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HOUSE OF REPRESENTATIVES

TAX LAWS AMENDMENT (2009 MEASURES No. 1) BILL 2009

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Treasurer, the Hon Wayne Swan MP)

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

Abbreviation	***Definition***
ANTS (MLS) Act 1999	*A New Tax System (Medicare Levy Surcharge – Fringe Benefits) Act 1999*
ATO	Australian Taxation Office
Co-contribution Act	*Superannuation (Government Co-contribution for Low Income Earners) Act 2003*
Commissioner	Commissioner of Taxation
DASP Act	*Superannuation (Departing Australia Superannuation Payments Tax) Act 2007*
EC	exceptional circumstances
HELP debt	Higher Education Loan Program debt
HESA 2003	*Higher Education Support Act 2003*
ITAA 1936	*Income Tax Assessment Act 1936*
ITAA 1997	*Income Tax Assessment Act 1997*
MLA 1986	*Medicare Levy Act 1986*
MLS lump sum	Medicare levy surcharge lump sum
PAYG	pay as you go
RESC	reportable employer superannuation contributions
SATO	senior Australians tax offset
SGAA 1992	*Superannuation Guarantee (Administration) Act 1992*
SS Act 1991	*Social Security Act 1991*
SSAA 1995	*Small Superannuation Accounts Act 1995*
S(UMLM) Act	*Superannuation (Unclaimed Money and Lost Members) Act 1999*
TAA 1953	*Taxation Administration Act 1953*

Abbreviation	***Definition***
Temporary Residents Act	*Temporary Residents' Superannuation Legislation Amendment Act 2008*
TFN	tax file number

General outline and financial impact

PAYG instalment reduction for small businesses

Schedule 1 to this Bill amends section 45-400 of Schedule 1 to the *Taxation Administration Act 1953* (which provides how the Commissioner of Taxation works out the amount of the pay as you go (PAYG) instalments on the basis of GDP-adjusted notional tax for quarterly payers paying four instalments annually) to provide for:

- a 20 per cent reduction of the amount of the PAYG instalment worked out under the section for the quarter that includes 31 December 2008 for certain small business taxpayers; and
- a regulation-making power to allow the amount of the PAYG instalment worked out under the section to be reduced in the future in circumstances specified by regulations.

Date of effect: This measure applies in relation to instalment quarters in the 2007-08 income year and later income years.

Proposal announced: This measure was announced in the Treasurer's Media Release No. 140 of 12 December 2008 and the Prime Minister's Media Release '$4.7 Billion Nation Building Package' of 12 December 2008.

Financial impact: This measure will have these revenue implications:

2007-08	*2008-09*	*2009-10*	*2010-11*	*2011-12*
Nil	–$440m	$395m	$45m	Nil

Compliance cost impact: Low. This measure will not require increased compliance activity on behalf of small business taxpayers. There is no ongoing compliance cost impact and a minimal transitional impact.

Temporary residents' superannuation and unclaimed money

Schedule 2 to this Bill amends various Acts as a result of the payment of temporary residents' unclaimed superannuation to the Australian

Government and to improve the administration of the broader unclaimed money regime.

The temporary residents' superannuation amendments affect legislation governing small superannuation accounts, superannuation guarantee, the Government superannuation co-contribution and administrative arrangements within the unclaimed money regime.

The changes to the broader unclaimed money regime are intended to make the existing provisions in the *Superannuation (Unclaimed Money and Lost Members) Act 1999* (S(UMLM) Act) more compatible with the new temporary residents' superannuation provisions which have been inserted into the S(UMLM) Act.

Date of effect: These amendments commence on the day after Royal Assent subject to the application, transitional and savings provisions outlined in Part 3 of Schedule 2.

Proposal announced: These amendments have not previously been announced.

Financial impact: Unquantifiable, but expected to have a minor or negligible net financial impact (revenue and outlays).

Compliance cost impact: Low.

Reforms to income tests

Schedule 3 to this Bill amends relevant legislation to give effect to measures, announced in the 2008-09 Budget, to amend income tests across the tax and transfer systems. These measures will enhance fairness in the application of income tests and better ensure that government assistance is targeted to those most in need.

Overview of arrangements

Chapter 3 outlines the key concepts and definitions that will be added to income for means-tested government assistance programs as a result of the 2008-09 Budget measures. These concepts are certain 'salary sacrificed' contributions to superannuation, to be known as 'reportable superannuation contributions', and an individual's 'total net investment loss'.

There is also a definition of 'reportable employer superannuation contributions' (RESC) that is to be inserted in Schedule 1 to the *Taxation*

Administration Act 1953 (TAA 1953). RESC are employer contributions that fall within the definition of 'reportable superannuation contributions'.

Further, Chapter 3 inserts a new definition of 'adjusted fringe benefits total' into the *Income Tax Assessment Act 1936* (ITAA 1936). The chapter also consolidates the components of income to be assessed for particular tax offsets and the Medicare levy surcharge into two new definitions in section 995-1 of the *Income Tax Assessment Act 1997*. These definitions are 'rebate income' and 'income for surcharge purposes' respectively.

Chapter 4 outlines the amendments to payment summary provisions in Schedule 1 to the TAA 1953 to require reporting of RESC on payment summaries and in the annual withholding report for the Commissioner of Taxation (Commissioner).

Chapter 5 outlines the amendments to specific income definitions across tax and transfer legislation for relevant affected programs to include the new components of income as relevant. These components are 'reportable superannuation contributions', RESC, an individual's 'total net investment loss', and an individual's 'adjusted fringe benefits total' in respect of particular tax offsets.

Chapter 6 is the regulation impact statement prepared in respect of the proposal to include particular 'salary sacrificed' contributions to superannuation in income tests.

Chapter 7 outlines amendments to the *Farm Household Support Act 1992* to exclude from income, certain superannuation contributions that would have become income for the purposes of the exceptional circumstances relief payment as a result of reforms announced in the 2008-09 Budget.

Chapter 8 outlines amendments to the dependency tax offset provisions in the ITAA 1936 to align the income definitions used for the purposes of those offsets with the 'adjusted taxable income' definition in the *A New Tax System (Family Assistance) Act 1999*. As part of these reforms, this chapter repeals the 'separate net income' definition.

Date of effect: These amendments commence the day after Royal Assent and apply in relation to income years starting on or after 1 July 2009.

Proposal announced: The amendments in this Schedule give effect to measures announced on 13 May 2008 as part of the 2008-09 Budget.

Financial impact: These amendments have a fiscal cost of $545.2 million over the forward estimates (including administration costs) as follows:

2007-08	*2008-09*	*2009-10*	*2010-11*	*2011-12*
Nil	–$15.1m	$164.0m	$192.5m	$203.8m

Compliance cost impact: There are likely to be medium implementation costs for employers as a result of the amendments to payment summary requirements and a medium increase in ongoing compliance costs. However, the design of the initiative as reflected in the law sought to minimise compliance costs for employers.

Summary of regulation impact statement

Regulation impact on business — inclusion of reportable superannuation contributions in income

Impact: The amendments to include ‘reportable superannuation contributions’ in income tests will affect employers, intermediaries, welfare recipients, tax practitioners and the Australian Government.

Main points

- The amendments will require entities to report any RESC on individual annual and part-year payment summaries from 1 July 2009, as well as the annual withholding report for the Commissioner.
- Intermediaries, such as payroll providers and software developers, will need to update software packages and payroll systems to allow for the reporting of RESC.
- The amendments will affect individuals’ eligibility for relevant means-tested government assistance programs. Individuals will also be required to declare any ‘reportable superannuation contributions’ as income when applying for government assistance.

Chapter 1
PAYG instalment reduction for small businesses

Outline of chapter

1.1 Schedule 1 to this Bill amends section 45-400 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) (which provides how the Commissioner of Taxation (Commissioner) works out the amount of the pay as you go (PAYG) quarterly instalments on the basis of GDP-adjusted notional tax) to provide for:

- a 20 per cent reduction of the amount of the PAYG instalment worked out under the section for the quarter that includes 31 December 2008 for certain small business taxpayers; and
- a regulation-making power to allow the amount of the PAYG instalment worked out under the section to be reduced in the future in circumstances specified by regulations.

Context of amendments

1.2 Under the PAYG instalments system, taxpayers earning business or investment income pay instalments during the year towards their final tax liability for that income year. Taxpayers may pay their PAYG instalments on the basis of GDP-adjusted notional tax (GDP-adjustment method) or on the basis of instalment income.

1.3 The GDP-adjustment method is available to the classes of taxpayers listed in section 45-130 of Schedule 1 to the TAA 1953. These taxpayers are individuals, multi-rate trustees and full self-assessment taxpayers with $2 million or less of instalment income for the previous income year or more than $2 million of instalment income for the previous income year and are eligible to pay an annual PAYG instalment but have chosen not to. For the 2009-10 income year or later income years, 'small business entities' (as defined by section 328-110 of the *Income Tax Assessment Act 1997* (ITAA 1997)) will be automatically eligible to use the GDP-adjusted method.

1.4 Taxpayers who pay PAYG instalments on the basis of the GDP-adjusted method are generally quarterly payers who pay four instalments annually. However, section 45-134 of Schedule 1 to the TAA 1953 allows primary production businesses and special professionals to pay two instalments a year under the GDP-adjustment method.

1.5 Under the GDP-adjustment method, the Commissioner works out the amount of the instalments taxpayers pay in accordance with Subdivision 45-L of Schedule 1 to the TAA 1953.

1.6 The amount of the instalments payable depends on the taxpayer's GDP-adjusted notional tax which is worked out under section 45-405 of Schedule 1 to the TAA 1953. Broadly, the GDP-adjusted notional tax is worked out by 'uplifting' the taxpayer's income in the previous year by that year's rate of nominal GDP growth (the GDP uplift factor).

1.7 The GDP uplift factor can be unrepresentative of expected profit growth in income years where economic and business conditions change quickly and the expected income of taxpayers changes accordingly. This can cause taxpayers to be required to pay PAYG instalments that are too high compared with their actual income, with the overpaid tax being refunded to them at the conclusion of the income year when their final tax liability is assessed. For example, for the 2008-09 income year, due to the global financial crisis, the profit growth for small businesses as forecasted in the Mid-year Economic and Fiscal Outlook 2008-09 is significantly lower than the GDP uplift factor of 8 per cent.

1.8 While taxpayers may vary their instalment amounts calculated and notified by the Commissioner themselves, many are reluctant to do so, as underpayments can trigger the general interest charge. As such, it is desirable to build more flexibility in the law to allow the instalment amounts calculated on the basis of GDP-adjusted notional tax to be reduced to more accurately reflect changing economic circumstances.

Summary of new law

1.9 The PAYG instalment amount for the quarter that includes 31 December 2008 for certain small business taxpayers who are quarterly payers paying four instalments annually on the basis of the GDP-adjustment method as worked out under section 45-400 of Schedule 1 to the TAA 1953 will be reduced by 20 per cent. This reduction will not affect the instalment amounts as worked out under the section for the following quarters in the same income year.

1.10 In addition, the PAYG instalment amounts as worked out under section 45-400 of Schedule 1 to the TAA 1953 may be reduced in the future in certain circumstances as prescribed by regulations. Any prescribed reduction will not affect the instalment amounts as worked out under the section for the quarters following the prescribed quarter(s) in the same income year.

Comparison of key features of new law and current law

New law	*Current law*
The PAYG instalment amount for the quarter that includes 31 December 2008 as worked out under section 45-400 of Schedule 1 to the TAA 1953 (for quarterly payers who pay four instalments annually on the basis of GDP-adjusted notional tax) is reduced by 20 per cent for certain small business taxpayers.	No equivalent.
The PAYG instalment amount as worked out under section 45-400 of Schedule 1 to the TAA 1953 (for quarterly payers who pay four instalments annually on the basis of GDP-adjusted notional tax) may be reduced in certain circumstances as prescribed by regulations.	No equivalent.

Detailed explanation of new law

Amount of instalments reduced as specified by regulation

1.11 The amendments insert a regulation-making power to allow for PAYG instalment amounts for quarterly payers who pay four instalments annually on the basis of GDP-adjusted notional tax to be reduced in certain specified circumstances to more accurately reflect prevailing economic conditions and actual income of certain taxpayers for a particular income year. Section 18 of the TAA 1953 provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the TAA 1953 .
[Schedule 1, item 3, subsection 45-400(3) of Schedule 1 to the TAA 1953]

1.12 The PAYG instalment amounts payable under the GDP-adjustment method for quarterly payers who pay four instalments annually are worked out in accordance with the table in subsection 45-400(2) of Schedule 1 to the TAA 1953.

1.13 The regulations may specify the instalment quarter(s) to which a reduction applies or the taxpayers eligible for the reduction. ***[Schedule 1, item 3, subsection 45-400(4) of Schedule 1 to the TAA 1953]***

1.14 A prescribed reduction of the instalment amount for a quarter in an income year will not affect the working out of instalment amounts for the later quarters of that income year. The amounts worked out for quarters following the prescribed quarter will be determined as if no reduction had occurred. ***[Schedule 1, item 3, subsection 45-400(5) of Schedule 1 to the TAA 1953]***

1.15 An instalment amount for a quarter in an income year as worked out in accordance with the table in subsection 45-400(2) of Schedule 1 to the TAA 1953 is a set percentage of a taxpayer's GDP-adjusted notional tax reduced by the instalment amounts for the earlier quarters in that income year. As such, the reduction of one quarter's amount would ordinarily be clawed back in the next quarter's instalment amount, effectively reversing the cash flow benefit of reducing one quarter's PAYG instalment amount. By ignoring the reduction for the quarters following the quarter(s) to which the reduction applies, the amount reduced is not clawed back through the subsequent quarter's instalment amount.

December 2008 quarter PAYG instalment reduction

1.16 The quarterly PAYG instalment amount for the quarter that includes 31 December 2008 for certain small business taxpayers who are quarterly payers paying four instalments annually on the basis of GDP-adjusted notional tax will be reduced by 20 per cent. ***[Schedule 1, item 3, subsection 45-400(6) of Schedule 1 to the TAA 1953]***

1.17 The 20 per cent reduction for the quarter that includes 31 December 2008 broadly represents the annual reduction in instalments necessary to reflect the expected slowing in small business profit growth for the 2008-09 income year in a single quarterly instalment.

1.18 Small business taxpayers who will be eligible for the reduction are *small business entities* (see below), a partner of a partnership that is a small business entity, or a beneficiary of a trust that is a small business entity, for either the 2007-08 or 2008-09 income years. ***[Schedule 1, item 3, paragraphs 45-400(6)(a) to (c) of Schedule 1 to the TAA 1953]***

Example 1.1

Alice is a partner of a partnership that is a small business entity for the 2007-08 income year. Alice is required to pay quarterly PAYG instalments on investment and business income she derives (including her share of the partnership income) on the basis of GDP-adjusted notional tax.

While Alice is not a small business entity herself she is eligible to receive the 20 per cent reduction to her quarterly PAYG instalment amount for the December 2008 quarter as she is a partner of a partnership that is a small business entity. The 20 per cent reduction applies to all the income accounted for in working out Alice's GDP-adjusted notional tax which includes both her income from the partnership and business and investment income from other sources.

1.19 'Small business entity' is defined in section 328-110 of the ITAA 1997. Broadly, an entity is a small business entity for an income year if they are carrying on a business for the income year and their aggregated turnover is less than $2 million for the previous income year or is likely to be less than $2 million for the current income year (calculated on the first day of the current income year for the entity).

Example 1.2

In the 2007-08 income year, James carried on an IT consultancy business. His aggregated turnover for that income year was $1.9 million.

For the 2008-09 income year, James is a small business entity because his aggregated turnover for 2007-08 was less than $2 million. This is irrespective of his likely or actual turnover in the 2008-09 income year.

1.20 Small business taxpayers who are quarterly payers who pay two instalments annually are not eligible for the reduction. Under section 45-134 of Schedule 1 to the TAA 1953, primary production businesses and certain professionals, such as professional sports persons, may pay two instalments annually under the GDP-adjusted method. The amount of instalment for quarterly payers who pay two instalments annually is worked out under section 45-402 of Schedule 1 to TAA 1953. These taxpayers are required to pay their two instalments at the third and fourth quarters in an income year, as such, the period between the time that they are required to pay instalments and the time they are required to pay their final annual income tax liability is shorter than a taxpayer who pays four quarterly instalments throughout the income year. Accordingly, applying the PAYG instalment reduction will not provide much cash flow relief for these taxpayers as the timing difference between the payment of their instalments and receiving a possible refund on their final annual income tax liability is small.

Example 1.3

> Michael is a primary producer and pays two instalments annually on the basis of GDP-adjusted notional tax. Michael is not eligible for the 20 per cent reduction applicable to the PAYG instalment for the instalment quarter including 31 December 2008.

1.21 Similarly, small business entities who have voluntarily varied their PAYG instalment amount for the instalment quarter that includes 31 December 2008 to better reflect their individual circumstances under section 45-112 of Schedule 1 to the TAA 1953 are not eligible for the 20 per cent reduction. The 20 per cent reduction is intended as an alternative to voluntary variation where taxpayers are uncertain about varying their PAYG instalment.

1.22 Depending on a taxpayer's accounting period, the instalment quarter that includes 31 December 2008 may be an entity's first, second, third or fourth instalment quarter. The meaning of instalment quarter is provided in section 45-60 of TAA 1953.

Example 1.4

> Constantine Cleaning Services Pty Ltd, with the Commissioner's permission, adopts a substituted accounting period and is a quarterly payer who pays four instalments annually on the basis of GDP-adjusted notional tax. Constantine Cleaning Services Pty Ltd is an 'early balancer' and its 2008-09 income year covers the period from 1 May 2008 to 30 April 2009.
>
> As a company with an aggregated turnover of less than $2 million in the 2007-08 income year, Constantine Cleaning Services Pty Ltd is eligible for the 20 per cent PAYG instalment reduction. The quarter including 31 December 2008 will be the third quarter for Constantine Cleaning Services Pty Ltd. The 20 per cent reduction will apply to Constantine Cleaning Services Pty Ltd's third quarter PAYG instalment.

1.23 The reduction for the quarter that includes 31 December 2008 will not affect the instalment amounts worked out under section 45-400 of Schedule 1 to the TAA 1953 for the later quarters in the same income year. The amounts worked out for quarters following the quarter that includes 31 December 2008 will be worked out as if no reduction had occurred. ***[Schedule 1, item 3, subsection 45-400(7) of Schedule 1 to the TAA 1953]***

1.24 Ignoring the 20 per cent reduction for the quarter that includes 31 December 2008 will make sure the reduction is not clawed back through the subsequent instalment amounts in the same income year.

1.25 In order to avoid inoperative provisions in the tax laws, the provisions that give effect to the reduction for the quarter that includes the 31 December 2008 will be automatically repealed on 1 July 2013. ***[Schedule 1, item 4*.**

1.26 Given the insertion of new provisions in section 45-400 of Schedule 1 to the TAA 1953, two headings will be inserted in the section to make clearer the matters that are dealt with by each of the subsections. ***[Schedule 1, items 1 and 2]***

Application provisions

1.27 The amendments in Part 1 of this Schedule commence on the day the Bill receives Royal Assent and apply in relation to instalment quarters in the 2007-08 income year and later income years. The application to instalment quarters in the 2007-08 income year is required in order to account for small business taxpayers who adopted a substituted accounting period with a late December balancing date in lieu of 30 June 2008 (late December balancers). The quarter that includes 31 December 2008 for late December balancers will be the fourth quarter of the 2007-08 income year for these taxpayers. ***[Schedule 1, item 5]***

Chapter 2
Temporary residents' superannuation and unclaimed money

Outline of chapter

2.1 Schedule 2 to this Bill amends various Acts as a result of the payment of temporary residents' unclaimed superannuation to the Australian Government. Schedule 2 also amends the *Superannuation (Unclaimed Money and Lost Members) Act 1999* (S(UMLM) Act) to facilitate the administration of the broader unclaimed money regime. All references are to the S(UMLM) Act unless otherwise stated.

Context of amendments

2.2 The *Temporary Residents' Superannuation Legislation Amendment Act 2008* (Temporary Residents Act) amended the S(UMLM) Act and other Acts to provide that the superannuation money of a former temporary resident is included in unclaimed superannuation and is payable to the Commissioner of Taxation (Commissioner).

2.3 Changes to the broader unclaimed money regime make the existing provisions in the S(UMLM) Act more compatible with the new temporary residents' unclaimed superannuation provisions which have been inserted into that Act. The amendments also improve the general administration of the unclaimed money regime.

2.4 Additional consequential amendments are required to other Acts as a result of the temporary residents' unclaimed superannuation regime.

Summary of new law

2.5 The temporary residents' superannuation amendments include changes to legislation governing:

- small superannuation account payments;
- superannuation guarantee shortfall components;

- Government superannuation co-contribution payments; and
- financial transaction reporting.

2.6 The changes to the broader unclaimed money regime include:

- allowing the Commissioner to set the due dates for statements and payments by legislative instrument;
- payments of unclaimed superannuation by the Commissioner;
- making the penalties and general interest charge operate for unclaimed money consistent with broader taxation administration;
- clarifying the law in relation to the taxation components of unclaimed money payments made by the Commissioner;
- other administrative issues, such as refunds and returns and recovery of overpayments; and
- other minor refinements and improvements to the operation of the existing law.

