2010-2011-2012-2013

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TAX LAWS AMENDMENT (2013 MEASURES No. 2) BILL 2013

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Deputy Prime Minister and Treasurer, the Hon Wayne Swan MP)

TABLE OF CONTENTS

Glossary 1

General outline and financial impact..... 3

Chapter 1 Monthly Pay As You Go instalments 15

Chapter 2 Tax loss incentive for designated infrastructure projects..... 37

Chapter 3 Creating a regulatory framework for tax (financial) advice services and other amendments..... 75

Chapter 4 Regulation impact statement — Creating a regulatory framework for tax (financial) advice services and other amendments 119

Chapter 5 Improving the transparency of Australia's corporate tax system 139

Chapter 6 Petroleum Resource Rent Tax 153

Chapter 7 Removing the Capital Gains Tax Discount for Foreign Individuals 173

Chapter 8 Tax exemption for payments under the Defence Abuse Reparation Scheme 195

Chapter 9 GST-free treatment for National Disability Insurance Scheme funded supports..... 199

Chapter 10 Deductible gift recipients 209

Chapter 11 Miscellaneous amendments..... 215

Index..... 229

Glossary

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

Abbreviation	***Definition***
AAT	Administrative Appeals Tribunal
ABN	Australian Business Number
ABS	Australian Bureau of Statistics
ACNC	Australian Charities and Not-for-profits Commission
AFSL	Australian financial services licence
APS	Australian Public Service
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
AWOTE	average weekly ordinary time earnings
CGT	capital gains tax
Commissioner	Commissioner of Taxation
Coordinator	Infrastructure Coordinator
Corporations Act	*Corporations Act 2001*
Corporations Regulations	*Corporations Regulations 2001*
CPE	continuing professional education
DCA	DisabilityCare Australia
DGRs	deductible gift recipients
DIP	designated infrastructure project
Esso	*Esso Australia Resources Pty Ltd v Commissioner of Taxation* [2012] FCAFC 5
FBT	fringe benefits tax
FBTAA	*Fringe Benefits Tax Assessment Act 1986*
GST	goods and services tax
GST Act	*A New Tax System (Goods and Services Tax) Act 1999*

Abbreviation	***Definition***
ITAA 1936	*Income Tax Assessment Act 1936*
ITAA 1997	*Income Tax Assessment Act 1997*
MRRT	Minerals Resource Rent Tax
NDIS	National Disability Insurance Scheme
NDIS Act	*National Disability Insurance Scheme Act 2013*
PI insurance	professional indemnity insurance
PRRT	petroleum resource rent tax
PRRTAA	*Petroleum Resource Rent Tax Assessment Act 1987*
R&D	research and development
SMSF	self managed superannuation fund
TAA 1953	*Taxation Administration Act 1953*
TASA 2009	*Tax Agent Services Act 2009*
TASR 2009	*Tax Agent Services Regulations 2009*
TPB	Tax Practitioners Board
Treasury	Department of the Treasury

General outline and financial impact

Monthly Pay As You Go instalments

Schedule 1 to this Bill amends Division 45 of Schedule 1 to the *Taxation Administration Act 1953* to require certain large entities to pay Pay As You Go (PAYG) instalments monthly.

The PAYG instalment system requires entities with business or investment income to pay instalments towards their income tax liability. It is designed to ensure the efficient collection of income tax, including the Medicare levy, Higher Education Loans Program (HELP) debts, and debts under the Student Financial Supplement Scheme and the Aboriginal Study Assistance Scheme (ABSTUDY).

Schedule 1 requires large entities to pay PAYG instalments monthly rather than quarterly or annually. Entities will be transitioned into the monthly PAYG instalment system over a four year period. This change does not increase the overall tax liability of an entity. Rather it makes PAYG instalments more responsive to the economic position of an entity and better aligns the timing of PAYG instalments with Government payments. This reduces the risk of an entity accumulating large tax debts.

Date of effect: The amendments introduced by Schedule 1 apply to corporate tax entities from 1 January 2014.

The amendments apply to all other entities from 1 January 2016.

Proposal announced: The Government announced the changes to the timing of instalment payments for corporate tax entities as part of the 2012-13 Mid-Year Economic Financial Outlook. The Government announced that the measure would apply to other large entities as part of the 2013-14 Budget.

Financial impact: This measure is expected increase revenue by $10.15 billion over the forward estimates.

