which has the potential to generate severe erosion of the revenue base and undermine business and community confidence.

The Phoenix Taskforce is currently comprised of the following agencies:

Australian Taxation Office (ATO)
Australian Business Register (ABR)
Australian Securities and Investments Commission (ASIC)
Australian Crime Commission (ACC)
Fair Work Ombudsman
Australian Federal Police (AFP)
Australian Competition and Consumer Commission (ACCC)
Clean Energy Regulator
Department of Employment
Department of Environment
Department of Human Services
Department of Immigration and Border Protection
Office of the Migration Agents Registration Authority
The State and Territory Revenue Offices

For the taskforces to fulfil their objective effectively, information must be shared between the constituent agencies. However, the confidentiality provisions of the TAA 1953 provide that it is an offence if an entity which acquires protected information, as a taxation officer, discloses that information to another entity. Protected information in the taxation law refers to information disclosed or obtained under a taxation law that could be used to identify an individual, business or entity.

The TAA 1953 sets out a range of exceptions to this general prohibition, including for law enforcement and other public purposes. An exception set out in the TAA 1953 permits disclosure to an officer of a prescribed taskforce if the disclosure is made for, or in connection with, a purpose of a prescribed taskforce. There were three taskforces already prescribed under the TAR 1976, namely, the National Anti-Gang Taskforce, the Criminal Assets Confiscation Taskforce and the National Criminal Intelligence Fusion Centre.

For a taskforce to be prescribed, the TAA 1953 requires that a major purpose of the taskforce must be the protection of the public finances of Australia. As the Phoenix Taskforce is constituted to monitor and deter phoenix activity, which involves the deliberate evasion of taxation and other liabilities through the deliberate and cyclic liquidation of related corporate trading entities, a major purpose of that Taskforce is to protect the public finances of Australia. Equally, since the Trusts Taskforce is constituted for the purpose of auditing taxpayers involved in tax avoidance and evasion using trust structures, a major purpose of that taskforce is to protect the public finances of Australia.

The Regulation prescribes the Phoenix Taskforce and the Trusts Taskforce in regulation 48 of the TAR 1976, allowing for the disclosure of protected tax information by taxation officers to officers of each taskforce, for the purposes of that taskforce.

Accordingly, two new items are included in the table contained in regulation 48, prescribing each taskforce.

The disclosure of taxation information by a taxation officer must be made for or in connection with a purpose of the taskforce. On-disclosure rules in the TAA 1953 continue to protect taxation information once it is disclosed. Under these rules, a taskforce officer may only on-disclose taxation information for taskforce purposes.

Amendments to tax arrangements for overseas Defence Force personnel

The Regulation also amends the *Income Tax Regulations 1936* (ITR 1936) to provide tax concessions to certain Australian Defence Force (ADF) personnel serving in Iraq as part of Operation OKRA.

Section 23AD of the ITAA 1936 provides an exemption from income tax of pay and allowances of ADF members performing certain overseas duty. Subsection 23AD(1) of the ITAA 1936 exempts the pay and allowances earned by ADF members from income tax where there is a certificate in force, issued in writing by the Chief of the Defence Force, to the effect that the members are on 'eligible duty'.

Subsection 23AD(2) of the ITAA 1936 provides that the regulations may declare that duty with a specified organisation, in a specified area outside Australia, and after a specified day, is 'eligible duty' for the purposes of that section.

Regulation 7A of the ITR 1936 declares that duty with various organisations in various areas outside Australia to be 'eligible duty' for the purposes of section 23AD of the ITAA 1936.

Operation OKRA is the ADF contribution to the Iraq crisis. Under Operation OKRA, the Department of Defence provides humanitarian aid and operational support in the region as agreed by the Australian Government. Item 1 in Schedule 2 to Regulation amends the ITR 1936 to specify that eligible duty includes duty undertaken within the Republic of Iraq as part of Operation OKRA for the period 9 August 2014 to 30 June 2015.

Details of the Regulation are set out in the [Attachment](#).

The changes to tax information sharing provisions have no revenue impact. The changes to tax concessions for ADF personnel have a cost to revenue of \$2.9 million over the forward estimates.

Public consultation on the Regulation was not required, as both amendments only results in minor machinery of government changes. The amendments to the tax arrangements for overseas ADF personnel were developed in consultation with the Department of Defence. All of the changes made by this regulation are both minor and machinery in nature and have no or negligible impacts on compliance costs.

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

The TAA 1953 and the ITAA 1936 do not specify any conditions that must be satisfied before the power to make the Regulation may be exercised.

The Regulation commenced on the date after registration.