Comparison of key features of new law and current law

New law	***Current law***
Superannuation providers will work out their unclaimed money on specified unclaimed money days as determined by the Commissioner by legislative instrument.	Superannuation providers work out if they have unclaimed money on the last day of the half-years that end on 31 December and 30 June each year.
Statements of unclaimed money are due to be given to the Commissioner by the scheduled statement day (as determined by the Commissioner by legislative instrument) that relates to the unclaimed money day.	Statements of unclaimed money are due to be given to the Commissioner before 1 May and 1 November respectively.
Payment of unclaimed money to the Commissioner is due and payable by the scheduled statement day (as determined by the Commissioner by legislative instrument) that relates to the unclaimed money day.	Payment of unclaimed money to the Commissioner is due and payable when a statement of unclaimed money is given to the Commissioner.

New law	***Current law***
State and territory providers that do not comply with state and territory arrangements that mirror the existing unclaimed money regime will have to comply with the new arrangements with the Commissioner.	State and territory providers can comply with state and territory arrangements that mirror the existing unclaimed money regime rather than sending statements and payments to the Commissioner.
Nil reporting will apply to all superannuation providers (except regulated superannuation funds with fewer than five members and state and territory providers, unless the state or territory provider is making payments to the Commonwealth unclaimed money regime).	Unless unclaimed money exists the superannuation provider does not have to provide a statement to the Commissioner.
A superannuation provider will be required to correct an error or omission in a statement of unclaimed money given to the Commissioner.	A superannuation provider is not compelled to correct an error or omission in a statement of unclaimed money given to the Commissioner.
Broader taxation administration will apply to all unclaimed money payments to the Commissioner in relation to general interest charge and administrative penalties.	General interest charge cannot be applied to late payments of unclaimed money to the Commissioner.
During the life of a person, the Commissioner must pay unclaimed money to a person, or a fund for the person if the Commissioner is satisfied that a superannuation provider paid unclaimed money to the Commissioner in respect of that person.	During the life of a person, the Commissioner must pay unclaimed money to a person if unclaimed money has been paid to the Commissioner and the Commissioner is satisfied that if the unclaimed money law had not been enacted the superannuation provider would have paid the unclaimed money to the person.
After the death of a person, if the Commissioner is satisfied that the superannuation provider, had it not paid the amount to the Commissioner as unclaimed money, would have been required to pay a death benefit amount or amounts to one or more death beneficiaries as a result of the person's death, then the Commissioner must pay the amount to that beneficiary or beneficiaries (or to the person's legal personal representative if the Commissioner is not satisfied).	After the death of a person, the Commissioner must pay unclaimed money to a person if unclaimed money has been paid to the Commissioner and the Commissioner is satisfied that if the unclaimed money law had not been enacted the superannuation provider would have paid the unclaimed money to the person.

New law	*Current law*
The unclaimed money register will also include details of temporary residents' unclaimed superannuation and related information.	The unclaimed money register includes details of unclaimed money.
The Commissioner will treat a superannuation guarantee shortfall for a former temporary resident as if it had been paid to the Commissioner as temporary resident unclaimed superannuation by a superannuation plan.	Depending on the circumstances of the person, the Commissioner deals with superannuation guarantee shortfall by paying it to a fund for the person, to the person, or to the person's legal personal representative.
A person who holds a temporary visa at any time during the income year, and who is not a prescribed visa holder or a New Zealand citizen at all times whilst holding that temporary visa, will not be eligible for a Government superannuation co-contribution in that year.	A person who holds an eligible temporary resident visa at any time during the income year will not be eligible for a Government superannuation co-contribution in that year.

Detailed explanation of new law

Unclaimed money

2.7 The simplified outline of the S(UMLM) Act is being amended to reflect the amendments being made to that Act by this Schedule. ***[Schedule 2, items 1 to 5, section 7]***

2.8 A definition of 'former temporary resident' is being inserted into the S(UMLM) Act to simplify various provisions in that Act and as a reference for use of this term in another Act. The meaning is effectively the same as that outlined in paragraphs 20C(1)(b) to (d) of that Act (which are to be repealed). ***[Schedule 2, items 6, 28 and 29, sections 8 and 20AA and paragraphs 20C(1)(b) to (d)]***

2.9 Part 3 of the S(UMLM) Act will now also be separated into Divisions, with Division 1 commencing at section 11. ***[Schedule 2, item 9]***

2.10 A minor technical correction is being made so that references in the S(UMLM) Act correctly refer to a superannuation provider for a fund rather than a superannuation provider in relation to a fund. ***[Schedule 2, item 10, subsection 13(1)]***

Dates for statements and payments of unclaimed money

2.11 Currently Part 3 of the S(UMLM) Act requires a superannuation provider to give a statement and pay unclaimed money in relation to that statement to the Commissioner in relation to the unclaimed money as at the end of each half-year. A half-year ends on 30 June or 31 December. Statements in relation to those half-years are due before 1 November and 1 May respectively. Payments are due and payable when the statement of unclaimed money is given to the Commissioner.

2.12 The definition of 'scheduled statement day' inserted into the S(UMLM) Act by the Temporary Residents Act is being replaced by a new definition so that the term also has the meaning given by section 15A of the S(UMLM) Act in relation to a statement required by Part 3 of that Act. This will help to achieve consistency in the reporting requirements of Part 3 and Part 3A of that Act. ***[Schedule 2, item 7, section 8]***

2.13 A definition of 'unclaimed money day' is being inserted into the S(UMLM) Act and will have the meaning given by section 15A. ***[Schedule 2, item 8, section 8]***

2.14 For the purposes of Part 3 of the S(UMLM) Act, the Commissioner will be able to specify unclaimed money days by legislative instrument. The Commissioner will also be able to specify the scheduled statement day that relates to the unclaimed money day by legislative instrument. ***[Schedule 2, item 11, section 15A]***

2.15 The new regime being implemented by this Schedule as it applies to statements and payments of unclaimed money by superannuation providers to the Commissioner under Part 3 of the S(UMLM) Act, will not apply to half-years that end on 30 June 2009 or earlier half-years. ***[Schedule 2, subitem 67(2)]***

2.16 An unclaimed money day specified by the Commissioner under paragraph 15A(a) of the S(UMLM) Act will have to be a day that occurs on or after 1 July 2009. ***[Schedule 2, subitem 67(1)]***

2.17 Despite the amendments to sections 16, 17 and 18 of the S(UMLM) Act being made by this Bill, those sections, as in force just before the commencement of this Schedule, continue to apply in relation to half-years ending before 1 July 2009. ***[Schedule 2, subitem 67(2)]***

Statement of unclaimed money

2.18 For the purposes of Part 3 of the S(UMLM) Act a superannuation provider will now be required by section 16 to give to the Commissioner, by the end of the scheduled statement day that relates to

an unclaimed money day, a statement in relation to all unclaimed money as at the end of the unclaimed money day. ***[Schedule 2, item 12, subsections 16(1) and (3)]***

2.19 A superannuation provider includes the trustee of a regulated superannuation fund or an approved deposit fund and a retirement savings account provider. However this requirement under section 16 of the S(UMLM) Act does not apply to a superannuation provider who is the trustee of a state or territory public sector superannuation scheme as defined in subsection 18(7) of the S(UMLM) Act and who gives a statement and makes a payment to a state or territory authority as provided for in section 18 of that Act.

2.20 The Commissioner may, under the *Taxation Administration Act 1953* (TAA 1953), defer the time for the superannuation provider to give the statement of unclaimed money to the Commissioner. If the information is not given when it must be given the TAA 1953 provides for offences and administrative penalties.

2.21 The requirement by a superannuation provider to give a statement under section 16 of the S(UMLM) Act does not apply to a regulated superannuation fund with fewer than five members if there is no unclaimed money at the end of the unclaimed money day in that fund. That is, self-managed superannuation funds and small Australian Prudential Regulation Authority regulated superannuation funds will only be required to give to the Commissioner such a statement if they have unclaimed money at the end of an unclaimed money day. ***[Schedule 2, item 12, subsections 16(1) and (2A)]***

2.22 Where a statement is required by subsection 16(1) of the S(UMLM) Act and there is no unclaimed money for any member (or holder in the case of a retirement savings account provider) at the end of the unclaimed money day the statement must say so. ***[Schedule 2, item 12, subsection 16(1A)]***

2.23 Currently, a superannuation provider that holds no unclaimed money for a person in a reporting period is not required to give to the Commissioner a statement under section 16 of the S(UMLM) Act. This new reporting requirement will give the Commissioner greater certainty about whether a superannuation provider is fulfilling its reporting obligations and allow more effective enforcement of reporting obligations.

2.24 A statement under subsection 16(1) of the S(UMLM) Act will be required to be given in a form approved by the Commissioner. The statement may also cover matters of unclaimed money administration in connection with Part 3 of the S(UMLM) Act, the *Superannuation (Departing Australia Superannuation Payments Tax) Act 2007* (DASP Act), as well as (in so far as they relate to either the DASP Act or Part 3 of the S(UMLM) Act), Part 3AA of the S(UMLM) Act, (dealing with the unclaimed superannuation money of former temporary residents), the *Income Tax Assessment Act 1997* (ITAA 1997), and Chapters 2 and 4 in Schedule 1 to the TAA 1953. The approved form may also require the statement to include certain tax file numbers (TFNs) under subsection 25(1) of the S(UMLM) Act. ***[Schedule 2, item 12, subsection 16(1)]***

2.25 Such reporting may include information that allows the Commissioner to apply the correct taxation treatment to a payment of unclaimed money made in respect of a person under section 17 of the S(UMLM) Act.

2.26 If the statement required to be given by superannuation providers under subsection 16(1) of the S(UMLM) Act includes false or misleading statements the TAA 1953 provides for offences and administrative penalties. The amendments in this Bill will make the penalties for unclaimed superannuation money consistent with broader taxation administration.

2.27 The statement of unclaimed money required to be given by a superannuation provider under subsection 16(1) of the S(UMLM) Act to the Commissioner will (similar to the existing requirement) include information about each payment made to an entitled person between the end of the unclaimed money day and the day on which the superannuation provider gives the statement to the Commissioner. ***[Schedule 2, item 12, subsection 16(2)]***

2.28 The statement of unclaimed money must also now include information about amounts that were unclaimed money at the end of the unclaimed money day, but which ceased to be unclaimed money between the end of that day and the day on which the superannuation provider gives the statement to the Commissioner (other than in situations where the provider made a payment to the Commissioner under subsection 17(1) of the S(UMLM) Act). ***[Schedule 2, item 12, paragraph 16(2)(b)]***

Example 2.5

> On 31 December 2009 Lidia's superannuation provider considered that the amount payable to Lidia was unclaimed money as it satisfied all the conditions of subsection 12(1) of the S(UMLM) Act. The amount was due and payable before 1 May 2010. However on 31 March 2010

Lidia made a contribution to her account, resulting in the criterion of paragraph 12(1)(c) no longer being satisfied.

Although the amount payable to Lidia was no longer unclaimed money, Lidia's superannuation provider is still required to include in the statement of unclaimed money information in relation to the amount.

2.29 As a result of the amendments made by this Schedule, some minor technical corrections are made to subsection 16(7) and associated note of the S(UMLM) Act which were inserted by the Temporary Residents Act. ***[Schedule 2, items 13 and 14, subsection 16(7)]***

Errors or omissions

2.30 There is currently no obligation for superannuation providers to correct errors in, or omissions from, the information reported to the Commissioner in an unclaimed money statement (eg, unlike the case with member contributions statements provided under section 390 of the TAA 1953).

2.31 Where a superannuation provider is required to give the Commissioner a statement under section 16 of the S(UMLM) Act and the provider becomes aware of a material error in, or omission from, that statement, the provider must now give the Commissioner the corrected or omitted information in the approved form no later than 30 days after becoming aware of the error or omission. ***[Schedule 2, item 15, section 16A]***

2.32 These provisions will provide greater certainty to the Commissioner that superannuation providers have correctly fulfilled their reporting obligations under the S(UMLM) Act.

2.33 The obligations on superannuation providers under section 16A of the S(UMLM) Act will not apply in relation to statements given to the Commissioner under section 16 of that Act, as were in force just before the commencement of this Schedule. ***[Schedule 2, item 68]***

2.34 A superannuation provider's obligations to correct an error or omission remain even if the Commissioner becomes aware of the error or omission, including where the Commissioner takes action as a result of such a discovery (eg, by refunding under section 18A of the S(UMLM) Act an overpayment made by a superannuation provider).

2.35 The Commissioner may, under section 388-55 in Schedule 1 to the TAA 1953, defer the time for the superannuation provider to give the information. If the information is not given when it must be given, the TAA 1953 provides for offences and administrative penalties. The

amendments in this Bill make penalties operate for unclaimed superannuation money consistent with broader taxation administration.

Payment of unclaimed money to the Commissioner

2.36 For the purposes of Part 3 of the S(UMLM) Act a superannuation provider must under subsection 17(1) of that Act pay to the Commissioner the amount worked out under subsection 17(1A) of that Act in relation to each unclaimed money day. The amount that the provider must pay the Commissioner is due and payable at the end of the scheduled statement day for the unclaimed money day. However the requirements of subsection 17(1) of the S(UMLM) Act do not apply to a superannuation provider who is a trustee of a state or territory public sector superannuation scheme as defined in subsection 18(7) of that Act and who gives a statement and makes a payment to a state or territory authority as provided for in section 18 of that Act. Section 18A of the S(UMLM) Act also allows the Commissioner to refund an overpayment by the provider that occurs when making such a payment. ***[Schedule 2, items 16 and 20, subsections 17(1) and 18(2)]***

2.37 The Commissioner may, under section 255-10 in Schedule 1 to the TAA 1953, defer the time at which the amount is due and payable by the superannuation provider. The amount the provider must pay is a tax-related liability for the purposes of the TAA 1953 and as such a general interest charge and administrative penalties are connected with such liabilities. The amendments in this Bill make penalties operate for unclaimed money consistent with broader taxation administration.

2.38 The amount due and payable under subsection 17(1) of the S(UMLM) Act will now be worked out using the formula in subsection 17(1A) of that Act. The formula starts with all unclaimed money as at the end of the unclaimed money day. The formula then subtracts 'former unclaimed money' from the amount due and payable. Former unclaimed money arises from either one of two events that occur between the end of the unclaimed money day and the day on which the superannuation provider gives the statement of unclaimed money to the Commissioner under subsection 16(1). The first of those events is a payment or payments by the superannuation provider to a person who is entitled to the money. The second of those events is unclaimed money that ceases to be unclaimed money (other than because of a payment made by the superannuation provider under subsection 17(1) of the S(UMLM) Act). ***[Schedule 2, item 16, subsection 17(1A)]***

Example 2.6

Continuing from Example 1.1, Lidia's superannuation provider is not required to pay an amount to the Commissioner under subsection 17(1) of the S(UMLM) Act on 1 May 2010 in relation to Lidia, as the unclaimed money in question ceased to be unclaimed money between the end of the unclaimed money day and the day on which the superannuation provider gives the statement of unclaimed money to the Commissioner.

2.39 Subsection 17(1) of the S(UMLM) Act will not require the superannuation provider to pay the Commissioner an amount of unclaimed money that satisfied the conditions outlined in subsection 12(1) of the S(UMLM) Act if the amount relates to a person for whom the Commissioner has given a notice to the provider under section 20C of that Act. This is because such money is payable to the Commissioner under section 20F of the S(UMLM) Act. ***[Schedule 2, item 16, subsection 17(1B)]***

Example 2.7

Nadia was a former temporary resident who last left Australia in 2003. On 31 December 2009 Nadia's superannuation provider considered that the amount payable to Nadia was unclaimed money as it satisfied all the conditions of subsection 12(1) of the S(UMLM) Act. The amount was due and payable on 1 May 2010 under subsection 17(1) of that Act. However on 1 February 2010 the Commissioner gave a notice (former temporary resident notice) to Nadia's superannuation provider under section 20C of the S(UMLM) Act. As a result Nadia's superannuation provider was required to pay an amount to the Commissioner in accordance with section 20F of that Act and no longer required to pay the amount under subsection 17(1) of that Act.

State and territory providers

2.40 At present if the unclaimed money legislation of a state or territory satisfies the requirements of subsections 18(4) and (5) of the S(UMLM) Act the trustee of a state or territory public sector superannuation scheme can report and pay unclaimed money to the relevant state or territory authority rather than provide a statement to, and pay unclaimed money to, the Commissioner. That is, if such a provider complies with the relevant laws in its jurisdiction, it does not have to comply with subsection 16(1) or 17(1) of the S(UMLM) Act.

2.41 In the future a trustee of a state or territory public sector superannuation scheme can continue to report and pay unclaimed money to the relevant state or territory authority in accordance with the existing requirements. It will not be necessary for such a trustee to comply with the new arrangements as provided for by this Schedule in relation to statements and payments to the Commissioner, and the

periods that apply to those statements and payments (sections 16 and 17 of the S(UMLM) Act), if the unclaimed money legislation of a state or territory satisfies the requirements of subsections 18(4) and (5) of the S(UMLM) Act as in force just before the commencement of this Schedule and certain conditions are met. ***[Schedule 2, items 21 and 22, subsections 18(4) and (5)]***

2.42 The first condition is that a trustee of a state or territory public sector superannuation scheme gives the relevant state or territory authority a statement that satisfies the requirements of subsection 18(4) of the S(UMLM) Act in relation to the first half-year that ends on or after the unclaimed money day (to be specified by legislative instrument). The second condition is that such a trustee pays the amount worked out under item 3 of subsection 18(4) of that Act to the relevant state or territory authority. ***[Schedule 2, items 20 and 21, subsections 18(2) and (4)]***

2.43 If a trustee of a state or territory public sector scheme fails to comply with the requirements under section 18 of the S(UMLM) Act with the relevant state or territory authority, the trustee will then have to comply with the new arrangements as provided for by this Schedule in relation to all unclaimed money days for which both a statement was not given and a payment was not made to the state or territory authority.

Payment of unclaimed money from the Commissioner

2.44 A reference to a payment made under subsection 17(1) or 17(2) of the S(UMLM) Act includes a payment made under that respective subsection as in force before the commencement of this Schedule. ***[Schedule 2, item 69]***

2.45 The Commissioner will have to pay unclaimed money in respect of a person if a superannuation provider paid unclaimed money to the Commissioner under subsection 17(1) of the S(UMLM) Act in respect of that person and the Commissioner is satisfied that an amount can be paid in respect of that person under subsection 17(2) of that Act. The Commissioner may either be satisfied on receipt of an application in the approved form or by the Commissioner's own initiative. ***[Schedule 2, item 16, subsection 17(1C)]***

2.46 Money for payments under subsection 17(2) of the S(UMLM) Act is appropriated by section 16 of the TAA 1953. There is no need for the former appropriation provision in the S(UMLM) Act. ***[Schedule 2, item 18]***

2.47 If, during the life of a person, the Commissioner can pay unclaimed money in respect of a person because the conditions in subsection 17(1C) of the S(UMLM) Act are satisfied, then the Commissioner must pay the amount to the person unless the person

directs the Commissioner to pay the amount to a fund that is a complying superannuation plan. In the case of payments to a fund, the Commissioner can only pay to a single fund. ***[Schedule 2, item 16, paragraphs 17(2)(a) and (d)]***

2.48 If, after the death of the person, the Commissioner can pay unclaimed money in respect of a person because the conditions in subsection 17(1C) of the S(UMLM) Act are satisfied and the Commissioner is satisfied that the superannuation provider, had it not paid the amount to the Commissioner as unclaimed money, would have been required to pay a death benefit amount or amounts to one or more death beneficiaries as a result of the person's death then the Commissioner must pay the amount to that beneficiary or beneficiaries. If the Commissioner cannot be so satisfied, then the Commissioner must pay the amount to the person's legal personal representative. ***[Schedule 2, item 16, paragraphs 17(2)(b) and (c) and subsection 17(2AA)]***

Example 2.8

> Andrew provided a binding death nomination to his superannuation provider nominating his wife Thea as a death beneficiary. Unclaimed money in respect of Andrew was paid to the Commissioner by the superannuation provider under subsection 17(1) of the S(UMLM) Act. After Andrew died Thea contacted the Australian Taxation Office to inquire about lost or unclaimed superannuation held for her deceased husband either in a fund or by the Commissioner. The Commissioner was able to be satisfied through documents provided by Thea that Andrew's superannuation provider would have been required to pay Thea a death benefit had it not paid an amount in respect of Andrew to the Commissioner as unclaimed money. As the relevant conditions of paragraph 17(2)(b) of the S(UMLM) Act apply, the Commissioner must make a payment to Thea in accordance with subsection 17(2AA) of that Act.

2.49 A formula is applied to death beneficiary payment cases covered by paragraph 17(2)(b) of the S(UMLM) Act. If there is only one death beneficiary the whole of the unclaimed money is payable to that beneficiary. However where there is more than one death beneficiary the formula acts as a proportioning rule to determine how much of the amount that the Commissioner has available to pay, is payable to each death beneficiary. ***[Schedule 2, item 16, subsection 17(2AA)]***

2.50 As a result of the amendment made by this Schedule, some minor technical corrections are made to subsection 17(2A) of the S(UMLM) Act. Subsection 17(2A) was inserted by the Temporary Residents Act. ***[Schedule 2, item 17, subsection 17(2A)]***

2.51 The S(UMLM) Act will now provide that a superannuation provider is liable to pay a general interest charge on an amount of

unclaimed money that is due and payable under subsection 17(1) of that Act that remains unpaid after it is due and payable. These amendments will make the operation of unclaimed money consistent with broader taxation administration. ***[Schedule 2, item 19, subsection 17A(1)]***

2.52 The S(UMLM) Act will now provide that an offence is committed if a person by their conduct breaches a requirement under subsection 17(1) of that Act. These amendments make the former penalty provision in subsection 17(6) of that Act no longer necessary and so subsection 17(6) is repealed. ***[Schedule 2, items 18 and 19 and subsection 17A(2)]***

2.53 Whilst a reference to a payment made under subsection 17(1) of the S(UMLM) Act includes a payment made before the commencement of this Schedule, section 17A as inserted by this Schedule does not apply to such a payment. ***[Schedule 2, item 69]***

2.54 There is a lower likelihood that an amount will be required to be withheld by the Commissioner under Division 12 in Schedule 1 to the TAA 1953 from a payment made under subsection 17(2) of the S(UMLM) Act (eg, for an excess untaxed roll-over amount) than from a payment made under section 20H (ie, for withholding that applies to departing Australia superannuation payments). However, where tax is withheld from a payment under subsection 17(2) of the S(UMLM) Act, such an amount is still taken to have been paid by the Commissioner despite the fact that provisions that are similar to subsections 20H(5) and (6) of the S(UMLM) Act have not been inserted into section 17 by this Bill.

Refunds, overpayments and returns

2.55 The S(UMLM) Act will now provide for a refund of an overpayment made to the Commissioner by a superannuation provider under Part 3 in a similar manner as provided by section 20K for an overpayment made to the Commissioner by a superannuation provider under Part 3A (ie, payment of unclaimed superannuation of former temporary residents). As a result, subsection 17(3) of the S(UMLM) Act is also repealed. ***[Schedule 2, items 18 and 23, subsection 18A(1)]***

2.56 Similar to the conditions in section 20K of the S(UMLM) Act, where an amount is to be refunded by the Commissioner under section 18A, the Commissioner must pay the relevant amount to the superannuation provider which made the underlying overpayment (or, if that superannuation provider no longer exists, to the provider of a successor fund). ***[Schedule 2, item 23, subsection 18A(2)]***

2.57 Money for payments under subsection 18A(2) of the S(UMLM) Act is appropriated by section 16 of the TAA 1953.

2.58 Whilst a reference to a payment made under subsection 17(1) of the S(UMLM) Act includes a payment made before the commencement of this Schedule, section 18A as inserted by this Schedule does not apply to such a payment. ***[Schedule 2, item 69]***

2.59 The S(UMLM) Act will now allow the Commissioner to recover an overpayment that results from a payment made, or purportedly made, under Part 3 in respect of a person in a similar manner as provided for by section 20L for an overpayment made under Part 3A (ie, payment of unclaimed money of former temporary residents). ***[Schedule 2, item 23, section 18B]***

2.60 Before recovering an overpayment the Commissioner must give the debtor a written notice about the proposed recovery and specify the amount to be recovered. Prescribing the details to be covered by the written notice gives the Commissioner flexibility to alter the notice to allow for changing circumstances. ***[Schedule 2, item 23, paragraph 18B(4)(a)]***

2.61 The notice in section 18B of the S(UMLM) Act is not a 'legislative instrument' within the definition in section 5 of the *Legislative Instruments Act 2003* because it does not have a legislative character which determines or alters the content of the law; it is merely declaratory of the law and causes the law to be applied. ***[Schedule 2, item 23, subsection 18B(8)]***

2.62 Whilst a reference to a payment made under subsection 17(2) of the S(UMLM) Act includes a payment made before the commencement of this Schedule, section 18B as inserted by this Schedule does not apply to such a payment. ***[Schedule 2, item 69]***

2.63 The S(UMLM) Act will now provide that if a superannuation provider cannot credit a payment made by the Commissioner under subsection 17(2) within a certain period to an account for the benefit of the person, then the superannuation provider must return the payment to the Commissioner ***[Schedule 2, item 23, section 18C]***. This is similar to section 20M of the S(UMLM) Act in relation to payments made by the Commissioner under Part 3A (ie, payment of unclaimed money of former temporary residents).

2.64 Whilst a reference to a payment made under subsection 17(2) of the S(UMLM) Act includes a payment made before the commencement of this Schedule, section 18C as inserted by this Schedule does not apply to such a payment. ***[Schedule 2, item 69]***

2.65 The amount the provider must pay is a tax-related liability for the purposes of the TAA 1953 and the Commissioner can deal with the amount in a way that is consistent with broader taxation administration,

including deferring the time that the amount is due and payable and applying a general interest charge and administrative penalties in connection with such liabilities.

Administrative matters

Unclaimed and lost member registers

2.66 A new Part is inserted in the S(UMLM) Act by this Schedule in relation to the register of unclaimed money. ***[Schedule 2, item 23, Part 3AA]***

2.67 The register of unclaimed money will now also contain particulars of amounts paid to the Commissioner under section 20F of the S(UMLM) Act. That is, particulars of unclaimed superannuation of former temporary residents. ***[Schedule 2, item 26, paragraphs 19(1)(c) and (d)]***

2.68 Other minor technical amendments are made to the existing provisions of the S(UMLM) Act. ***[Schedule 2, items 24 and 25, paragraphs 19(1)(a) and (b)]***

2.69 Currently, a superannuation provider who fails to lodge a lost member statement with the Commissioner in accordance with Regulations 5 and 6 of the *Superannuation (Unclaimed and Lost Members) Regulations 1999*, is guilty of an offence under subsection 23(5) of the S(UMLM) Act. However, there are existing offence and administrative penalties under the TAA 1953 for failing to lodge an approved form on time (ie, sections 8C and 8E and Division 286 in Schedule 1). The duplicate offence in the S(UMLM) Act is removed by this Schedule. The TAA 1953 also provides for offences if the statement includes false or misleading statements. ***[Schedule 2, items 33 to 35, subsections 23(1) and (5)]***

Information, access and records

2.70 Subsection 25(1) of the S(UMLM) Act currently only allows a statement provided under section 16 to the Commissioner to include the TFN of the fund and the relevant member. This Schedule amends subsection 25(1) to also allow the TFN of the superannuation provider for the fund to be provided to the Commissioner. ***[Schedule 2, item 36, subsection 25(1)]***

2.71 Subsection 26(2) of the S(UMLM) Act currently provides that the trustee of a regulated exempt public sector superannuation scheme may (in certain circumstances) give a state or territory authority the TFNs of the scheme and the scheme's members in the approved form (ie, as per section 388-50 in Schedule 1 to the TAA 1953). This Schedule will now allow the form to be a form approved by a state or territory authority

rather than an approved form under the TAA 1953. ***[Schedule 2, item 37, subsection 26(2)]***

2.72 Section 32 of the S(UMLM) Act allows the Commissioner to disclose protected information for the purposes of, or in the performance of duties under, that Act. Section 37 is not relevant and is repealed. ***[Schedule 2, items 38 and 39]***

2.73 Notes are inserted in provisions that apply penalties on a person who prevents access to the Commissioner under section 288-35 in Schedule 1 to the TAA 1953, and, on a person who fails to keep and retain proper records under section 288-25 of Schedule 1 and sections 8L, 8M, 8Q, 8R, 8T and 8V of the TAA 1953. ***[Schedule 2, items 40 and 41, subsections 46(4) and 48(5)]***

Taxation administration

2.74 The TAA 1953 is amended so that a superannuation provider is liable to pay a general interest charge on an amount of unclaimed money that is due and payable under subsections 17(1) and 18C(2) of the S(UMLM) Act and remains unpaid after it is due and payable. This amendment will make the operation of unclaimed money consistent with broader taxation administration. ***[Schedule 2, item 64, subsection 8AAB(5) of the TAA 1953]***

2.75 The TAA 1953 is amended so that withholding tax can be worked out under the regulations for excess untaxed roll-over amounts. This amendment will make the operation of unclaimed money consistent with broader taxation administration. ***[Schedule 2, item 65, subsection 15-10(2) in Schedule 1 to the TAA 1953]***

2.76 The TAA 1953 is amended so that an amount that a superannuation provider must pay under section 17 or 18C of the S(UMLM) Act is a tax-related liability for the purposes of administrative penalties and offences that need to be connected with such liabilities. The amendments in this Bill will make the operation of the penalties and offences for unclaimed money consistent with broader taxation administration. ***[Schedule 2, item 66, subsection 250-10(2) in Schedule 1 of the TAA 1953]***

Temporary residents' superannuation consequential amendments

Former temporary resident definition

2.77 A new definition of 'former temporary resident' is inserted by this Schedule into the S(UMLM) Act. This definition will be used in other provisions in that Act and in the *Superannuation Guarantee (Administration) Act 1992* (SGAA 1992).

2.78 A 'former temporary resident' is a person in relation to whom the Commissioner would give a superannuation provider a notice under section 20C of the S(UMLM) Act if the Commissioner was also satisfied that the person has a superannuation interest in the fund. The simplified outline is also amended. ***[Schedule 2, items 27 to 29, sections 20A and 20AA and paragraphs 20C(1)(b) to (d)]***

2.79 The regulations may prescribe a visa for the purposes of subparagraph 20AA(1)(a)(i) of the definition. Prescribing exclusions to the definition of a former temporary resident allows flexibility, for example, to respond to changing circumstances (ie, if a new temporary visa class is created) and to cater appropriately for any specific visa classes. ***[Schedule 2, items 28 and 70, subsection 20AA(2)]***

2.80 The notice in section 20C of the S(UMLM) Act is not a 'legislative instrument' within the definition of section 5 of the *Legislative Instruments Act 2003* because it does not have a legislative character which determines or alters the content of the law; it is merely declaratory of the law and causes the law to be applied.

2.81 Minor technical amendments are made to the existing provisions of the S(UMLM) Act. ***[Schedule 2, items 30 to 32, paragraphs 20L(1)(a) and (b) and subparagraph 20E(1)(b)(iii)]***

Small superannuation amounts

2.82 The amendments will provide that where an individual satisfies the Commissioner that they are not a permanent resident or Australian citizen or New Zealand citizen and that they held a temporary visa that has ceased to be in effect and have left Australia, the individual may apply, under the *Small Superannuation Accounts Act 1995* (SSAA 1995), for a payment from the Superannuation Holding Account Special Account. ***[Schedule 2, items 53 to 57, sections 4, 14, 62 and 67A of the SSAA 1995]***

2.83 It was necessary to update the SSAA 1995 in this way as a result of the payment of temporary residents' unclaimed superannuation to the Australian Government. This condition is also consistent with the condition which applies to an individual applying for a departing Australia superannuation payment from a superannuation provider.

Superannuation guarantee shortfall amounts

2.84 If an employee was a former temporary resident and the Commissioner has received a superannuation guarantee shortfall component in respect of that person the Commissioner will no longer pay the amount to a superannuation provider of the person or to the person or to the person's legal personal representative, but rather will now treat the

amount as if it had been received from a superannuation provider under section 20F of the S(UMLM) Act. ***[Schedule 2, items 60 to 63, sections 65, 65AA, 65A, 66 and 67 of the SGAA 1992]***

2.85 It was necessary to update the SGAA 1992 in this way as a result of the payment of temporary residents' unclaimed superannuation to the Australian Government. This will prevent unnecessary transfers of amounts by the Commissioner to superannuation providers where the amount will most likely have to be paid back to the Commissioner under section 20F of the S(UMLM) Act.

Government superannuation co-contribution payments

2.86 Currently a Government superannuation co-contribution is not payable to a person who holds at any time during an income year an eligible temporary resident visa. The definition of 'eligible temporary resident visa' is being replaced as a result of the payment of temporary residents' unclaimed superannuation to the Australian Government. As a result amendments are necessary to the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* (Co-contribution Act).

2.87 A person will no longer be eligible for a Government superannuation co-contribution under the Co-contribution Act if they hold a temporary visa (under the *Migration Act 1958*) at any time during the income year unless at all times when they hold such a visa they are either a New Zealand citizen or the holder of a visa prescribed for the purposes of subsection 20AA(2) of the S(UMLM) Act. ***[Schedule 2, items 58 and 59, sections 6 and 56 of the Co-contribution Act]***

2.88 The amendments to section 6 of the Co-contribution Act made by this Schedule only apply in relation to the 2009-10 and later income years. ***[Schedule 2, item 71]***

Financial transaction reports

2.89 Under the *Financial Transaction Reports Act 1988* if a cash dealer does not have certain information about an account, the account is blocked and withdrawals from such an account can give rise to an offence under that Act. However, this does not apply to certain withdrawals made in accordance with the S(UMLM) Act. This Bill replaces references to sections 17 and 18 of the S(UMLM) Act as a result of the payment of temporary residents' unclaimed superannuation to the Australian Government. ***[Schedule 2, item 42, paragraph 18(4B)(ca) of the Financial Transaction Reports Act 1988]***

Income tax amendments

2.90 Schedule 2 amends the ITAA 1997 to address previous inefficiencies in the taxation treatment of payments of unclaimed money made by the Commissioner.

2.91 A lack of certainty previously existed as to whether a payment made by the Commissioner under subsection 17(2) of the S(UMLM) Act was an 'unclaimed money payment' and a 'superannuation benefit' as described in subsection 307-5(1) of the ITAA 1997. Previous wording of subsection 307-5(1) could be interpreted as only referring to payments made under subsection 17(1) of the S(UMLM) Act from a superannuation provider to the Commissioner. In order to remove any doubt in this regard, the reference in subsection 307-5(1) of the ITAA 1997 to section 17 of the S(UMLM) Act has been removed and replaced with a reference to subsection 17(1) or 17(2) of that Act. ***[Schedule 2, items 46 and 47, subsection 307-5(1) of the ITAA 1997]***

Components of unclaimed money payments made by the Commissioner

2.92 Section 307-120 of the ITAA 1997 provides that section 307-142 of the ITAA 1997 calculates the tax free and taxable components of a payment made by the Commissioner under section 20H of the S(UMLM) Act. Section 307-120 of the ITAA 1997 is now amended to advise that section 307-142 of the ITAA 1997 also deals with payments made by the Commissioner under subsection 17(2) of the S(UMLM) Act. ***[Schedule 2, item 48, paragraph 307-120(2)(e) of the ITAA 1997]***

2.93 Section 307-142 of the ITAA 1997 is amended to accommodate payments by the Commissioner under subsection 17(2) of the S(UMLM) Act, and to better address those payments made to the Commissioner under subsection 17(1) of the S(UMLM) Act before 1 July 2007 (when most superannuation payments were dealt with under the *Income Tax Assessment Act 1936* (ITAA 1936)).

2.94 The amount of the tax free component of a superannuation benefit paid by the Commissioner under subsection 17(2) or section 20H of the S(UMLM) Act is calculated by determining:

- the amount (the 'unclaimed amount') or amounts to which the superannuation benefit being paid by the Commissioner is attributable;
- an amount (the 'claimed equivalent') which represents an amount notionally paid to the person, based on an assumption that the unclaimed amount (or amounts) was (or were) paid to the person instead of being paid to the Commissioner; and
- the tax free component of that claimed equivalent.

2.95 The tax free component of the superannuation benefit paid under either subsection 17(2) or section 20H of the S(UMLM) Act is equal to the tax free component of the claimed equivalent. ***[Schedule 2, item 49, subsection 307-142(2) of the ITAA 1997]***

2.96 The determination of the claimed equivalent and tax free components are dependant upon whether the underlying payment was made by the superannuation provider to the Commissioner under subsection 17(1) or subsection 20F(1) of the S(UMLM) Act, and if made under subsection 17(1), when that payment was made. ***[Schedule 2, item 49, column 1 in the table in subsection 307-142(3) of the ITAA 1997]***

2.97 Where the Commissioner pays a superannuation benefit which is attributable to an unclaimed amount paid on or after 1 July 2007 by a superannuation provider to the Commissioner under subsection 17(1) of the S(UMLM) Act, the tax free component of that superannuation benefit is equal to the tax free component of the claimed equivalent. ***[Schedule 2, item 49, item 1 in the table in subsection 307-142(3) of the ITAA 1997]***

Example 2.9

On 6 August 2007, Jenny's superannuation provider paid $5,000 to the Commissioner under subsection 17(1) of the S(UMLM) Act in respect of Jenny. Had the payment been made as a superannuation benefit to Jenny instead, it would have comprised a tax free component of $1,500 and an element taxed in the fund of the taxable component of $3,500. If the Commissioner were to make a payment under subsection 17(2) (or section 20H if applicable) which was attributable to the $5,000 amount, the tax free component of the payment would be $1,500, being equal to the tax free component of the claimed equivalent.

2.98 Where the Commissioner pays a superannuation benefit which is attributable to an unclaimed amount paid before 1 July 2007 by a superannuation provider to the Commissioner under subsection 17(1) of the S(UMLM) Act, the tax free component of that superannuation benefit is equal to the total of the components, as referred to in subsection 307-225(2) of the ITAA 1997, that form part (or all) of the claimed equivalent. ***[Schedule 2, item 49, item 2 in the table in subsection 307-142(3) of the ITAA 1997]***

Example 2.10

On 15 June 2007, Daniel's superannuation provider paid $10,000 to the Commissioner under subsection 17(1) of the S(UMLM) Act in respect of Daniel. Had the payment been made as an eligible termination payment to Daniel instead, it would have comprised undeducted contributions of $1,000, a pre-July 1983 component of $2,000 and a post-June 1983 component (taxed element) of $7,000. The tax free component of this claimed equivalent is $3,000, being the

total of the components referred to in subsection 307-225(2) of the ITAA 1997. If the Commissioner were to make a payment under subsection 17(2) (or section 20H if applicable) which was attributable to that $10,000 amount, the tax free amount of the payment would be $3,000, being equal to the tax free component of the claimed equivalent.

2.99 Where the Commissioner pays a superannuation benefit which is attributable to an unclaimed amount paid by a superannuation provider to the Commissioner under subsection 20F(1) of the S(UMLM) Act (other than an amount referred to in section 65AA of the SGAA 1992), the tax free component of that superannuation benefit is equal to the tax free component of the claimed equivalent. ***[Schedule 2, item 49, item 3 in the table in subsection 307-142(3) of the ITAA 1997]***

2.100 The amount referred to in section 65AA of the SGAA 1992, which represents a shortfall component received by the Commissioner in relation to a former temporary resident, is excluded from the above calculation as the shortfall component should not contain a tax free component. The taxation treatment of shortfall components which relate to former temporary residents is discussed further in paragraph 2.108 of this chapter.

2.101 The taxable component of the superannuation benefit paid by the Commissioner under either subsection 17(2) or section 20H of the S(UMLM) Act is so much (if any) of the superannuation benefit that is not a tax free component. This includes, but is not limited to, a payment attributable to a shortfall component relating to a former temporary resident (as discussed above), as well as interest paid by the Commissioner under subsection 20H(2A) of the S(UMLM) Act. ***[Schedule 2, item 49, subsection 307-142(4)]***

Elements of the taxable component of unclaimed money payments made by the Commissioner

2.102 The amount of the element taxed in the fund of the taxable component of a superannuation benefit paid by the Commissioner under subsection 17(2) or section 20H of the S(UMLM) Act is calculated by determining:

- the amount (the 'unclaimed amount') or amounts to which the taxable component of the superannuation benefit being paid by the Commissioner is attributable;
- an amount (the 'claimed equivalent') which represents the taxable component of an amount notionally paid to the person, based on an assumption that the unclaimed amount

(or amounts) was (or were) paid to the person instead of being paid to the Commissioner; and

- the element taxed in the fund of the taxable component of the claimed equivalent.

2.103 The element taxed in the fund of the taxable component of the superannuation benefit paid under either subsection 17(2) or section 20H of the S(UMLM) Act is equal to the element taxed in the fund of the taxable component of the claimed equivalent. ***[Schedule 2, item 51, subsection 307-300(2) of the ITAA 1997]***

2.104 Similar to calculating the tax free component of the superannuation benefit, the determination of the element taxed in the fund of the taxable component is dependant upon whether the underlying payment was made by the superannuation provider to the Commissioner under subsection 17(1) or section 20F(1) of the S(UMLM) Act, and if made under subsection 17(1), when that payment was made. ***[Schedule 2, item 51, column 1 in the table in subsection 307-300(3) of the ITAA 1997]***

2.105 Where the Commissioner pays a superannuation benefit which is attributable to an unclaimed amount paid on or after 1 July 2007 by a superannuation provider to the Commissioner under subsection 17(1) of the S(UMLM) Act, the element taxed in the fund of the taxable component of that superannuation benefit is equal to the amount of the element taxed in the fund of the taxable component of the claimed equivalent. ***[Schedule 2, item 51, item 1 in the table in subsection 307-300(3) of the ITAA 1997]***

Example 2.11

Using the facts from Example 2.5, if the Commissioner were to make a payment under subsection 17(2) (or section 20H if applicable) which was attributable to the amount in question, the element taxed in the fund of the taxable component of the superannuation benefit would be $3,500, being equal to the element taxed in the fund of the taxable component of the claimed equivalent.