ATTACHMENT

Details of the *Tax and Superannuation Laws Amendment (2014 Measures No. 3) Regulation 2014*

Section 1 – Name of Regulation

This section provides that the name of the Regulation is the *Tax and Superannuation Laws Amendment (2014 Measures No. 3) Regulation 2014* (Regulation).

Section 2 – Commencement

This section provides that the Regulation commences the day following registration.

Section 3 – Authority

This section provides that the Regulation is made under the *Taxation Administration Act 1953* (TAA 1953) and the *Income Tax Assessment Act 1936* (ITAA 1936).

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to this instrument 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 – Amendments

Schedule 1 amends the table in Regulation 48 of the *Taxation Administration Regulations 1976* to include the Trusts Taskforce as item 4 and the Phoenix Taskforce as item 5 as prescribed taskforces to allow for disclosure of protected tax information by taxation officers to officers of the respective taskforces for the purposes of the taskforces.

Schedule 2 — Defence force pay and allowances

Section 23AD of the ITAA 1936 provides an exemption from income tax of pay and allowances of Australian Defence Force (ADF) members performing certain overseas duty. Subsection 23AD(1) of the ITAA 1936 exempts the pay and allowances earned by ADF members from income tax where there is a certificate in force, issued in writing by the Chief of the Defence Force, to the effect that the members are on 'eligible duty'. Subsection 23AD(2) of the ITAA 1936 provides that the regulations may declare that duty with a specified organisation, in a specified area outside Australia, and after a specified day, is 'eligible duty' for the purposes of that section.

Regulation 7A of the *Income Tax Regulations 1936* (ITR 1936) specifies duty with various organisations in various areas outside Australia and declares that duty to be 'eligible duty' for the purposes of section 23AD of the ITAA 1936.

Operation OKRA is the ADF contribution to the Iraq crisis. Under Operation OKRA, the Department of Defence provides humanitarian aid and operational support as agreed by the Australian Government. Item 1 in Schedule 2 to the Regulation amends

the ITR 1936 to specify that eligible duty includes duty undertaken within Iraq as part of Operation OKRA for the period 9 August 2014 to 30 June 2015. This includes duty in the land territory, territorial waters, airspace, and superjacent airspace of the Republic of Iraq.

Statement of Compatibility with Human Rights

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

Tax and Superannuation Laws Amendment (2014 Measures No. 3) **Regulation 2014**

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 amendments allow for the sharing of taxation information to and between constituent members of the Trusts Taskforce and Phoenix Taskforce, and provides an exemption from income tax of pay and allowances of Australian Defence Force (ADF) members performing certain overseas duty.

Human rights implication

Tax information sharing and taskforces

The amendments engage Article 17 of the International Covenant on Civil and Political Rights (ICCPR), as it will interfere with the privacy of individuals. Specifically, Article 17 says that individuals shall not be subject to unlawful or arbitrary interference with their privacy.

Prescription of the taskforces allow taxation information to be lawfully shared to and between the member agencies, in order to conduct investigations. While the United Nations Human Rights Committee states that arbitrary interference with privacy extends to interference provided for under the law, it also provides that where the interference is reasonable in the circumstances and in accordance with the aims and objectives of the ICCPR, the interference will not be considered arbitrary.

Both taskforces conduct investigations into behaviour which is difficult for a single agency to identify, and accordingly a cross-agency approach is required. If information sharing were not allowed, the investigations being conducted by the taskforces would be frustrated. The disclosure mechanism is proportional to achieving this objective, as information which is shared between members of the taskforce may only be used for the purposes of the taskforce.

Furthermore, the work of the Phoenix taskforce to mitigate and deter the evasion of employees' superannuation guarantees or other employee entitlements will help ensure the purposes of Article 9 of the International Covenant on Economic, Social and Cultural Rights, which recognises the right of everyone to social security, including social insurance. In fulfilling this obligation, public authorities are required to take responsibility for the effective administration of the system. It also engages Article 7 of the International Covenant on Economic, Social and Cultural Rights,

which recognises the right of everyone to the enjoyment of just and favourable conditions of work. In particular, Article 7 includes ensuring fair wages and equal remuneration for work of equal value.

Amendments to tax arrangements for overseas ADF personnel

The amendments relating to tax arrangements for overseas ADF personnel do not engage any of the applicable rights or freedoms. The amendments to tax arrangements for overseas ADF personnel are minor, and extend tax concessions to ADF personnel engaged in operation OKRA, consistent with previous arrangements for comparable operations.

Conclusion

The Regulation is compatible with human rights because to the extent that it may limit human rights, the limitations are reasonable, necessary and proportionate.