2.106 Where the Commissioner pays a superannuation benefit which is attributable to an unclaimed amount paid before 1 July 2007 by a superannuation provider to the Commissioner under subsection 17(1) of the S(UMLM) Act, the element taxed in the fund of the taxable component of that superannuation benefit is equal to the taxed element of the post-June 1983 component of the eligible termination payment (within the meaning of subsection 27A(1) of the ITAA 1936 as in force just before 1 July 2007) that forms part or all of the claimed equivalent. ***[Schedule 2, item 51, item 2 in the table in subsection 307-300(3) of the ITAA 1997]***

Example 2.12

> Using the facts from Example 2.6, if the Commissioner were to make a payment under subsection 17(2) (or section 20H if applicable) which was attributable to the amount in question, the element taxed in the fund of the taxable component of the superannuation benefit would be $7,000, being the taxed element of the 'post-June 1983 component' of the eligible termination payment and therefore also being the element taxed in the fund of the taxable component of the claimed equivalent.

2.107 Where the Commissioner pays a superannuation benefit which is attributable to an unclaimed amount paid by a superannuation provider to the Commissioner under subsection 20F(1) of the S(UMLM) Act (other than an amount referred to in section 65AA of the SGAA 1992), the element taxed in the fund of the taxable component of that superannuation benefit is equal to the amount of the element taxed in the fund of the taxable component of the claimed equivalent. ***[Schedule 2, item 51, item 3 in the table in subsection 307-300(3) of the ITAA 1997]***

2.108 Continuing on from the discussion in paragraph 2.100 of this chapter, the amount which represents a shortfall component received by the Commissioner in relation to a former temporary resident is excluded from the above calculation as that shortfall component should not contain an element taxed in the fund of a taxable component. The amount of the superannuation benefit paid by the Commissioner which is attributable to a shortfall amount referred to in section 65AA of the SGAA 1992 should be comprised of an element untaxed in the fund of a taxable component. This reflects its nature as not having been subject to taxation, having never been included in the assessable income of a superannuation provider.

2.109 The element untaxed in the fund of a taxable component of the superannuation benefit paid by the Commissioner under either subsection 17(2) or section 20H of the S(UMLM) Act is so much (if any) of the taxable component that is not the element taxed in the fund. This includes, but is not limited to, a payment attributable to a shortfall component relating to a former temporary resident (as discussed above), as well as interest paid by the Commissioner under subsection 20H(2A) of the S(UMLM) Act (which reflects the nature of interest as having never been taxed). ***[Schedule 2, item 51, subsection 307-300(4)]***

2.110 Subdivision 301-C of the ITAA 1997 deals with the taxation of elements untaxed in the fund of taxable components of superannuation benefits, but only in relation to superannuation benefits paid by superannuation plans. Amendments will be made to Subdivision 301-C of the ITAA 1997 to treat a superannuation lump sum paid by the Commissioner under either subsection 17(2) or section 20H of the S(UMLM) Act as if it were paid from a superannuation plan, thereby

ensuring the correct taxation treatment of such payments. ***[Schedule 2, item 43, section 301-125 of the ITAA 1997]***

Untaxed plan cap amount

2.111 An amendment is made to section 306-15 of the ITAA 1997 to clarify that an untaxed plan cap amount as referred to in that section relates to the superannuation plan making the payment, rather than to the superannuation plan receiving the roll-over amount. ***[Schedule 2, item 44, paragraph 306-15(1)(d) of the ITAA 1997]***

2.112 A note is also added to section 306-15 of the ITAA 1997, advising that an untaxed plan cap amount in relation to an unclaimed money payment made by the Commissioner is calculated under subsection 307-350(2B) of the ITAA 1997. ***[Schedule 2, item 45, subsection 306-15(1) of the ITAA 1997]***

2.113 Section 307-350 of the ITAA 1997 is amended to ensure that a person only has one untaxed plan cap amount in relation to amounts paid from the Commissioner under the S(UMLM) Act, regardless of whether more than one amount was received by the Commissioner from superannuation providers in relation to the person. ***[Schedule 2, item 52, subsection 307-350(2B) of the ITAA 1997]***

2.114 Currently under section 307-350 of the ITAA 1997 the 'untaxed plan cap amount' is adjusted to take into account any superannuation member benefit that is received from a superannuation plan which includes an element untaxed in the fund. However, because an unclaimed money payment from the Commissioner in respect of a person under the S(UMLM) Act is not from a superannuation plan, the untaxed plan cap amount for the person has not been subject to variation by payments made by the Commissioner. The amendments in this Bill correct that situation and treat an unclaimed money payment from the Commissioner as if it were a payment from a superannuation plan for the purposes of excess untaxed roll-over taxation. ***[Schedule 2, item 52, subsection 307-350(2B) of the ITAA 1997]***

Disability superannuation benefits

2.115 These provisions also clarify that section 307-145 of the ITAA 1997, relating to disability superannuation benefits, does not apply to an unclaimed money payment. ***[Schedule 2, item 50, subsection 307-145(1) of the ITAA 1997]***

Application and transitional provisions

2.116 Despite the amendments to sections 16, 17 and 18 of the S(UMLM) Act being made by this Schedule those sections, as in force just before the commencement of this Schedule, continue to apply in relation to half-years ending before 1 July 2009. In addition, an unclaimed money day specified by the Commissioner under paragraph 15A(a) of the S(UMLM) Act will have to be a day that occurs on or after 1 July 2009. ***[Schedule 2, item 67]***

2.117 The obligations on superannuation providers under section 16A of the S(UMLM) Act being made by this Schedule will not apply in relation to statements given to the Commissioner under section 16 of the S(UMLM) Act as in force just before the commencement of this Schedule. ***[Schedule 2, item 68]***

2.118 Whilst a reference to a payment made under subsection 17(1) or 17(2) of the S(UMLM) Act includes a payment made before the commencement of this Schedule, sections 17A, 18A, 18B and 18C as inserted by this Schedule do not apply to such payments. ***[Schedule 2, item 69]***

2.119 Savings provisions have been inserted to ensure that where regulations have been made for the purposes of subparagraph 20C(1)(b)(i) and paragraph 20L(4)(a) of the S(UMLM) Act before the commencement of this Schedule, that they have effect as if they had been made for the purposes of subsection 20AA(2) and paragraph 18B(4)(a) of the S(UMLM) Act respectively. These regulations deal with prescribed visa class exemptions from the definition of a 'former temporary resident' and written notices from the Commissioner to debtors respectively. ***[Schedule 2, item 70]***

2.120 The amendments to the Co-contribution Act made by this Schedule only apply in relation to the 2009-10 and later income years. ***[Schedule 2, item 71]***

Chapter 3
Key concepts

Outline of chapter

3.1 Part 1 of Schedule 3 to this Bill amends the *Income Tax Assessment Act 1936* (ITAA 1936), *Income Tax Assessment Act 1997 (*ITAA 1997) and Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) to provide the key concepts and definitions that will apply as part of three means testing reforms announced in the 2008-09 Budget.

3.2 In particular, this Part defines:

- ‘adjusted fringe benefits’;
- ‘reportable superannuation contributions’;
- ‘reportable employer superannuation contributions’ (RESC); and
- ‘total net investment loss’, which draws on a new definition of ‘financial investment’ to be inserted in the ITAA 1997.

3.3 There are also definitions of ‘rebate income’ and ‘income for surcharge purposes’ which consolidate the components of income to be assessed in determining an individual’s eligibility for particular offsets, and obligations to pay the Medicare levy surcharge.

Context of amendments

3.4 The 2008-09 Budget announced three measures to expand income definitions used for means-tested tax and transfer system programs. These measures enhance the fairness and integrity of the tax and transfer systems by removing inconsistencies in the treatment of non-wage remuneration and ensure better account is taken of certain losses.

3.5 One measure, *Means testing of government support — expanded definitions of income to include certain ‘salary sacrificed’ contributions to superannuation* will mean that particular ‘salary sacrificed’ superannuation contributions are assessed as income. As a result, those

individuals that reduce their assessable income by electing to have salary contributed to superannuation will be treated on an equivalent basis to those who cannot access salary sacrifice.

3.6 Another measure, *Means testing of government support — expanded definitions of income to include net losses from investments*' , expands relevant income definitions to include net losses from 'financial investments', and net losses from rental property where appropriate.

3.7 Net rental property losses are currently added to income for a number of transfer programs including Family Tax Benefit, Child Care Benefit, and child support. This measure extends the government assistance programs that income test net rental property losses and also adds net financial investment losses to income for those programs where such losses are not included.

3.8 As a result, this measure ensures better account is taken of losses and removes inconsistencies in their treatment for income test purposes.

3.9 The third means testing reform announced in the 2008-09 Budget, *Means testing of government support — expanded definitions of income to include reportable fringe benefits* was to extend income definitions for particular tax offsets to include reportable fringe benefits. However, on 19 June 2008, as part of a decision to retain the inclusion of *adjusted* fringe benefits in the income test for family assistance programs, the Government announced that the Budget measure would be varied so that *adjusted* fringe benefits were added to income.

3.10 *Adjusted* fringe benefits are the 'grossed-down' amount of reportable fringe benefits paid to an employee. Under current arrangements, reportable fringe benefit amounts are 'grossed-down' by multiplying the reportable fringe benefits amount by 53.5 per cent.

3.11 Most transfer programs that assess fringe benefits as income assess the *adjusted* value of fringe benefits. However, tax programs that currently assess fringe benefits rely on the reportable fringe benefits amount. This is the 'grossed-up' amount of fringe benefits which is designed to capture what an individual would have been required to pay before tax to acquire the benefit. The effect of the 'adjustment' process means the 'cash value' of the fringe benefit is assessed as income.

3.12 The 2008-09 Budget means test reforms extend to most Australian Government tax and transfer programs that are income tested. Among the programs to be affected are those that currently assess taxable income only and programs that use adjusted taxable income.

3.13 Under the current law, the definition of income used to assess an individual's liability to pay the Medicare levy surcharge is derived from three pieces of legislation: the *Medicare Levy Act 1986* (MLA 1986); the *A New Tax System (Medicare levy surcharge – Fringe Benefits) Act 1999* (ANTS (MLS) Act 1999); and Part VIIB of the ITAA 1936.

3.14 This is because the MLA 1986 applies the Medicare levy surcharge against an individual's taxable income (as modified by the MLA 1986) and the ANTS (MLS) Act 1999 applies the Medicare levy surcharge against an individual's reportable fringe benefits total for the year (where applicable).

3.15 The ANTS (MLS) Act 1999 replicates the income test that is used in the MLA 1986 to determine an individual's Medicare levy surcharge liability. This adds to legislative size and complexity.

Summary of new law

3.16 Part 1 of Schedule 3 inserts a number of new definitions into the ITAA 1997 and the TAA 1953. For example, a new definition of 'reportable superannuation contributions' is inserted into the ITAA 1997 which captures the particular 'salary sacrificed' superannuation contributions to be added to income as a result of means testing reforms announced in the 2008-09 Budget.

3.17 A component of 'reportable superannuation contributions' is employer contributions to superannuation that the employee has influenced to be made in such a way that their assessable income is reduced. These contributions, to be known as 'reportable employer superannuation contributions', are to be defined in Schedule 1 of the TAA 1953.

3.18 The amendments also insert a new definition of an individual's 'total net investment loss' into the ITAA 1997. This definition captures net losses from 'financial investments', and net rental property losses. The amendments insert a new definition of 'financial investment' into the ITAA 1997 for the purposes of this definition.

3.19 A taxpayer's 'adjusted fringe benefits total', which are to be assessed as income for particular tax offsets as a result of the reforms, are to be defined in the ITAA 1936.

3.20 Also, the amendments insert two new definitions of 'rebate income' and 'income for Medicare levy surcharge purposes' into the

ITAA 1936 and the ITAA 1997 for legislative simplicity in response to the income test reforms announced in the 2008-09 Budget.

3.21 These definitions will be used to determine eligibility for particular means-tested tax offsets and obligations to pay the Medicare levy surcharge.

Detailed explanation of new law

Key concepts and definitions

Adjusted fringe benefits total

3.22 Part 1 of Schedule 3 amends the ITAA 1936 to insert a definition of 'adjusted fringe benefits total' into subsection 6(1), which is the definitions section of the ITAA 1936. ***[Schedule 3, Part 1, item 1]***

3.23 The amendments also repeal the current definition of 'reportable fringe benefits total' from subsection 6(1) of the ITAA 1936 and insert a definition that cross-references the *Fringe Benefits Assessment Act 1986*.

3.24 The new 'adjusted fringe benefits total' definition is consistent with the definition of that concept in other legislation such as clause 4 of Schedule 3 to the *A New Tax System (Family Assistance) Act 1999* and subpoint 1067G-F11(2) of the *Social Security Act 1991* (SS Act 1991). The effect of the definition, having regard to the current rate of fringe benefits tax, is that an individual's 'adjusted fringe benefits total' will be their reportable fringe benefits for the income year multiplied by 53.5 per cent.

3.25 An individual's 'adjusted fringe benefits total' will be assessed in determining eligibility for the senior Australians tax offset and the pensioner tax offset as a consequence of the income definition for these programs being amended to 'rebate income' (explored below).

3.26 The beneficiary, and beneficiary's spouse's adjusted fringe benefits total (where appropriate), will also become relevant in determining a trustee's eligibility for the offset in section 160AAAB of the ITAA 1936.

Rebate income

3.27 Part 1 of Schedule 3 to this Bill also inserts a definition of 'rebate income' into the ITAA 1936. ***[Schedule 3, Part 1, item 2]***

3.28 This 'rebate income' definition will be applied in determining an individual's eligibility for the senior Australians tax offset, the pensioner tax offset and a trustee's eligibility for an offset under section 160AAAB of the ITAA 1936. 'Rebate income' is inserted to consolidate the components of income that are to be assessed for these offsets.

3.29 This is because, as a result of the 2008-09 Budget reforms, the income tests for these offsets will expand to assess an individual's (and their spouse's where appropriate): taxable income; 'adjusted fringe benefits total'; 'total net investment loss'; and 'reportable superannuation contributions' for the year of income. Including a new definition of 'rebate income' that incorporates these income components reduces the need for unnecessary amendments.

3.30 The label 'rebate income' is used, even though the benefits to which it applies are more commonly known as 'offsets', because the ITAA 1936 refers to the benefits as 'rebates' so the references to 'rebate income' was preferred for consistency.

Income for Medicare levy surcharge purposes

3.31 The amendments also amend the ITAA 1997 to insert a new definition of 'income for surcharge purposes'. This definition will be used to determine an individual's liability to pay the Medicare levy surcharge. ***[Schedule 3, Part 1, item 7]***

3.32 The new definition consolidates the current components of income assessed in determining an individual's Medicare levy surcharge liability and the new components which are to be assessed as a result of the Budget measures, so that there is less complexity in the law and reduced duplication.

Reportable superannuation contributions

3.33 Another definition to be inserted by Part 1 of Schedule 3 is 'reportable superannuation contributions'. This is the definition for the certain 'salary sacrificed' superannuation contributions that were announced as being for inclusion in income tests in the 2008-09 Budget.

3.34 'Reportable superannuation contributions' will be added to income for a range of programs across the tax and transfer systems. 'Reportable superannuation contributions' include the total of an individual's deductions under Subdivision 290-C of the ITAA 1997 and an individual's 'reportable employer superannuation contributions'.

3.35 The total personal contributions that are to be assessed are all contributions that are, or will be, deductible under Subdivision 290-C of

the ITAA 1997. Under income test arrangements for income support payments paid under the SS Act 1991, these contributions are currently assessed as income.

Reportable employer superannuation contributions

3.36 A definition of RESC is inserted in Schedule 1 of the TAA 1953. The location for this provision is in the payment summary provisions which are relevant for RESC as, from 1 July 2009, employers will be required to report RESC on annual and part-year payment summaries. ***[Schedule 3, Part 1, item 11]***

3.37 RESC are also defined in section 995-1 of the ITAA 1997 and subsection 6(1) of the ITAA 1936, which are the definitions sections for those Acts. The definition in section 995-1 of the ITAA 1997 cross-references the RESC definition in Schedule 1 of the TAA 1953. ***[Schedule 3, Part 1, items 4 and 8]***

3.38 RESC are contributions to a superannuation fund or retirement savings account, made on behalf of an individual during an income year, by their employer or an associate of their employer. 'Employer' is defined in new subsection 16-182(3) of Schedule 1 to the TAA 1953 to have the expanded meaning of that term in section 12 of the *Superannuation Guarantee (Administration) Act 1992.*

Associate of the employer

3.39 'Associate' is defined in section 318 of the ITAA 1936. In respect of an employer company, the definition would include the trustee of any trust of which the employer was a beneficiary, or of which their 'associate' were a beneficiary, and a subsidiary of the employer company.

3.40 One of the tests for whether contributions being made by a second entity, on behalf of an individual employed by the first entity, are RESC will be whether the first entity *sufficiently influenced*, or was *sufficiently influenced* by, the second entity (whether individually or in concert with another entity).

3.41 An entity is *sufficiently influenced* by a second entity, or other entities, if the entity is accustomed, under an obligation (whether formal or informal) or might reasonably be expected to act in accordance with directions, instructions or wishes of the second entity or other entities.

3.42 Relevant considerations in determining whether an entity is *sufficiently influenced* by a second entity will be the history of relations between the entities, including evidence of non-arms' length dealings.

3.43 Evidence that the directors or senior personnel of the different entities are the same, or associates, for the purposes of subsection 318(1) of the ITAA 1936 will be strong evidence that two entities are associates. It is also relevant if the directors of a second entity are former directors of the first entity.

Capacity to influence — size of the amount

3.44 The fact superannuation contributions have been made on behalf of an individual does not mean they are RESC. Only those contributions made on behalf of an individual in circumstances where the individual had some capacity, or might reasonably be expected to have some capacity, to influence the size of the contribution or the way in which the contribution was made are RESC.

3.45 There are two amounts of superannuation contribution made on behalf of an individual that may be RESC. The first is any amount made where the individual has, or has had, or might reasonably be expected to have or have had, capacity to influence the size of the amount. The other example of RESC is any amount that an individual has, or has had, or might reasonably be expected to have or have had made in such a way so that his or her assessable income is reduced.

3.46 A key example of the first category of RESC are amounts that an individual has elected to have contributed to superannuation as part of a 'salary sacrifice arrangement'. These are arrangements between an employer and their employee to have prescribed amounts, or a prescribed percentage, of their salary contributed to superannuation.

3.47 In these circumstances, the amount of contribution in excess of the amount required to be made under superannuation guarantee law would be RESC.

Example 3.13

> Lisa is an employee of FJH Pty Ltd (FJH). FJH contributes 9 per cent of Lisa's total remuneration (including her reportable fringe benefits total) to superannuation under an industrial agreement that was negotiated between FJH and the union representative. Lisa was not involved in these negotiations and had no involvement in the preparation of the agreement, aside from voting on it. As such, Lisa would have no capacity to influence this amount of contribution. However, under the agreement, employees may elect to have an amount of salary paid to superannuation. This is in addition to the 9 per cent contribution required under the agreement. During the year, Lisa approached FJH to have $5,000 contributed to her superannuation fund as part of an effective 'salary sacrifice' agreement. This $5,000 contribution is RESC.

3.48 A further example where RESC would exist is where contributions above the amount required under superannuation guarantee law are made pursuant to the terms of a common law employment contract or as a result of some agreement between an employee and their employer for increased superannuation contributions to be made on behalf of an employee as part of a remuneration package.

Example 3.14

Wei is an employee of TKU Pty Ltd (TKU). During negotiations of Wei's common law employment contract, TKU offered Wei increased contributions to superannuation as part of a range of employment-related benefits. These contributions, which equate to $10,000 of Wei's total remuneration, were provided as part of a remuneration package that Wei was allowed to consider and discuss with TKU. TKU made it clear to Wei that he could negotiate the contents of the additional incentives and that other benefits may be provided. These dealings are evidence to suggest Wei might reasonably have been expected to have had capacity to influence the amount of contributions being made on his behalf. The $10,000 contribution is in addition to contributions being made by TKU under superannuation guarantee law. TKU would be expected to record the $10,000 superannuation contribution as RESC.

3.49 Importantly, the definition of RESC does not capture that part of a contribution made by an employer that meets the employer's requirements under federal, state or territory legislation. That is, an amount of contributions equating to what an employer would have been required to make on behalf of an employee under the *Superannuation Guarantee (Administration) Act 1992* would never be RESC.

3.50 This is because, to the extent an employer contribution meets the employer's requirements under law, or some other obligation, the employee cannot have, have had, or reasonably be expected to have or have had, capacity to influence the size of the contribution.

Example 3.15

Owen is an employee of KZP Pty Ltd (KZP). KZP pays 9 per cent of Owen's ordinary time earnings to superannuation in accordance with the *Superannuation Guarantee (Administration) Act 1992*. This amount is the minimum amount required to be contributed by KZP on Owen's behalf so Owen would not have, and could not reasonably be expected to have, capacity to influence this amount. Because Owen has not influenced further superannuation contributions to be made on his behalf by KZP or influenced any contributions to be made in such a way that his assessable income is reduced, Owen has no RESC for the income year.

3.51 It is not necessary for contributions to be compelled by law for them to fall outside the definition of RESC. To the extent that an employer makes contributions above those mandated by law for administrative or other considerations, over which the employee has no, and could not reasonably be expected to have, capacity to influence, then those contributions will not be RESC.

Example 3.16

> Aparna is an employee of GKU Pty Ltd (GKU). Aparna's ordinary time earnings are $100,000 but Aparna has earned $1,000 in overtime during the income year. GKU's payroll system calculates superannuation contributions on Aparna's total income of $101,000. However, GKU is only compelled, under superannuation guarantee law, to make superannuation contributions on $100,000. GKU's payroll system does not allow for superannuation contributions to be made on an employee's ordinary time earnings alone. Because Aparna has not influenced further contributions to be made on her behalf or influenced contributions to be made in such a way that her assessable income is reduced, Aparna has no RESC for the income year.

3.52 There is also the circumstance where an employer makes superannuation contributions on behalf of an employee under the terms of an industrial agreement. Provided this agreement has been made at arms' length with the employee and that employee has no capacity to influence, and could not reasonably be expected to have capacity to influence, the terms of the agreement, then the amount would not be RESC. This includes if an employer is paying more than the amount required under the agreement for administrative reasons and the employee could not reasonably be expected to have capacity to influence the amount of contributions being made on their behalf.

Example 3.17

> Costa is an employee of PQZ Pty Ltd (PQZ). Costa's employment conditions are governed by an industrial agreement that was negotiated between Costa's employer and the union representative. Costa was not involved in the negotiations and had no involvement in the preparation of the agreement, aside from voting on it. The terms of the agreement require PQZ to contribute 15 per cent of Costa's ordinary time earnings to superannuation. However, PQZ's payroll system pays 15 per cent of Costa's total remuneration (including overtime). PQZ's payroll system does not allow for superannuation contributions to be made on an employee's ordinary time earnings alone. Because Costa has not influenced further contributions to be made on his behalf or influenced contributions to be made in such a way that his assessable income is reduced, Costa has no RESC for the income year.

3.53 However, for a contribution to be excluded from the RESC definition when made pursuant to the terms of an industrial agreement, it must be demonstrated that the employee had no capacity to influence the terms of the agreement and could not reasonably be expected to have capacity to influence those terms.

3.54 If an employee is related to their employer in the sense that they are an associate of the employer for the purposes of section 318 of the ITAA 1936, or an 'attributable stakeholder' of their employer company or trust for the purposes of the SS Act 1991, then there is a rebuttable presumption that the employee had capacity to influence the amount of contributions being made on their behalf to the extent that those contributions exceed the amount is required by law.

3.55 In these circumstances, the burden of proving that an employee had no capacity to influence falls on the employer. Relevant considerations in demonstrating whether an employee had capacity to influence will be the relationship of the employee to their employer, the involvement of the employee in the negotiations concerning the terms of any industrial agreement governing the employee's work conditions, and the size of the amount contributed on the employee's behalf relative to what amount would be required by superannuation guarantee law.

Example 3.18

> Tula is an employee of MGK Pty Ltd (MGK). Tula's employment conditions are governed by an industrial agreement that was negotiated between Tula and the other employees of MGK (Tula's husband, Tony and their adult children, Michael and Rena). There was no external involvement in the negotiations of the agreement and it was not made at arms' length. The agreement requires MGK to contribute an amount equating to 15 per cent of employee total remuneration (including overtime) to superannuation. In Tula's case, her total remuneration is $66,000 per year but ordinary time earnings is only $60,000 per year. Tula's annual contribution from MGK is $5,940. However, under superannuation guarantee law, MGK is only compelled to pay $5,400 on behalf of Tula, being 9 per cent multiplied by $60,000. Because the contributions made on behalf of Tula and her fellow employees are required under the terms of an agreement that was not negotiated at arms' length, and which Tula had capacity to influence, then MGK must report the difference between the amount compelled by law and the amount paid under the industrial agreement as RESC. That amount is the difference between $5,940 and $5,400 (being $540).

3.56 However, an employer must only report an amount contributed in excess of that required by law as RESC to the extent that the employee had capacity to influence that amount. That is, if an employee would not have capacity to influence an amount above that compelled by law

because it is the minimum amount that may be contributed under the employer's payroll system, and the employee does not have, has not had, and could not reasonably be regarded as having capacity to influence that minimum amount, then the employer must only report the contribution to the extent that the employee had capacity to influence its size or the way the contribution was made.

Capacity to influence — form of contribution

3.57 The other category of contributions that fall within the RESC definition are contributions that an individual has or has had, or might reasonably be expected to have or have had, capacity to influence to be made in such a way that the individual's assessable income is reduced.

3.58 For some funds, particularly defined benefit funds, members are required to make contributions from their assessable income (known as 'member contributions'). These contributions are typically a certain percentage although members may elect the relevant percentage of contribution they would like to make.

3.59 New subsection 16-182(2) of Schedule 1 to the TAA 1953 provides that all contributions made from an individual's assessable income for the income year are excluded from the RESC definition. As a result, notwithstanding that they may have capacity to influence the amount of contributions being made, employees that vary their member contribution rate will not have any increased superannuation contribution assessed as income.

3.60 However, if an employee has capacity to 'salary sacrifice' a member contribution under the rules of a defined benefit scheme then the amount of any contribution they have influenced to be paid, or might reasonably be expected to have influenced to be paid, in such a way that their assessable income is reduced, will be RESC.

Example 3.19

> Rhonda's employer makes superannuation contributions on Rhonda's behalf to a defined benefit fund. The employer contributions are applied to a pool to fund the liability of the entire fund. In addition, the rules of the fund require Rhonda to make a member contribution equal to 7 per cent of ordinary time earnings. Ordinarily, this member contribution would be made from Rhonda's assessable income. However, the rules of the defined benefit fund were recently amended so that individuals may elect to contribute their member contribution from pre-tax salary or wages. Rhonda exercises this option and the 'grossed-up' amount of her member contribution is deducted from her pre-tax salary or wages so that Rhonda makes the same net contribution to her employer's defined benefit fund as she would have

made if the member contribution were made from assessable income. The total 'grossed-up' amount of the contribution is RESC because it represents the amount that Rhonda has elected to have made from pre-tax salary with the effect that her assessable income is reduced.

Financial investment

3.61 Part 1 of Schedule 3 inserts a new definition of 'financial investment' into section 995-1 of the ITAA 1997. This definition will be relevant for the purposes of the 'total net investment loss' definition. ***[Schedule 3, Part 1, item 6]***

3.62 The new 'financial investment' definition includes shares in a company (whether those shares are in an Australian company or foreign company), and interests in a managed investment scheme for the purposes of the *Corporations Act 2001*. This means that the requirement for the managed investment scheme to have more than 20 members, which is an element of the 'managed investment scheme' definition in the ITAA 1997, does not apply.

3.63 Paragraph (e) of the 'financial investment' definition also captures investments of a 'like nature' to shares and managed investment schemes. Relevant considerations in determining whether an investment is of a 'like' nature to the other investments are whether the investment is traded in a manner similar to the other investments and the similarities between the type of investors in that investment, and other investments in the 'financial investment' definition.

3.64 Given the relevance of the 'financial investment' definition to the concept of an individual's 'total net investment loss', it will also be relevant if the particular investment involved is the subject of an investment loan arrangement. It is intended that the 'financial investment' definition capture as many investments subject to investment loan, or margin loan arrangements as is appropriate.

Total net investment loss

3.65 Part 1 of Schedule 3 also inserts a definition of 'total net investment loss' into the ITAA 1997, which is referenced in a new definition of the concept in the ITAA 1936. ***[Schedule 3, Part 1, items 5 and 10]***

3.66 The 'total net investment loss' definition rationalises the various definitions of net rental property loss that are currently in applicable legislation and recognises them in one definition. This ensures the definition of net rental property losses added to income for means-tested assistance programs is consistent across tax and transfer legislation.

3.67 The definition also captures net losses from ‘financial investment’ with a definition of ‘financial investment’ to be inserted in section 995-1 of the ITAA 1997.

3.68 An individual will have a ‘total net investment loss’ where their deductions for the relevant income year from financial investments and rental property exceed the individual’s gross income from those activities for the year. Deductions in respect of a financial investment may be claimed for expenses such as the costs of borrowing to invest in the financial investment or management fees charged on the investment.

Application and transitional provisions

3.69 These amendments will commence the day after Royal Assent.

3.70 The amendments apply in relation to income years starting on or after 1 July 2009.

Chapter 4
Amendment of payment summary provisions

Outline of chapter

4.1 Part 2 of Schedule 3 to this Bill amends Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) to provide the mechanism for reporting of 'reportable employer superannuation contributions' (RESC).

4.2 This chapter details how 'payers', for the purposes of the payment summary provisions in the TAA 1953, will be required to include RESC amounts in annual withholding reports and in annual and part-year payment summaries.

Context of amendments

4.3 Schedule 1 to the TAA 1953 contains the pay as you go (PAYG) withholding arrangements that require 'payers' to withhold amounts from 'withholding payments' made to recipients to assist the recipient meet their ultimate income tax liability. Withheld amounts must be paid to the Commissioner of Taxation (Commissioner).

4.4 'Withholding payment' is defined in section 995-1 of the *Income Tax Assessment Act 1997* and includes payments identified in Divisions 12, 13 and 14 of Schedule 1 to the TAA 1953. Examples are payments for work and services; superannuation payments; benefit and compensation payments; non-cash benefits (other than fringe benefits); and particular alienated personal services payments.

4.5 Payers that withhold amounts from particular 'withholding payments' must provide a payment summary to the recipient within 14 days after the end of the financial year. A payment summary must also be provided if the recipient has a reportable fringe benefits amount in respect of his or her 'employment' (as defined in the *Fringe Benefits Tax Assessment Act 1986*) by the payer.

4.6 The payment summary must be in the 'approved form' and must satisfy other content requirements in section 16-170 of Schedule 1 to the

TAA 1953. In particular, it must include total amounts withheld and the total income to which the withheld amounts relate. Where applicable, the payment summary must also specify the reportable fringe benefit amount it covers and the income year to which the amount relates.

4.7 Schedule 1 to the TAA 1953 provides for part-year payment summaries, which must be given to a recipient (on request) where the recipient made their request more than 21 days before the end of the financial year. Part-year payment summaries must generally be provided to the recipient 14 days after the payer receives the request unless the recipient has a reportable fringe benefits amount in respect of their employment with the payer for the income year.

4.8 The penalty for failing to meet the requirements in Schedule 1 to the TAA 1953 in respect of an annual or part-year payment summary is 20 penalty units and the offence is an offence of strict liability. Having regard to the circumstances of a particular case, the Commissioner may exempt an entity from the need to provide a payment summary or specified requirements of the payment summary provisions under section 16-180 of Schedule 1 to the TAA 1953.

4.9 For example, on 16 May 2008, the Australian Taxation Office (ATO) issued a legislative instrument (ID: 2008/MEI001) pursuant to subsection 16-180(1). The instrument exempts payers from the requirement to provide recipients with a *copy* of the payment summary under sections 16-155, 16-160 and 16-167 of Schedule 1 to the TAA 1953.

4.10 Schedule 1 to the TAA 1953 also provides for an annual withholding report that must be prepared by payers. If an entity has withheld amounts in an income year, or a person has a reportable fringe benefits amount at the end of the year in respect of their employment with the entity, the entity must give a report to the Commissioner under subsection 16-153(2) of Schedule 1 to the TAA 1953. This report must meet content requirements and must be provided no later than 14 August after the end of the financial year.

4.11 For some withholding payments, prescribed in subsection 16-153(1) of Schedule 1 to the TAA 1953, the annual report may be provided after 14 August but no later than 31 October after the financial year in which the withholding payment was made.

Summary of new law

4.12 Part 2 of Schedule 3 amends Schedule 1 to the TAA 1953 to require payers to disclose RESC made on behalf of an employee during a financial year, or part of a financial year, on part-year payment summaries and the annual payment summary provided to that employee for the financial year.

4.13 Part 2 of Schedule 3 also amends Schedule 1 to the TAA 1953 to require payers to provide an annual withholding report to the Commissioner where they have made RESC during the financial year. Payers will need to provide this annual withholding report to the Commissioner, no later than 14 August after the end of the financial year in which the RESC were made.

Comparison of key features of new law and current law

New law	*Current law*
Payers *must* disclose RESC on part-year and annual payment summaries.	Payers *do not* disclose RESC on part-year and annual payment summaries.
Payers *must* disclose RESC on the annual withholding report provided to the Commissioner.	Payers *do not* disclose RESC on the annual withholding report provided to the Commissioner.

Detailed explanation of new law

Amendment to the annual report content requirements

4.14 The amendments in Part 2 of Schedule 3 amend subsection 16-153(2) of Schedule 1 to the TAA 1953 so that entities that have made RESC during a financial year will need to provide an annual withholding report to the Commissioner no later than 14 August after the end of the financial year in which the RESC were made. ***[Schedule 3, Part 2, item 12]***

4.15 Under the current law, this report may be in the 'approved form' (as defined in section 388-50 of Schedule 1 to the TAA 1953) or the report may consist of copies of a payment summary or payment summaries that the entity provided in respect of withholding payments and reportable fringe benefits, plus an accompanying statement in the approved form.

4.16 The amendments revise subparagraph 16-153(3)(b)(ii) to include RESC. This means that entities may provide the Commissioner with a payment summary or payment summaries they have issued in respect of RESC made during the financial year as an alternative to providing the approved form. The entity needs to provide an accompanying statement in the approved form as well. ***[Schedule 3, Part 2, item 13]***

4.17 Because the annual report will deal with RESC as well as withholding payments and reportable fringe benefit amounts, the heading to section 16-153 is revised to omit the words 'about withholding payments and reporting fringe benefits'. ***[Schedule 3, Part 2, item 12 (note)]***

Amendment to the payment summary provisions

4.18 The amendments in Part 2 of Schedule 3 also revise the requirements for annual and part-year payment summaries.

4.19 A new paragraph (d) is inserted in subsection 16-155(1) so that payers will need to provide an annual payment summary to an individual where they have made RESC for that individual during the year in respect of the individual's employment. ***[Schedule 3, Part 2, item 14]***

4.20 The amendments also insert a new paragraph (c) in subsection 16-155(2) so that an annual payment summary will need to cover the total RESC made by the payer during the financial year, with the exception of any contributions reported on a previous part-year payment summary that was provided to the recipient. ***[Schedule 3, Part 2, item 15]***

4.21 As a result of the legislative instrument issued by the ATO on 16 May 2008 exempting entities from the need to provide a copy of the payment summary, new paragraph (c) does not include the words '(and a copy of it)' like the other paragraphs in subsection 16-155(2). This is because, from 1 July 2008, entities have been relieved from the requirement to provide a copy of the payment summary.

4.22 There is also an amendment to subsection 16-170(1), which deals with the form and content of a payment summary, to require payment summaries to specify the RESC they cover (if any) and the income year to which the contribution(s) relate. ***[Schedule 3, Part 3, item 18]***

4.23 These amendments in respect of RESC and payment summaries ensure that payers have the same reporting obligations for RESC on payment summaries as currently apply for other employment benefits such as salary or wages and reportable fringe benefit amounts.

4.24 The amendments also alter the part-year payment summary provisions in section 16-160 to include RESC. As a result, payers will

need to provide a part-year payment summary if a recipient asks for one covering any RESC made by the payer in respect of the recipient's employment during the financial year. ***[Schedule 3, Part 3, items 16 and 17]***

4.25 Pursuant to subsection 16-170(2) of Schedule 1 to the TAA 1953, this part-year payment summary must be provided to the recipient no later than 14 days after the payer received the request.

Application and transitional provisions

4.26 These amendments will commence the day after Royal Assent.

4.27 These amendments apply to payment summaries, and annual withholding reports, that are issued in the 2009-10 income year and later income years.

Chapter 5
Amendment of income tests

Outline of chapter

5.1 Part 3 of Schedule 3 to this Bill amends income tests across various Acts to include reportable superannuation contributions; reportable employer superannuation contributions (RESC), and total net investment losses where appropriate.

5.2 The Acts amended, and the programs to which the amendments relate, are outlined in Table 5.1.

Table 5.1

Act	*Program(s)*
A New Tax System (Family Assistance) Act 1999	Child Care Benefit Family Tax Benefit Baby Bonus
A New Tax System (Medicare Levy Surcharge – Fringe Benefits) Act 1999 (ANTS (MLS) Act 1999)	Medicare levy surcharge
Medicare Levy Act 1986 (MLA 1986)	Medicare levy surcharge
Child Support (Assessment) Act 1989	Child support
Higher Education Support Act 2003	Higher Education Loan Program
Income Tax Assessment Act 1936 (ITAA 1936)	Senior Australians tax offset Tax offset for trustees (section 160AAAB)
Income Tax Assessment Act 1997 (ITAA 1997)	Deduction for personal superannuation contributions Mature age worker tax offset Spouse superannuation contributions tax offset Tax offset for Medicare levy surcharge (lump sum payments in arrears)

Act	***Program(s)***
Social Security Act 1991 (SS Act 1991)	Commonwealth Seniors Health Card Student Financial Supplement Scheme Youth Allowance
Student Assistance Act 1973	Student Financial Supplement Scheme
Superannuation (Government Co-contribution for Low Income Earners) Act 2003	Government superannuation co-contribution scheme
Veterans' Entitlement Act 1986	Commonwealth Seniors Health Card

Context of amendments

5.3 The various definitions of income used to assess eligibility for particular tax and transfer payments are located in different Acts. For some programs, the means test arrangements are located in non-legislative instruments or guidelines.

5.4 There is no single definition of income for all means-tested tax and transfer programs. As a result, income definitions for individual programs must be amended to provide for the new income components.

Summary of new law

5.5 Part 3 of Schedule 3 amends relevant income definitions to include reportable superannuation contributions, RESC and total net investment losses where appropriate. In some instances, to avoid duplication, references to net rental property losses are repealed as these losses are a component of the new 'total net investment loss' definition to be included in the ITAA 1997.

5.6 In respect of the Medicare levy surcharge, the ANTS (MLS) Act 1999 and the MLA 1986 are amended to recognise the new definition of 'income for surcharge purposes' which is to be included in the ITAA 1997.

5.7 The amendments also revise the parental income test, and family actual means test, which are used to determine a dependant's eligibility for Youth Allowance, to ensure that the particular superannuation contributions and losses that are assessed as income for the purposes of those tests align with the reportable superannuation contributions and 'total net investment loss' definitions.

Detailed explanation of new law

Amendment of the *A New Tax System (Family Assistance) Act 1999*

5.8 The *A New Tax System (Family Assistance) Act 1999* provides the means test arrangements for family assistance programs such as Family Tax Benefit, Child Care Benefit and Baby Bonus. Eligibility for these programs is assessed against 'adjusted taxable income' which is defined in Schedule 3 to the *A New Tax System (Family Assistance) Act 1999.*

5.9 Part 3 of Schedule 3 amends the definition of 'adjusted taxable income' in clause 2 of Schedule 3 to include an individual's total net investment loss and RSC. ***[Schedule 3, Part 3, items 19 and 20]***

5.10 This means an individual's 'total net investment loss' and reportable superannuation contributions will be assessed as income in determining their eligibility for Family Tax Benefit (Parts A and B); Child Care Benefit; and Baby Bonus.

5.11 The reference to net rental property losses in the current 'adjusted taxable income' definition is substituted with a reference to an individual's total net investment loss, as the definition of 'total net investment loss' captures an individual's net rental property loss.

5.12 The definition of 'net rental property loss' in clause 6 of Schedule 3 to the *A New Tax System (Family Assistance) Act 1999* is repealed. ***[Schedule 3, Part 3, item 21]***

Amendment of the *A New Tax System (Medicare levy surcharge — Fringe Benefits) Act 1999* and the *Medicare Levy Act 1986*

5.13 Part 3 of Schedule 3 amends the ANTS (MLS) Act 1999 and the MLA 1986 which provide the arrangements for determining whether an individual is liable to pay the Medicare levy surcharge.

5.14 The ANTS (MLS) Act 1999 determines whether an individual is liable to pay the Medicare levy surcharge in respect of a reportable fringe benefits total they or their spouse may have. The MLA 1986 determines whether an individual is liable to pay the Medicare levy surcharge in respect of their, or their spouse's, taxable income.

5.15 The test for whether an individual must pay the Medicare levy surcharge depends on whether the individual's modified taxable income and reportable fringe benefits total (if any) exceed prescribed income thresholds.

5.16 Under the current law, taxable income is modified by different provisions of the two Acts. In particular, the Acts include modified definitions of 'taxable income' in section 9 of the ANTS (MLS) Act 1999 and subsection 3(2A) of the MLA 1986.

5.17 These definitions apply in determining an individual's liability to pay the Medicare levy surcharge. Further adjustments to modified 'taxable income' are made where the taxpayer or their spouse is the beneficiary of a trust estate whose trustee is liable to be assessed under section 98 of the ITAA 1936.

5.18 The amendments revise the ANTS (MLS) Act 1999 and the MLA 1986 to recognise the new 'income for surcharge purposes' definition. A cross-reference to the 'income for surcharge purposes' definition in the ITAA 1997 is inserted in the definition sections of both Acts. ***[Schedule 3, Part 3, items 22 and 48]***

5.19 'Income for surcharge purposes' includes the modifications to taxable income that are made by section 9 of the ANTS (MLS) Act 1999 and subsection 3(2A) of the MLA 1986. As such, the amendments repeal section 9. The amendments also repeal the definition of 'taxable income' which cross-references section 9 from the list of definitions in section 3 of the ANTS (MLS) Act 1999. ***[Schedule 3, Part 3, items 24 and 25]***

5.20 Further, the amendments simplify the definition of 'reportable fringe benefits total' in the ANTS (MLS) Act 1999 and remove the 'reportable fringe benefits total' definition from the MLA 1986 as the need to refer separately to reportable fringe benefits is removed by references to 'income for surcharge purposes' which includes reportable fringe benefits. ***[Schedule 3, Part 3, items 23 and 49]***

5.21 Although subsection 3(2A) of the MLA 1986 currently amends 'taxable income' for the purposes of sections 8B to 8G, the amendments do not alter this provision. As a result, any reference to 'taxable income' in those provisions should continue to be read as being modified by subsection 3(2A). That is, the Medicare levy surcharge continues to be 1 per cent of an individual's taxable income (as modified by subsection 3(2A)).

5.22 Under the ANTS (MLS) Act 1999 and the MLA 1986, separate sections prescribe the income tests to apply in respect of periods where a taxpayer is a single person without dependants, a single person with dependants, or person with a spouse.

5.23 The income tests used in respect of a single person without dependants are contained in section 12 of the ANTS (MLS) Act 1999 and section 8B of the MLA 1986. The amendments modify the income test in

these sections so that ‘income for surcharge purposes’ substitutes for references to taxable income. ***[Schedule 3, Part 3, items 26 and 51]***

5.24 The tests used in respect of a single person with dependants are contained in section 13 of the ANTS (MLS) Act 1999 and section 8C of the MLA 1986. The amendments modify these sections so that an individual’s ‘income for surcharge purposes’ is assessed in determining their Medicare levy surcharge liability. ***[Schedule 3, Part 3, items 27 and 52]***

5.25 In respect of a period where a taxpayer has a spouse, the income relevant in determining their Medicare levy surcharge liability is both the taxpayer’s income and the income of their spouse. Sections 15 and 16 of the ANTS (MLS) Act 1999 provide the test to determine an individual’s Medicare levy surcharge liability on their reportable fringe benefits total. The relevant section in the MLA 1986 is section 8D.

5.26 The amendments revise the definitions of ‘income’ used to assess liability to pay the Medicare levy surcharge in those provisions so that ‘income for surcharge purposes’ of both the taxpayer and their spouse is assessed in determining the taxpayer’s Medicare levy surcharge liability. ***[Schedule 3, Part 3, items 28, 30, 31 and 53 to 55]***

5.27 Subsection 8D(5) of the MLA 1986 currently includes a modified definition of ‘taxable income’ that is to be used for the purposes of that section. The amendments repeal this definition and insert a new definition where modifications are made to the taxpayer’s spouse’s ‘income for surcharge purposes’ which is the new income base used to determine an individual’s Medicare levy surcharge liability rather than their taxable income. ***[Schedule 3, Part 3, item 56]***

5.28 The amendments also substitute references to taxable income in section 8G of the MLA 1986 with references to ‘income for surcharge purposes’. ***[Schedule 3, Part 3, items 58 and 59]***

5.29 Section 8G of the MLA 1986 requires trustees of a trust estate who are liable to be assessed under section 98 of the ITAA 1936 in respect of a share of the net income of a trust estate to which a beneficiary is presently entitled, to pay the Medicare levy surcharge where the *sum* of the beneficiary’s trust income and the beneficiary’s spouse’s taxable income or reportable fringe benefits *total* (if any) is *greater* than the family surcharge threshold provided in section 3A of the ITAA 1936.

5.30 The amendments alter section 8G of the MLA 1986 so that the trustee of a trust estate will need to pay the Medicare levy surcharge where the *sum* of the beneficiary’s trust income and the beneficiary’s spouse’s ‘income for surcharge purposes’ *exceed* the family surcharge threshold in section 3A of the ITAA 1936. ***[Schedule 3, Part 3, item 58]***

5.31 Subsection 8G(3) of the MLA 1986, which is relevant where section 8G applies to a beneficiary for only some days in the income year, is amended to substitute references to taxable income with 'income for surcharge purposes'. ***[Schedule 3, Part 3, items 59 and 60]***

5.32 The amendments also repeal subsection 8G(4) of the MLA 1986, which modifies 'taxable income', and insert a new subsection where the modifications are made to 'income for surcharge purposes' rather than taxable income. ***[Schedule 3, Part 3, item 61]***

5.33 The ANTS (MLS) Act 1999 has specific provisions dealing with the income test that applies where a taxpayer's spouse is a presently entitled beneficiary in a trust. These are subsections 15(2) and 16(5) of the ANTS (MLS) Act 1999.

5.34 These subsections prescribe that a taxpayer's spouse's 'taxable income' should be assumed to include any share in the net income of a trust estate to which the spouse is presently entitled in respect of which the trustee of the trust estate is liable to be assessed under section 98 of the ITAA 1936.

5.35 The amendments revise subsections 15(2) and 16(5) of the ANTS (MLS) Act 1999 to substitute references to 'taxable income' with references to 'income for surcharge purposes'. ***[Schedule 3, Part 3, items 29 and 32]***

5.36 There is also an amendment to substitute a new subsection 3(2) of the MLA 1986. This subsection substitutes the reference to 'taxable income' with a reference to 'income for surcharge purposes'. ***[Schedule 3, Part 3, item 50]***

5.37 To assist understanding, and more closely relate provisions to the Medicare levy surcharge, the amendments revise the headings of current provisions so that they commence with 'Levy Surcharge' rather than 'Increase in Levy'.

5.38 Also, section 8F of the MLA 1986 is amended to ensure the wording used in respect of an individual's 'family surcharge threshold' is consistent with the wording in other amended provisions. That is, the wording refers to the 'beneficiary's family surcharge threshold' rather than the 'family surcharge threshold of the beneficiary'. ***[Schedule 3, Part 3, item 57]***

Amendment of the *Child Support (Assessment) Act 1989*

5.39 Part 3 of Schedule 3 amends the *Child Support (Assessment) Act 1989* to include a parent's total net investment loss and reportable

superannuation contributions in the person's 'adjusted taxable income'. 'Adjusted taxable income' is used to determine a parent's capacity to meet the costs of his or her children. ***[Schedule 3, Part 3, items 34 and 35]***

5.40 The definition of 'net rental property' loss in the *Child Support (Assessment) Act 1989* is repealed as net rental property losses are included in the definition of 'total net investment loss'. ***[Schedule 3, Part 3, item 33]***

Amendment of the *Higher Education Support Act 2003*

5.41 Part 3 of Schedule 3 amends the *Higher Education Support Act 2003* (HESA 2003) to include a person's total net investment loss and reportable superannuation contributions in the definition of 'repayment income'. The amendments also simplify the language used to describe a person's exempt foreign income. ***[Schedule 3, Part 3, items 36 and 37]***

5.42 Repayment income is assessed in determining whether an individual is required to make a compulsory repayment of an accumulated 'HELP debt' (defined in the HESA 2003). If an individual's repayment income exceeds the minimum repayment income for the income year, as determined in accordance with the HESA 2003, the individual must make a compulsory repayment towards any accumulated HELP debt.

5.43 The components of repayment income currently include an individual's taxable income; exempt foreign income, as defined in the HESA 2003; and an individual's reportable fringe benefits total. The definition also includes an individual's net rental property loss.

5.44 The amendments repeal provisions in respect of net rental property losses as those losses are included in an individual's total net investment loss. ***[Schedule 3, Part 3, items 38 and 39]***

5.45 The 'total net investment loss' definition includes losses from property that is held by an individual as a member of a partnership. This is because the 'total net investment loss' definition is intended to capture all income and losses derived by an individual from rental investments.

Amendment of the *Income Tax Assessment Act 1936*

5.46 Part 3 of Schedule 3 amends the ITAA 1936 to extend the income definitions used for the purposes of the senior Australians tax offset (SATO) and the tax rebate in section 160AAAB for trustees assessed under section 98 of the ITAA 1936.

Senior Australians tax offset

5.47 To be eligible for the SATO, taxpayers must satisfy particular age and income requirements, and not be in gaol for the whole income year. The income assessed in determining whether income requirements are met is currently taxable income. These amendments mean that the new concept of an individual's 'rebate income', as defined in the ITAA 1997, will be the relevant income definition that is assessed in determining eligibility for the SATO. ***[Schedule 3, Part 3, item 40]***

5.48 Where a taxpayer has a spouse, the current income definition in subsection 160AAAA(4) of the ITAA 1936 assesses the taxpayer's taxable income; the actual taxable income of their spouse (reduced by any amount included in the spouse's assessable income under section 100 of the ITAA 1936); and any share of the net income of a trust estate to which the spouse is presently entitled and that is assessed under section 98 of the ITAA 1936.

5.49 These amendments repeal the current subsection 160AAAA(4) of the ITAA 1936 and insert a new subsection that replaces references to 'taxable income' with 'rebate income' so that components such as reportable superannuation contributions and total net investment losses are assessed for both the taxpayer and their spouse. ***[Schedule 3, Part 3, item 41]***

Tax offset in section 160AAAB for particular trustees assessed under section 98 of the ITAA 1936

5.50 Section 160AAAB of the ITAA 1936 provides a tax offset for trustees who are assessed under section 98 of the ITAA 1936 in respect of a beneficiary's share of the net income of a trust estate, provided particular conditions in subsections 160AAAB(2) and (3) of the ITAA 1936 are met.

5.51 In particular, the relevant beneficiary must satisfy requirements that would entitle them to the SATO. That is, the beneficiary must have income below the relevant thresholds, and meet age or pension entitlement requirements and not have been in gaol for the entire income year.

5.52 Depending on whether the beneficiary has a spouse or not will affect the actual income assessed against the income thresholds. Subsection 160AAAB(4) deems a single beneficiary's taxable income to be their share in the net income of the trustee's trust estate.

5.53 The taxable income of a beneficiary with a spouse is assumed to be *half* the sum of the beneficiary's share of the net income of the trust estate; *any* share of the trust estate to which the beneficiary's spouse is

presently entitled and that is assessed under section 98 of the ITAA 1936; and the spouse's *actual* taxable income (*reduced* by any amount included in the spouse's assessable income under section 100 of the ITAA 1936).

5.54 These amendments extend the definition of 'beneficiary income' that is assessed in determining the trustee's entitlement for an offset under section 160AAAB of the ITAA 1936 to include other components of rebate income.

5.55 This means the income of a single beneficiary that will be assessed in determining the trustee's offset entitlement is the beneficiary's rebate income, as defined in the ITAA 1997, modified so that 'taxable income' equates to the beneficiary's share of the net income of the trust estate. ***[Schedule 3, Part 3, items 42 and 43]***

5.56 In respect of a beneficiary that has a spouse, the income to be assessed is that income which would have been assessed under the current law but modified to include what extra amounts would be assessed if the beneficiary did not have a spouse together with the rebate income of the beneficiary's spouse (reduced by any amount included in the spouse's assessable income under section 100 of the ITAA 1936). ***[Schedule 3, Part 3, item 43]***

Amendment of the *Income Tax Assessment Act 1997*

5.57 Part 3 of Schedule 3 amends the ITAA 1997 to extend the income definitions used for the purposes of the mature age worker tax offset; the tax offset for the Medicare levy surcharge (lump sum payments in arrears); the spouse superannuation contributions tax offset; and deduction for personal superannuation contributions.

Mature age worker tax offset

5.58 The mature age worker tax offset is available to Australians aged 55 or over at the end of an income year who derive income from employment-related activities, known as 'net income from working', and that income is within particular thresholds.

5.59 Current components of 'net income from working' under section 61-570 of the ITAA 1997 include net personal services income and net business income, *plus* amounts included in income as a result of the repayment of a farm management deposit. Specific income excluded from the 'net income from working' definition by subsection 61-570(2) of the ITAA 1997 includes amounts of superannuation lump sums in employment termination payments and amounts of unused annual leave or long service leave.

5.60 'Net income from working' is designed to capture assessable income that is primarily a reward for an individual's personal efforts or skills, *less* any related deductions. Salary or wages from employment are an example of 'net income from working'.

5.61 RESC represent amounts of salary or wages that have been taken in the form of contributions to a superannuation fund. That is, RESC are amounts paid in the form of superannuation contributions that are made in respect of an individual's personal efforts or skills.

5.62 The amendments revise the 'net income from working' definition to include RESC. ***[Schedule 3, Part 3, item 44]***

Tax offset for the Medicare levy surcharge (lump sum payments in arrears)

5.63 Subdivision 61-L of the ITAA 1997 provides a tax offset for taxpayers who are liable to pay additional Medicare levy surcharge because a 'MLS lump sum' was paid to them or their spouse in the current income year.

5.64 'MLS lump sums' are lump sum amounts of unpaid salary or wages from previous years that are included in an individual's assessable income. 'MLS lump sums' may also include lump sum payments included in an individual's exempt foreign employment income (but only to the extent that the payments accrued during a period ending more than 12 months before the date on which the lump sum was paid).

5.65 To qualify for the offset, the total of the MLS lump sums paid to a taxpayer must be greater than, or equal to, one-eleventh of the income that would be assessed in determining whether that individual is liable to pay the Medicare levy surcharge. That is, the income test used to determine an individual's Medicare levy surcharge liability should be consistent with the income test used to determine whether an individual is eligible for the offset.

5.66 The income test for the purposes of the Medicare levy surcharge is amended to include an individual's reportable superannuation contributions and total net investment loss as a result of the introduction of the 'income for surcharge purposes' definition. For consistency, the income definition used to determine eligibility for the offset should also be amended to include reportable superannuation contributions and total net investment losses. ***[Schedule 3, Part 3, item 45]***

Deduction for personal superannuation contributions

5.67 The ITAA 1997 allows an individual to deduct contributions made to a superannuation fund or a retirement savings account, subject to certain conditions. In particular, the contribution must be made to a complying superannuation fund and the individual must have provided the fund or the retirement savings account provider with a valid notice, in the approved form and in accordance with the relevant timeframes, of their intent to claim the deduction. The trustee of the fund or the retirement savings account provider must give the individual an acknowledgement of this notice. There are also age-related conditions to claiming a deduction for personal superannuation contributions.

5.68 Section 290-160 of the ITAA 1997 limits an individual's capacity to deduct personal contributions where the individual has derived income from activities that resulted in them being treated as an employee for the purposes of the *Superannuation Guarantee (Administration) Act 1992* (SGAA 1992). To be eligible to deduct the personal contribution in these circumstances, less than 10 per cent of the individual's assessable income and reportable fringe benefits total must be attributable to the activities. This is designed to ensure that only primarily self-employed individuals may claim the deduction.

5.69 Under the current arrangements, individuals may reduce the proportion of their income that is related to employee activities by entering into an arrangement with their employer to have some or all of their income from those activities contributed to superannuation by their employer. These amounts would ordinarily be attributable to activities that result in the individual being treated as an employee for the purposes of the SGAA 1992. However, as a result of the arrangement, the amounts are not included in the assessable income of the individual.

5.70 The amendments include RESC in the income base that is used in determining whether personal superannuation contributions may be deducted. ***[Schedule 3, Part 3, item 46]***

5.71 The amendments do not add reportable superannuation contributions or an individual's total net investment loss to income as the income base is assessable income which is an individual's gross income before deductions are applied.

Spouse superannuation contributions tax offset

5.72 Under section 290-230 of the ITAA 1997, a taxpayer is entitled to a tax offset in an income year for a contribution they make in that year to a superannuation fund or the retirement savings account for the purpose of providing a superannuation benefit for their spouse.

5.73 However, to qualify for the offset, the taxpayer and their spouse must satisfy particular conditions in subsection 290-230(2) of the ITAA 1997, including a requirement that the spouse's assessable income and reportable fringe benefits total be less than $13,800 per annum.

5.74 The amendments extend this income definition to include any RESC of the spouse. ***[Schedule 3, Part 3, item 47]***

5.75 This means a spouse's assessable income, reportable fringe benefits total and RESC will need to be *less* than $13,800 per annum for the taxpayer to be eligible for the offset. The amendments do not add reportable superannuation contributions or an individual's total net investment loss to income as the income base is assessable income which is an individual's gross income before deductions are applied.

Amendment of the *Social Security Act 1991*

5.76 Part 3 of Schedule 3 amends the *Social Security Act 1991* (SS Act 1991) to extend income definitions used for the purposes of the parental income test on Youth Allowance; the Commonwealth Seniors Health Card; and the Student Financial Supplement Scheme to include total net investment losses and reportable superannuation contributions where appropriate.

Commonwealth Seniors Health Card

5.77 The amendments to point 1071-3 of the SS Act 1991 expand the definition of income used to determine eligibility for the Commonwealth Seniors Health Card to include an individual's total net investment loss. ***[Schedule 3, Part 3, item 81]***

5.78 The amendments also repeal the definition of 'net rental property loss' in section 10A of the SS Act 1991, and references to net rental property losses in points 1071-3 and 1071-8. ***[Schedule 3, Part 3, items 62, 63, 82 and 83]***

5.79 Net rental property losses are assessed as income for the purposes of the Commonwealth Seniors Health Card. However, because the 'total net investment loss' definition includes net rental property losses, it is no longer necessary for those losses to be separately defined.

Parental income test, Youth Allowance

5.80 Where a Youth Allowance applicant is considered to be dependent on their parents, a parental means test will apply to assess the extent to which the individual's parents can financially support the applicant while they are studying or looking for work.

5.81 The amendments to point 1067G-F10 of the SS Act 1991 revise the parental income test to include the parent's reportable superannuation contributions and the parent's total net investment loss amount for the income year. ***[Schedule 3, Part 3, item 73]***

5.82 This will ensure a broader range of resources are assessed for parental means test purposes.

5.83 The amendments also repeal the concept of 'net passive business losses'. These losses, which were defined as losses from particular business activities in which a person is usually engaged for less than 17.5 hours per week, are replaced by the concept of an individual's total net investment loss. ***[Schedule 3, Part 3, items 74 to 76]***

5.84 This ensures the definition of losses assessed for the Youth Allowance parental income test is consistent with the losses added to income for other means-tested programs. The 'total net investment loss' definition captures aspects of the former 'net passive business loss' definition such as losses from share trading activity and rental property investments.

Family actual means test, Youth Allowance

5.85 The 'family actual means test' is provided for in Module G of Part 3.5 of the SS Act 1991. The test is used to determine the income of 'designated parents' such as those who are self-employed; have a business loss or an interest in a company or trust; or have overseas income or assets worth $2,500 or more.

5.86 The 'family actual means test' assesses the ***actual means*** of a parent, defined in subpoint 1067G-G8(1) of the SS Act 1991 as an amount equal to the total spending and savings of the person in the relevant tax year. There are specific exclusions from the actual means definition.

5.87 For example, paragraph 1067G-G9(3)(a) of the SS Act 1991 excludes an amount equal to what would be an allowable deduction under the income tax law for the individual because the amount was necessarily incurred in carrying on the business. This exclusion is qualified by subpoint 1067G-G9(4) which limits the amount allowed as a deduction in respect of superannuation contributions.

5.88 The amendments to point 1067G-G9 of the SS Act 1991 revise this qualification so that reportable superannuation contributions are the *excess* superannuation contributions that are effectively included in a person's actual means. ***[Schedule 3, Part 3, item 77]***

5.89 The amendments also repeal references to net passive business losses from the 'family actual means test' provisions. This includes the definitions of 'net passive business loss' and 'passive business' from the family actual means test definitions section in section 10B of the SS Act 1991. ***[Schedule 3, Part 3, items 65 and 66]***

5.90 The definition of 'business' from section 10B is revised to reflect the definition of 'business' from subpoint 1067G-F19A(2) of the SS Act 1991 which is repealed by item 76. Also, a definition of 'total net investment loss' is inserted in subsection 10B(2). ***[Schedule 3, Part 3, items 64 and 67]***

5.91 The concept of net passive business losses is replaced by the 'total net investment loss' definition to ensure greater consistency in the definition of losses added to income definitions across the tax and transfer systems. The amendments substitute references to net passive business losses in the 'family actual means test' provisions with references to an individual's 'total net investment loss. ***[Schedule 3, Part 3, items 78 to 80]***

5.92 Further, the definition of 'designated parent', which is used in determining whether the 'family actual means test' applies, is amended to substitute a reference to 'net passive business loss' with 'total net investment loss'. ***[Schedule 3, Part 3, items 69 and 72]***

5.93 The amendments ensure the 'family actual means test' assesses a consistent definition of *excess* superannuation contributions to that which will be assessed as income for the purposes of other means-tested tax and transfer programs, including the Youth Allowance parental income test.

Student Financial Supplement Scheme

5.94 The amendments to section 1061ZZFA of the SS Act 1991 extend the definition of 'repayment income', which is used to determine an individual's obligation to repay an accumulated Financial Supplement debt under the now closed Student Financial Supplement Scheme, to include an individual's total net investment loss and reportable superannuation contributions for the income year. ***[Schedule 3, Part 3, items 70 and 71]***

5.95 The amendments also repeal provisions dealing with the definition of 'rental property loss' as rental property losses are included in the definition of 'total net investment loss'. ***[Schedule 3, Part 3, items 69 and 72]***

Amendment of the *Student Assistance Act 1973*

5.96 Part 3 of Schedule 3 amends section 12ZL of the *Student Assistance Act 1973* to include an individual's total net investment loss and reportable superannuation contributions for the income year in the 'repayment income' definition under that Act. ***[Schedule 3, Part 3, items 85 and 86]***

5.97 Because the 'total net investment loss' definition includes an individual's net rental property losses, references to net rental property losses are removed. ***[Schedule 3, Part 3, items 84 and 87]***

5.98 The 'repayment income' test is used to assess an individual's obligations to repay an accumulated Student Financial Supplement Scheme debt.

Amendment of the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*

5.99 Part 3 of Schedule 3 amends the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* to expand the definition of income that is used to determine an individual's entitlement under the Government's superannuation co-contribution scheme, to include the individual's RESC. ***[Schedule 3, Part 3, item 88]***

5.100 The amendments do not add reportable superannuation contributions or an individual's total net investment loss to income as the income base is assessable income which is an individual's gross income before deductions are applied.

Amendment of the *Veterans' Entitlement Act 1986*

5.101 Part 3 of Schedule 3 amends section 118ZZA of the *Veterans' Entitlement Act 1986* to include a person's total net investment loss in the definition of 'adjusted taxable income' provided for in that section. This definition is used to determine an individual's eligibility for the Commonwealth Seniors Health Card for the purposes of the *Veterans' Entitlement Act 1986*. ***[Schedule 3, Part 3, item 89]***

5.102 The definition of 'adjusted taxable income' currently includes an individual's accepted estimate of their net rental property losses for the income year. The amendments repeal references to net rental property losses or replace references with a reference to an individual's total net investment loss. ***[Schedule 3, Part 3, items 90 and 91]***

Application and transitional provisions

5.103 The amendments in this chapter will commence the day after Royal Assent.

5.104 The amendments will apply to income assessments made in the 2009-10 income year and later income years.

5.105 The amendments will not apply in relation to a claim for Baby Bonus under the *A New Tax System (Family Assistance) Act 1999* if the relevant income period commenced before 1 July 2009 (even if the period continues after 1 July 2009).

5.106 Further, the amendments will not apply in respect of both the *real* and estimated adjusted taxable income that is assessed for the remainder of a child support period following an election under section 60 of the *Child Support (Assessment) Act 1989,* if the remaining period commenced before 1 July 2009.

5.107 The amendments will not apply in determining the *actual amount* that would be the parents adjusted taxable income for the purposes of subsection 60A(1) of the *Child Support Assessment Act 1989* if the relevant remaining period commenced before 1 July 2009.

Chapter 6
Regulation impact statement

Introduction

6.1 The following regulation impact statement assesses the costs and benefits of a proposal to include certain 'salary sacrificed' contributions to superannuation in the income tests of means-tested government assistance programs. This proposal is discussed in Chapters 3, 4 and 5.

Problem

6.2 Generally, government support payments in the Australian tax and transfer system are means- or income-tested. This approach promotes the underlying principle of government support that individuals with greater means to support themselves receive less support than those with fewer resources or those in greater need of assistance. Income tests are generally comprised of different types of income, such as income from work-related activities or income from investments.

6.3 At present, there are some inconsistencies in the treatment of certain types of income to determine eligibility for government support payments. While many types of income are assessed, certain contributions to superannuation — for employees sometimes referred to as employer 'salary sacrificed' contributions to superannuation — that could have been received as present disposable income by individuals to support themselves are not assessed when determining eligibility to government support. This treatment produces inequity and inefficiency in the provision of government financial assistance. It allows individuals and families to access more government support payments than others with similar levels of resources or than would be possible if their total remuneration were paid as wages or salary income. Further, it favours those who have access to these types of remuneration arrangements over those who do not.

6.4 Remuneration arrangements of this kind have become more widespread over time. At present, there are an estimated 540,000 employees whose employers' salary sacrifice part of their income into superannuation. While not all of these individuals access government support, their number has increased substantially since

these remuneration arrangements began in the early 1990s and is expected to increase further in the future.

6.5 It is estimated that the cost of inaction would be approximately $160–170 million each year over the period 2009-10 to 2011-12. This cost of inaction is expected to increase over time. It is inefficient because expenditure is directed at individuals and families with sufficient resources to support themselves. They are getting by without wage and salary income and are benefiting from programs designed to support those in genuine need of assistance. They are also benefiting from significant concessional tax treatment of their superannuation contributions.

6.6 The following government programs are affected by this treatment of income:

- income support payments paid under the *Social Security Act 1991* for people below age pension age (noting that payments paid to those of age pension age already define income as is proposed by this structural reform);
- parental income tests for Youth Allowance and ABSTUDY;
- Commonwealth Seniors Health Card;
- Family Tax Benefit (Parts A and B);
- Child Care Benefit;
- Child Support;
- Additional Boarding Allowance; Assistance for Isolated Children scheme;
- dependency tax offsets;
- mature age worker tax offset;
- senior Australians tax offset;
- offset for trustees under section 160AAAB of the *Income Tax Assessment Act 1936*;
- pensioner tax offset;
- Medicare levy surcharge;

- Higher Education Loan Program and Student Financial Supplement Scheme;
- deduction for personal superannuation contributions under Subdivision 290-C of the *Income Tax Assessment Act 1997*;
- spouse superannuation contributions offset; and
- Government superannuation co-contribution scheme.

6.7 There are other benefits in respect of employment that are commonly salary sacrificed. These include vehicles and some expense payments. Benefits, such as the former, are captured by the fringe benefits tax arrangements. They are considered reportable fringe benefits and are treated as income for most government support programs. Others, such as the latter, are non-reportable and not considered as income. 'Salary sacrificed' superannuation is exempt from fringe benefits tax and not assessed as income for means-testing purposes.

6.8 The consequences of not assessing certain 'salary sacrificed' contributions to superannuation as income impose a medium impact on the community. It creates inequity in the treatment of individuals and families with similar resources and inefficiency in the provision of government assistance.

Policy objective

6.9 The specific objective of the proposal to assess certain 'salary sacrificed' contributions to superannuation as income is to broaden the definition of income that is assessed in determining eligibility for government support programs.

Implementation options

6.10 Explicit government regulation is the only feasible option to deal with inadequate income-testing of government support programs. It is compared to the case of doing nothing.

No change option

6.11 At present, income that could have been used by individuals to support themselves may be instead sacrificed as contributions to superannuation. This income is not assessed for the purposes of

determining entitlement to government support programs. This creates inequity among individuals and families with similar means as it allows some to access government support while others who receive their remuneration as wages or salary are unable to do so.

6.12 The current situation provides perverse incentives for individuals to cost shift from private means to public funds. It is an inefficient use of government resources to provide support, which is intended for people in genuine need of assistance, to individuals who can afford to 'salary sacrifice' all or part of their income.

6.13 Inadequate and out-dated income-testing will continue to produce stress on government expenditure. Treasury estimates this expenditure to be around $160–170 million per year between 2009-10 and 2011-12.

Explicit government regulation — include certain 'salary sacrificed' contributions to superannuation in the income tests used to determine eligibility to government support programs

6.14 Explicit government regulation (black letter law) is the preferred regulatory approach to achieve the desired outcome due to the complexity and universality of the legislative definition required.

6.15 At the core of the proposal is the requirement to draft and implement a robust and workable definition of 'salary sacrificed' contributions to superannuation — those that could have been received by individuals as cash income — that should be assessed as income for a range of income-tests in the tax and transfer system (eg, adjusted taxable income, separate net income, net income from working). Mandated employer contributions to superannuation on behalf of employees will not be assessed as income as they could not have been received by employees as current income.

6.16 Universal application of the definition is required across different remuneration arrangements and industrial instruments. For example, some employers 'salary sacrifice' mandated contributions on behalf of their employees in addition to non-mandated contributions. Further, mandated arrangements can vary. The minimum stated in the superannuation guarantee legislation is 9 per cent of ordinary time earnings. However, many industrial instruments mandate higher levels of compulsory employer superannuation contributions.

6.17 The definition of 'salary sacrificed' superannuation contributions to be assessed as income will also have to take into account the different types of contributions to superannuation. In the case of

defined benefit schemes, employer contributions, in addition to and sometimes well above those required under superannuation guarantee law, will not be assessed as these contributions could not have been taken by the employee as cash. However, in some defined benefit schemes, where post-tax contributions can be converted to pre-tax contributions, these will be assessed because they could have been used by the employee to support themselves.

6.18 The definition will need to anticipate contrived arrangements between employees and employers to circumvent the policy intent. There will remain incentive to minimise assessable income in order to maintain eligibility for government financial assistance.

6.19 Implementation of the proposal will require employers to record superannuation contributions that are assessed as income on the payment summaries of their employees. Employees in turn will record these amounts on their tax return. The Australian Taxation Office (ATO) will undertake information and education campaigns for employers, tax intermediaries and individuals. The ATO estimates that around 61,000 employers will be affected by the proposal.

6.20 The new definition of income will include deductible personal superannuation contributions as these contributions are conceptually similar to 'salary sacrificed' contributions made by employees. The proposal is due to commence from 1 July 2009 (2009-10 income year). Once implemented, the income tests of government support programs will be more comprehensive and treatment of income between those who receive their income as wages or salary and those who receive this income as contributions to superannuation will be more equitable.

Assessment of impacts

Explicit government regulation — include certain 'salary sacrificed' contributions to superannuation in the income tests used to determine eligibility to government support programs

6.21 The impact analysis of the proposed regulation has been compared to leaving the current situation unchanged, that is, where salary sacrificed contributions to superannuation are not assessed as income to determine government support program eligibility.

Impact group identification

6.22 The groups in the community that are affected by salary sacrificing remuneration arrangements are:

- Individuals (employees and the self-employed). The ATO estimates that around 540,000 employees alone are salary sacrificing above 9 per cent employer superannuation contributions. There will also be self-employed people who contribute to superannuation.
- Employers including small business. The ATO estimates that around 61,500 employers will be affected by the proposal, of which around 1,500 are large, 25,000 are small to medium in size and 35,000 are micro-sized (source: number of businesses lodging Fringe Benefits Tax returns, ATO statistics 2004-05).
- Tax practitioners. The ATO estimates that a small proportion of the 22,000 tax practitioners would be affected by the proposal.
- Other intermediaries (eg, software developers, payroll providers and financial planners). The ATO estimates that a proportion of the 7,000 financial planners will be affected, as will other intermediaries.
- Australian Government. There will be additional administrative and compliance costs on the ATO and Centrelink, and additional departmental costs in affected government agencies.
- The Australian community. The Australian people will benefit from the proposal through more effective targeting of government support programs to those they are designed to assist (eg, low- and middle-income individuals and families). The proposal promotes greater equity in the treatment of resources available to individuals and families to determine eligibility to support programs. It also treats the employment-related income of those with and without salary sacrifice superannuation arrangements in a like way.

Analysis of costs/benefits

Individuals

6.23 Individuals, who claim government support at present, will no longer be entitled to that support if their income including salary sacrificed contributions to superannuation is above means-test thresholds. These individuals will need to re-evaluate their remuneration arrangements. Some may need to use private income in lieu of government assistance to support themselves. In cases where private income from other (non-employment) sources is unavailable, retirement savings in the form of salary sacrificed contributions to superannuation may decrease. It is possible that some people will lose access to government financial assistance and concessional tax treatment on their superannuation contributions which they can no longer afford to make.

6.24 Receiving parents and their children will benefit from the proposal through increased child support payments from paying parents, whose more comprehensive measure of available resources will now be taken into account when determining these child support payments.

6.25 Some low- and middle-income individuals may receive greater support under the proposed changes. This will occur in programs with a phase-in threshold, such as the mature age worker tax offset and the government co-contribution scheme. Whether individuals receive greater government support overall will depend on what other programs they access.

6.26 Individuals, whose employers do not provide access for them to, or they themselves cannot afford to, salary sacrifice income into superannuation will not be affected by the proposal. They will continue to receive government support if their assessable resources permit.

6.27 Individuals that enter into salary sacrifice remuneration arrangements with their employers will be required to report the total amount of ‘salary sacrificed’ superannuation contributions on their annual income tax returns. This information will be provided by employers on (annual) payment summaries.

6.28 Self-employed people will continue to report their annual personal superannuation deductions on their income tax return. Individuals with both employee and self-employed income in any given year will need to report both components of superannuation in their annual tax returns.

Employers (including small business)

6.29 There will be a medium-implementation burden and medium-ongoing impact on employers who offer these remuneration arrangements. Employers will need to be aware of the change and understand its potential implications as they will be a key contact for their employees. Employers will need to understand the distinction between mandated and greater-than mandated contributions to superannuation so that they can report the latter on employee payment summaries. Employers with a mix of employees entitled to different levels of mandated contributions will face added complexity. Employers will need to update their software and systems by 1 July 2009 to report salary sacrificed contributions on employee payment summaries for the 2009-10 income year. Employers will have ongoing procedural and record-keeping costs.

6.30 There may be a relatively disproportionate burden on small businesses that offer these arrangements to their employees.

6.31 There is no direct benefit to employers. Those that offer these arrangements will continue to receive a tax deduction in respect of these contributions.

Tax practitioners and other intermediaries

6.32 Tax practitioners and other intermediaries (eg, software developers, human resource service providers, financial planners) will need to be aware of the change and understand its potential implications for their clients.

Australian Government

6.33 The cost to the Government of administering the proposal is estimated at around $5.5 million per year from 2008-09 to 2011-12 for the ATO alone. The cost to Government reflects a large implementation cost of $10 million in 2009-10, around $8 million of which will be spent on stakeholder education. Ongoing costs beyond the forward estimates are expected to be around $2.8 million per year. These are comprised of processing, client contact, debt collection and compliance costs.

6.34 There will be additional administration costs in Centrelink and other affected agencies. The Government will need to provide information and conduct education campaigns for individuals, employers and other stakeholders.

6.35 The fiscal impact of the proposal is a saving of around $160 million to $170 million each year from 2009-10 to 2011-12.

Australian community

6.36 The Australian community stands to benefit from the proposal through more equitable provision of government support and more efficient redistribution of income collected by government.

Risks

6.37 It will be difficult to prescribe in legislation the definition of superannuation contributions that should be assessed as income for government support programs. At present, there is no legislative definition of these contributions and there are many superannuation contribution arrangements between employers and employees. There is a risk that employees and employers may enter into contrived remuneration arrangements to circumvent the policy intent.

Tax Compliance Cost Calculator

6.38 The ATO has assessed the potential compliance-cost impact to be medium, which is comprised of a medium-implementation impact and a medium-ongoing impact. It has identified that significant system changes may be required by employers.

6.39 Table 6.1 contains a summary of potential direct compliance-cost impacts only and is a partial estimate of the potential compliance-cost impact. The compliance costs are mainly borne by employers with a small impact on individuals. The cost to employers in different market segments is higher. For example, a large company would have a start-up cost of $9,114 and an ongoing cost of $702 each year. The start-up and ongoing costs for small and medium enterprises and micro-employers are $648 and $33, and $504 and $27 respectively. Ongoing costs to individuals are assumed to be nil. However, supporting evidence is weak as firm data is not available, requiring estimates to be made.

6.40 Data used in calculating suggested times (average hours) are informed by ATO expertise and information derived from the ATO-ATAX compliance-cost survey; New Zealand SME survey; ATO time-box form data; and post-implementation reviews conducted by the Board of Taxation.

Table 6.2: Estimated cost of regulation to taxpayers and employers, Australia, 2008

Client type	*Number of clients*	*Cost per client*	*Total potential cost of regulation*
		($ per year)	*($ per year)*
Implementation cost			
Individuals	540,000	18	9,719,999
Large businesses	1,473	9,114	13,424,922
Small to medium businesses	25,000	648	16,200,000
Micro businesses	35,000	504	17,640,000
Total implementation cost	*601,500*	*95*	*56,984,921*
Ongoing cost			
Individuals	540,000	0	0
Large businesses	1,473	702	1,034,046
Small to medium businesses	25,000	33	825,000
Micro businesses	35,000	27	945,000
Total ongoing cost	*601,500*	*5*	*2,804,046*

Cumulative regulatory burden

Individuals

6.41 There is a small increase in regulatory burden for employees that have entered this type of remuneration arrangement with their employer. These employees will be required to report 'salary sacrificed' superannuation contributions on annual tax returns. Employees will report the amount recorded by employers on annual payment summaries. The self-employed already report personal deductible contributions on tax returns.

6.42 Some individuals will need to review their remuneration arrangements. Some may be inclined to seek arrangements which circumvent the policy to maintain access to government support.

Businesses

6.43 There will be a medium increase in regulatory burden for employers. On implementation, they will face a medium burden as they will be required to update their systems by 1 July 2009 to record employer

contributions to superannuation — to be defined in legislation — made on behalf of their employees. Employers will also have a medium-ongoing regulatory burden in the form of continued procedural and record-keeping costs.

6.44 Employers are already required to report total employer contributions to superannuation made on behalf of each employee to superannuation funds. However, this amount does not discretely identify the various components of these contributions (eg, mandated contributions, salary sacrificed contributions).

Data sources, assumptions and data gaps

6.45 Personal income tax data (2004-05) and superannuation surcharge (2004-05) data has been used to obtain estimates of deductible superannuation contributions. The Treasury's STINMOD model, which uses Australian Bureau of Statistics' Survey of Income and Housing data (2002-03 and 2003-04), has been used to estimate fiscal impacts on income support and family assistance programs. A range of employer data has been used to estimate employer burden.

Consultation

Who has been consulted?

6.46 The affected Government agencies have been consulted, namely:

- Treasury;
- Department of Finance and Deregulation;
- Department of Families, Housing, Community Services and Indigenous Affairs;
- Department of Education, Employment and Workplace Relations;
- Department of Human Services;
- Department of Health and Ageing;
- Child Support Agency;
- Department of Veterans' Affairs;

- Department of Agriculture, Fisheries and Forestry;
- ATO; and
- Centrelink.

What are their views?

6.47 All relevant agencies support the policy.

6.48 Treasury has developed the policy and appropriate mechanism for putting the policy into practice. Treasury has also highlighted the challenges in drafting effective legislation.

6.49 The ATO has also highlighted complexities for particular groups (eg, self-employed, transition to retirement) and noted the legislative difficulty.

6.50 Centrelink applies the policy to people of age pension age.

6.51 The Department of Finance and Deregulation has cleared the program (administered) and departmental costs.

What was the consultation process?

Policy development

6.52 Treasury prepared a discussion paper outlining the rationale and mechanism for the policy proposal in consultation with the Department of Families, Housing, Community Services and Indigenous Affairs. Treasury and the Department of Families, Housing, Community Services and Indigenous Affairs consulted affected line agencies to seek comment and support.

6.53 Treasury consulted internally to refine the policy and in particular the mechanism for change (eg, superannuation contributions to be reported on payment summaries). Treasury also consulted the ATO and Centrelink to determine the integrity of the proposal and seek advice on compliance and administrative costs.

6.54 Consultation did not occur with individuals, businesses and other stakeholders as the proposal was being developed and put forward in the context of the 2008-09 Budget.

Draft legislation

6.55 Public consultation on draft legislation giving effect to this proposal and other reforms to income tests announced in the 2008-09 Budget took place from 5 November 2008 to 7 December 2008 from the Treasury website (www.treasury.gov.au). Stakeholders were advised via email when the consultation period commenced. There was also a reminder of a final opportunity to submit comments sent via email on 12 December 2008.

6.56 Key stakeholders were identified following consultation with relevant agencies. The ATO also notified members of its stakeholder committees that the consultation period had commenced and details of the changes are available from the ATO and Centrelink websites.

Conclusion and recommended option

6.57 Government support programs in the Australian tax and transfer system are generally means-tested to target them to groups with certain levels of resources. However, many income tests omit important components of remuneration and other income. In the case of 'salary sacrificed' contributions to superannuation, this is a relatively modern form of remuneration and one that has been increasing in popularity.

6.58 The inclusion of 'salary sacrificed' superannuation contributions in income is a structural reform of the tax and transfer system, which broadens the concept of remuneration. It treats this type of income in the same way as other forms of income, such as salary and wages. Further, it treats people with access to this type of remuneration equally to those without access to these arrangements. More equitable treatment of government support recipients means that those with similar levels of private resources receive similar levels of government support.

6.59 Explicit government regulation defined in legislation is the recommended approach due to the complexity and universality of the definition required to achieve the desired outcome. To leave the current situation unchanged would most likely make the problem of inequitable treatment of income more widespread as salary sacrificed superannuation arrangements are used by greater numbers of individuals to access government support payments. The recommendation has support from agencies (eg, ATO, Centrelink) that will administer the proposal. Centrelink already assesses this type of income for people of age pension age. The Department of Veterans' Affairs also assesses this type of income for its clients.

6.60 There is some risk that the proposal will be compromised where individuals enter into contrived remuneration arrangements to circumvent the policy.

Implementation and review

6.61 'Salary sacrificed' superannuation contributions made on behalf of employees will need to be recorded and reported by employers on employee annual payment summaries. The proposal will increase the reporting burden on employers, but its design is similar to other employee entitlements already reported by employers on payment summaries (eg, reportable fringe benefits). Employees will report these amounts on annual tax returns. The ATO will determine eligibility for the government support programs it administers when it undertakes individual assessments. The ATO will forward this information to the Child Support Agency and Centrelink. The ATO has estimated administration costs of around $20 million over four years from 2008-09 to 2011-12, though around half of these costs occur in the implementation year 2009-10. Future administrative costs are estimated to be around $2 million per year.

6.62 Centrelink clients will provide details of 'salary sacrificed' contributions to the agency when they apply for government support programs administered by it (eg, income support payments, family assistance). At present, Centrelink collects this information from clients of age pension age only. The proposal extends collection to clients below age pension age.

6.63 The proposal will be implemented from 1 July 2009 (2009-10 income year) to enable individuals, businesses and government agencies to update their systems over the preceding 13 months. The ATO will inform individuals of the changes to ensure they have sufficient time to make changes to their arrangements if they wish. The ATO will also communicate to individuals in the lead up to Tax Time 2010. The ATO will also inform employers of the changes well before 1 July 2009 to ensure they will be able to capture necessary data for contributions made from 1 July 2009. The ATO will inform employers of their obligations in relation to payment summaries in the lead up to 30 June 2010. The ATO will also inform intermediaries such as software developers, payroll providers and salary packaging providers of the changes.

6.64 The ATO will undertake some compliance work in relation to correct reporting by employers on payment summaries as part of its existing employer compliance framework. This would add time to a review or audit and may also require some targeted selection for reviews in the first few years.

6.65 While there is no formal review mechanism foreshadowed, the design of the proposal enables its effectiveness to be assessed in the future. The proposal relies on individuals self-reporting their salary sacrificed contributions to superannuation (as recorded by their employers). Employers make employer contributions to superannuation funds, which in turn provide the information to the ATO on individual member contribution statements. While not part of this proposal, it would be possible for the ATO to match information on annual tax returns with that obtained through member contribution statements.

Chapter 7
Exclusion of certain employer superannuation contributions from test for exceptional circumstances relief payment

Outline of chapter

7.1 Part 4 of Schedule 3 to this Bill amends the *Farm Household Support Act 1992* to ensure that particular employer superannuation contributions, which would have been assessed as income for exceptional circumstances (EC) relief payment purposes due to reforms to income tests announced in the 2008-09 Budget, are disregarded.

7.2 However, the amendments do not exclude those superannuation contributions made by or on behalf of an individual that are currently considered in determining an individual's income for EC relief payment purposes

Context of amendments

7.3 EC relief payment provides assistance to farmers living in 'EC declared areas' that are experiencing difficulty in meeting living expenses. EC relief payment is also available to small business operators whose gross business turnover and therefore income has been significantly reduced by the effects on farmers, farm workers and their families of living in an 'EC declared area'.

7.4 There are guidelines stating that EC are rare and severe events outside those that a farmer could normally be expected to manage using responsible farm management strategies. An EC event is expected to occur once every 20 to 25 years on average and have an impact on farm income for a prolonged period. An EC event cannot be used to define part of long-term structural adjustment processes or normal fluctuations in commodity prices.

7.5 'EC declared areas' are the result of a declaration from the Australian Government Minister for Agriculture, Fisheries and Forestry.

Applications for an EC declaration are typically made by state or territory governments on behalf of an affected region or relevant industry body.

7.6 There is no set duration for EC declarations although such declarations are initially issued for two years. EC declarations are reviewed prior to cessation and, if required, are generally extended for 12 months.

7.7 Once an EC declaration covers an area, farmers and small business operators located in that area may apply for EC relief payment. However, to be eligible under the *Farm Household Support Act 1992*, applicants must hold an EC certificate from Centrelink to prove they reside in the 'EC declared area'.

7.8 The rate of EC relief payment for farmers and small business operators is the fortnightly rate of Newstart Allowance to which the individual would be entitled. If the applicant is of 'youth allowance age', as defined in the *Social Security Act 1991* (SS Act 1991), the fortnightly rate is the amount of Youth Allowance to which the individual would be entitled.

7.9 Through this means, the income assessed for Newstart and Youth Allowance purposes is relevant in determining an individual's rate of EC relief payment.

7.10 From 1 July 2009, income test reforms announced in the 2008-09 Budget will extend what income is assessed for income support purposes to include the new concept of 'reportable employer superannuation contributions' (RESC) where those contributions are made in respect of an individual below age pension age. This ensures that such contributions are treated consistently as income with how they are treated where made in respect of an individual above age pension age.

7.11 These reforms, which are to be made through administrative changes with no need for legislative reform, are part of broader 2008-09 Budget reforms to include 'reportable superannuation contributions' in income across means-tested tax and transfer systems.

7.12 Reportable superannuation contributions are an individual's RESC and their deductions for personal superannuation contributions under Subdivision 290-C of the ITAA 1997. These deductible personal contributions are currently assessed as income for income support payments made under the SS Act 1991.

7.13 The 2008-09 Budget reforms would mean that, from 1 July 2009, the income assessed in determining a farmer or small business operator's rate of EC relief payment would include the

individual's RESC for individuals below age pension age. The test already includes contributions similar to RESC for farmers and small business operators above age pension age.

Summary of new law

7.14 Part 4 of Schedule 3 excludes contributions that would have become income for the purposes of EC relief payment from 1 July 2009, as a result of reforms announced in the 2008-09 Budget, from the definition of income used to determine a farmer or small business operator's rate of EC relief payment.

7.15 The amendments mean that the income definition used for EC relief payment purposes will be unchanged following 1 July 2009.

Comparison of key features of new law and current law

New law	*Current law*
No change.	RESC of below age pension age individuals are not assessed as income for EC relief payment.

Detailed explanation of new law

7.16 The amendments provide for certain superannuation contributions, which would have been assessed as income for EC relief payment purposes as a consequence of reforms announced in the 2008-09 Budget, to be disregarded in determining an individual's rate of EC relief payment.

7.17 This reform is made in recognition of the difficult conditions faced by many of Australia's farmers and small business operators in 'EC declared areas'.

7.18 From 1 July 2009, the definition of income used to determine a farmer's rate of EC relief payment under section 24A of the *Farm Household Support Act 1992* will be unchanged from what was assessed before 1 July 2009. ***[Schedule 3, Part 4, item 92]***

7.19 Similarly, the amendments to section 24AA of the *Farm Household Support Act 1992* mean the definition of income assessed in

determining a small business operator's rate of EC relief payment will be unchanged. ***[Schedule 3, Part 4, item 93]***

7.20 However, those contributions which are currently assessed as income for EC relief payment will continue to be assessed from 1 July 2009.

7.21 For example, under the current Newstart Allowance income definition, contributions broadly equating to RESC are assessed as income of individuals above age pension age. Deductible personal superannuation contributions are also assessed.

7.22 Further, the amendments do not alter the inclusion of superannuation contributions in the definition of income for Newstart Allowance purposes as a result of the attribution of income rules in Part 3.18 of the SS Act 1991.

7.23 Under the SS Act 1991, income and assets of companies and trusts may be attributed to individuals in some circumstances. For an entity's income to be attributed to an individual, the company or trust must be a controlled private company or trust of the individual and the individual must be an 'attributable stakeholder' as defined in section 1207X of the SS Act 1991.

7.24 If an individual is an 'attributable stakeholder', ordinary income of the company or trust will be attributed to them pursuant to section 1207Y of the SS Act 1991. As a result, that income will be assessed in determining the individual's entitlement for income support payments under the SS Act 1991 which affects their rate of EC relief payment.

7.25 Section 1208B of the SS Act 1991 allows business or investment income of a company or trust to be reduced by any amounts that would be allowed as a tax deduction against that income. Section 1209C also allows company or trust income from a 'primary production enterprise' (as defined in section 1207A of the SS Act 1991) to be reduced by any amounts that would be tax deductible against that income.

7.26 These provisions reduce the company or trust's income and, therefore, the amount of income that may be subject to the attribution rules.

7.27 However, subsections 1208B(2) and 1209C(2) of the SS Act 1991 do not allow 'ineligible deductions' to be applied against business or investment income or income from a primary production enterprise. The power to specify particular expenses as an 'ineligible part' of a deduction is in subsections 1208B(5) and 1209C(5) of the SS Act 1991.

7.28 *The Social Security (Attribution of Income — Ineligible Deductions) Determination 2004*, made on 1 April 2004, provides that superannuation contributions made by a company or trust on behalf of an ‘attributable stakeholder’, or prescribed associate of an ‘attributable stakeholder’, are an ‘ineligible part’ of a deduction if they exceed the contribution required to be made under superannuation guarantee legislation.

7.29 That is, these *excess* contributions cannot be applied against a company or trust’s business or investment income, or the income of a primary production enterprise. As a result, their amount will be added to the income of the company or trust that will be attributed as income to the relevant ‘attributable stakeholder’ under section 1207Y of the SS Act 1991.

7.30 By excluding contributions made by a company or trust to an ‘attributable stakeholder’, or associate of an ‘attributable stakeholder’ such as a relative or business partner, the new subsection 24A(9) of the *Farm Household Support Act 1992* does not alter the current assessment of such contributions in determining an individual’s rate of EC relief payment.

Example 7.20

> Simon is an employee of XYP Pty Ltd (XYP). XYP manages Simon’s farm in an ‘EC-declared area’ and he is the company’s sole director. As such, Simon is an ‘attributable stakeholder’ of XYP and the company’s net income should be attributed to him in accordance with section 1207Y of the SS Act 1991. XYP makes superannuation contributions on Simon’s behalf and $2,000 of the annual contributions total exceed what is required to have been made under superannuation guarantee law. This $2,000 is added to the remainder of XYP’s net income and the total (including the $2,000) is attributed as income to Simon. That total is then taken into account in determining Simon’s rate of EC relief payment.

7.31 New subsection 24A(9) means, from 1 July 2009, individuals below age pension age will have these *excess* contributions, which would fall within the RESC definition, assessed in determining their rate of EC relief payment. This is unchanged from the current contributions assessed for these individuals.

Application and transitional provisions

7.32 These amendments will commence the day after Royal Assent.

7.33 The amendments apply in relation to income years starting on or after 1 July 2009.

Chapter 8
Dependency tax offsets

Outline of chapter

8.1 Part 5 of Schedule 3 to this Bill amends the *Income Tax Assessment Act 1936* (ITAA 1936) to replace all current income definitions used to determine eligibility for the dependency tax offsets with 'adjusted taxable income'. 'Adjusted taxable income' is the income definition used to determine eligibility for family assistance payment purposes.

8.2 Part 5 also extends the income cap on eligibility for the dependency tax offsets, introduced as part of the 2008-09 Budget, so that it applies to the combined adjusted taxable income of the taxpayer and their spouse (where appropriate). The exception is the income cap on eligibility for the dependent spouse tax offset which will continue to apply to the taxpayer's income only.

Context of amendments

8.3 The dependency tax offsets are available to taxpayers that maintain a dependant during an income year. To qualify for the offsets, a taxpayer and their dependant must have income below particular thresholds. For example, the dependant must have 'separate net income' below $282 if the taxpayer is to qualify for the maximum offset.

8.4 'Separate net income' is broadly defined as gross income that the dependant earned or received while being maintained by the taxpayer less expenses that are regarded, according to ordinary accountancy and commercial principles, as a direct charge against that income. Separate net income includes some exempt income that would not ordinarily be included in the taxpayer's assessable income such as disability support pensions.

8.5 Where a dependant's separate net income is above $282 then the maximum offset available to the taxpayer will reduce by $1 for every $4 by which the dependant's separate net income exceeds $282. The formula to calculate the offset in these circumstances is as follows:

Tax offset available = maximum tax offset − (separate net income – 282)/4

8.6 From 1 July 2008, taxpayers must have taxable income of $150,000 or less to be eligible for the dependency tax offsets. This change was introduced as part of the *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2008 Budget and Other Measures) Act 2008* (No. 63 of 2008).

8.7 The $150,000 threshold was announced in the 2008-09 Budget and will be indexed in accordance with the indexation arrangements applying to the $150,000 combined adjusted taxable income threshold that has applied on eligibility for Family Tax Benefit (Part B) from 1 July 2008.

8.8 Dependants for the purposes of the dependency tax offsets are the taxpayer's spouse; child-housekeeper; housekeeper; invalid-relative; or taxpayer's parent or parent-in-law. ***Housekeeper*** is defined as any person who was wholly engaged in keeping house in Australia for the taxpayer and in caring for particular dependants of the taxpayer. A ***child-housekeeper*** is any child of the taxpayer who was wholly engaged in keeping house for the taxpayer during the income year.

8.9 Taxpayers cannot claim both the dependent spouse tax offset and either the child-housekeeper or housekeeper tax offsets in respect of the same year or period of a year. Pursuant to subsection 159L(3) of the ITAA 1936, taxpayers cannot claim both the child-housekeeper and housekeeper tax offsets in respect of the same period in a year. Further, a taxpayer is unable to claim the dependent spouse, child-housekeeper or housekeeper tax offsets for any part of an income year where they or their spouse are eligible for Family Tax Benefit (Part B).

8.10 The fact a taxpayer is precluded from claiming the dependency tax offsets due to their eligibility for Family Tax Benefit (Part B) does not affect their entitlement for some other tax offsets whose amount increases depending on the taxpayer's dependants. For example, when determining a taxpayer's 'relevant rebate amount' under section 79A of the ITAA 1936 for the purposes of the zone tax offset, the fact a taxpayer is precluded from claiming the dependent spouse tax offset due to eligibility for Family Tax Benefit (Part B) is to be ignored.

8.11 Similarly, the fact a taxpayer has been precluded from claiming a dependency tax offset because their income exceeds the income cap is to be ignored for the purposes of the medical expenses tax offset. Paragraph (e) of the 'dependant' definition for the purposes of the medical expenses tax offset in section 159P of the ITAA 1936 includes a taxpayer's dependent spouse; child-housekeeper; invalid relative; or parent/parent-in-law even if the taxpayer is precluded from claiming a tax offset in respect of maintaining for such dependants because their income exceeds the income cap.

8.12 This extension of the 'dependant' definition was made by the *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2008 Budget and Other Measures) Act 2008* (No. 63 of 2008).

8.13 If a taxpayer is eligible for a dependency tax offset for only part of the income year then a formula applies for calculating a pro rata offset.

8.14 The reforms to the dependency tax offsets should reduce workforce participation disincentives that can be associated with the dependency tax offsets and more closely align the eligibility criteria used for these offsets with those applying for family assistance.

8.15 The reforms replace all existing income definitions used to determine eligibility for the dependency tax offsets with 'adjusted taxable income', as defined in the *A New Tax System (Family Assistance) Act 1999*. As part of this Bill, 'adjusted taxable income' is amended to include 'reportable superannuation contributions' and a broader definition of losses from discretionary activities.

8.16 This ensures greater consistency between the income arrangements for family assistance payments and the dependency tax offsets.

Summary of new law

8.17 Part 5 of Schedule 3 amends all income definitions used to determine eligibility for the dependency tax offsets so that they become 'adjusted taxable income', which is the income definition used for family assistance payment purposes. As part of this process, Part 5 repeals the definition of 'separate net income' from the ITAA 1936.

8.18 Part 5 also links the current $150,000 income cap on eligibility for the dependency tax offsets to the income limit on eligibility for Family Tax Benefit (Part B) and extends the income test to assess the combined

income of the taxpayer and their spouse for the purposes of the child housekeeper; housekeeper; invalid relative; and parent/parent-in-law tax offsets. The income cap on eligibility for the dependent spouse tax offset will continue to apply to the taxpayer's income only. However, the income assessed in determining the dependant's income will be 'adjusted taxable income'.

Comparison of key features of new law and current law

New law	*Current law*
With the exception of the dependent spouse tax offset, eligibility for the dependency tax offsets will be assessed having regard to whether the combined adjusted taxable income of the taxpayer and their spouse is $150,000 (indexed) or less. The income of the taxpayer's dependant will still need to be below applicable unchanged low income thresholds.	A person is eligible for the dependency tax offsets if their taxable income is $150,000 or less and their dependant's income is below applicable low income thresholds.
The dependant's 'adjusted taxable income' will be assessed in determining the taxpayer's eligibility for a dependency tax offset. The concept of separate net income will be repealed.	The dependant's separate net income is assessed in determining the taxpayer's eligibility for a dependency tax offset.

Detailed explanation of new law

8.19 Part 5 of Schedule 3 amends the definition of income used for the purposes of the $150,000 cap on eligibility for the dependency tax offsets from taxable income to 'adjusted taxable income'. 'Adjusted taxable income' has the same meaning as that concept would have in the *A New Tax System (Family Assistance) Act 1999* if clauses 3 and 3A of Schedule 3 of that Act were taken not to have been enacted. ***[Schedule 3, Part 5, item 97]***

8.20 The amendments also align the $150,000 income cap with the indexed income limit applied on eligibility for Family Tax Benefit (Part B). A definition of the 'income limit for Family Tax Benefit (Part B)' is inserted in subsection 159J(6) of the ITAA 1936. ***[Schedule 3, Part 5, item 98]***

8.21 Linking the income cap on eligibility for the dependency tax offsets with the income limit for Family Tax Benefit (Part B) prevents some taxpayers, who will be precluded from being eligible for Family Tax Benefit (Part B) due to the income cap, becoming eligible for the dependency tax offsets.

8.22 The 'income limit for Family Tax Benefit (Part B)' will apply to the combined adjusted taxable income of the taxpayer and their spouse in respect of the child-housekeeper; invalid relative; and parent/parent-in-law tax offsets. The income limit on eligibility for the dependent spouse tax offset will apply to the taxpayer's income only. ***[Schedule 3, Part 5, item 94]***

8.23 Given the already low income permitted of a spouse as a condition of taxpayers being eligible to claim the dependent spouse tax offset, it was not considered necessary to extend the income cap to a spouse's income for the purposes of that offset.

8.24 The income limit on eligibility for the housekeeper tax offset was included subsection 159L(3B) of the ITAA 1936. The amendments substitute subsection 159L(3B) with a new subsection that references the revised income cap on eligibility for the other dependency tax offsets in new subsection 159J(1AC). ***[Schedule 3, Part 5, item 100]***

8.25 The income assessed in determining the dependant's income for the purposes of the dependency tax offsets has altered from separate net income to 'adjusted taxable income' so the amendments repeal the definition of separate net income. ***[Schedule 3, Part 5, item 99]***

8.26 The amendments also replace references to the separate net income concept with 'adjusted taxable income'. ***[Schedule 3, Part 5, items 95 and 96]***

8.27 These amendments mean a taxpayer's offset entitlement will reduce by $1 for every $4 by which a dependant's 'adjusted taxable income' exceeds $282 pursuant to subsection 159J(4) of the ITAA 1936.

Example 8.21

Heather and Jane are partners in a same-sex couple. Heather earns $90,000 per annum in salary and wages. Jane is on unpaid leave. Heather wishes to claim the maximum dependent spouse tax offset in respect of Jane for the 2009-10 income year.

While Jane has no employment income, she and Heather jointly own an investment property. The rental income for the property in 2009-10 is $13,000 but the total expenses related to the property are $17,500. That is, the property has made a net rental property loss of $4,500. As

joint owners, Heather and Jane split this loss so that both have a $2,250 net rental property loss in 2009-10. Jane has no other income or deductions from investment activities so her total net investment loss is $2,250. As Jane had no other income or fringe benefits amounts for the income year, her 'adjusted taxable income' is $2,250. Heather is ineligible for the maximum dependent spouse tax offset as Jane's adjusted taxable income exceeds $282. However, Heather would still be eligible for some dependent spouse tax offset in accordance with subsection 159J(4) of the ITAA 1936.

8.28 Where a taxpayer has a spouse for only part of the income year, or has multiple spouses in a year, the amendments include a formula for determining the taxpayer's combined income for the purposes of the income limit on eligibility. ***[Schedule 3, Part 5, item 94]***

8.29 Because the amendments to the income cap on eligibility for the dependency tax offsets substitute the former subsection 159J(1AB) with a new subsection, the fact a taxpayer is ineligible to claim a dependent spouse; child-housekeeper; invalid relative; or parent/parent-in-law tax offset due to their income continues to be ignored in determining the taxpayer's dependants for the purposes of the medical expenses tax offset. This is a result of paragraph (e) of the definition of 'dependant' for the purposes of the medical expenses tax offset in subsection 159P(4) of the ITAA 1936.

Example 8.22

Michael wishes to claim the medical expenses tax offset for medical expenses incurred in respect of his mother-in-law during the 2009-10 income year. Michael's combined adjusted taxable income with his spouse is $158,000 so he is not eligible to claim the parent-in-law tax offset. However, this fact is ignored for the purposes of the medical expenses tax offset 'dependant' definition. As a result, Michael's mother-in-law is considered one of his dependants for the purposes of the medical expenses tax offset and he may claim the offset for amounts paid in respect of her medical expenses.

Application and transitional provisions

8.30 These amendments will commence the day after Royal Assent.

8.31 The amendments will apply to assessments for the 2009-10 income year and later income years.

Consequential amendments

8.32 The amendments replace a reference to 'separate net income' in the family actual means test provisions of the *Social Security Act 1991* with a reference to 'adjusted taxable income. ***[Schedule 3, Part 5, item 101]***

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