2013-14	***2014-15***	***2015-16***	***2016-17***
$5,600m	$1,600m	$2,000m	$950m

Human rights implications: This Schedule does not raise any human rights issue. See *Statement of Compatibility with Human Rights* — Chapter 1, paragraphs 1.61 to 1.67

Compliance cost impact: Low.

Tax loss incentive for designated infrastructure projects

Schedule 2 to this Bill amends the *Income Tax Assessment Act 1997* to provide a tax incentive for entities that carry on a nationally significant infrastructure project that has been designated by the Infrastructure Coordinator.

The tax incentive:

- uplifts the value of such entities' carry forward tax losses by the long-term bond rate; and
- exempts such entities from the continuity of ownership, same business, trust loss and bad debt deduction tests.

Date of effect: This measure applies for the 2012-13 and later income years. The measure has a concessional retrospective element.

Proposal announced: This measure was announced by the Deputy Prime Minister and Treasurer and the Minister for Infrastructure and Transport in a Joint Media Release No 054 of 10 May 2011.

Financial impact: This measure has an unquantifiable but small impact on revenue over the forward estimates.

Human rights implications: This Schedule does not raise any human rights issue. See *Statement of Compatibility with Human Rights* — Chapter 2, paragraphs 2.182 to 2.186.

Compliance cost impact: Compliance costs will be reduced by the removal of the continuity of ownership, same business tests, trust loss and bad debt deduction tests.

Summary of regulation impact statement

Regulation impact on business

Impact: This measure will affect some companies and fixed trusts that carry on designated infrastructure projects.

Main points:

- Companies and fixed trusts that carry on designated infrastructure projects, and do not carry on activities that are not for the purpose of the project, can uplift their tax losses and are allowed to utilise losses and bad debt deductions without applying the continuity of ownership and same business tests.
- To limit the potential cost to revenue, the measure has been capped at projects with an estimated capital expenditure of $25 billion. In the absence of a cap, taxpayers would be able to self-regulate their access to the concessions. However, to manage potential costs to revenue and to ensure the highest value projects are supported, a decision maker (the Infrastructure Coordinator) will deem certain projects to be designated infrastructure projects.
- Before entities can access the concessions, an entity (not necessarily the entity that uses the concessions) must apply for a project to be designated as a designated infrastructure project and the entity must meet additional integrity requirements (such as notifying the Commissioner of Taxation that is eligible for the concessions).
- However, these costs are likely to be small relative to the size of the project and the sophisticated nature of the entities involved.
- Entities may only carry on one project in an entity. This avoids the need to identify which part of the assessable income and allowable deductions for an entity (worked out under the ordinary income tax law) are eligible for the concessions.

Creating a regulatory framework for tax (financial) advice services and other amendments

Schedule 3 to this Bill amends the *Tax Agent Services Act 2009* to bring entities that give tax advice in the course of giving advice that is usually provided by financial services licensees within the regulatory regime administered by the Tax Practitioners Board. This ensures the consistent regulation of all forms of tax advice, irrespective of whether it is provided by a tax agent, a BAS agent or an entity in the financial services industry.

In addition, Schedule 4 to this Bill makes a number of other amendments to the *Tax Agent Services Act 2009* to correct a range of technical issues.

Date of effect: The amendments in Schedule 3 mostly commence from 1 July 2013 with a three-year transitional period before the new regime commences in full on 1 July 2016. This transitional period ensures those in the financial services industry have time to adapt to the new regulatory requirements. The amendments in Schedule 4 apply from the day after this Bill receives Royal Assent

Proposal announced: On 29 November 2010, the then Assistant Treasurer and Minister for Financial Services and Superannuation released an options paper 'Regulation of tax agent services provided by financial planners' for public consultation. Following an ongoing consultation process with industry stakeholders, these amendments were announced in the 2012-13 Mid-year Economic and Fiscal Outlook.

Financial impact: Nil.

Human rights implications: These Schedules do not raise any human rights issues. See Statement of Compatibility with Human Rights — Chapter 3, paragraphs 3.165 to 3.172.

Compliance cost impact: Medium. Entities in the financial services industry that give tax advice in the course of giving advice that is usually provided by financial services licensees will need to register with the Tax Practitioners Board and meet standards of relevant qualifications and experience.

Summary of regulation impact statement

Regulation impact on business

Impact: These amendments will affect entities in the financial services industry that provide tax advice in the course of giving advice that is usually provided by financial services licensees.

Main points:

- Entities in the financial services industry may currently provide their clients with tax advice without being subject to the application of the *Tax Agent Services Act 2009*. This exemption expires on 30 June 2013.
- There are three courses of action available to address the situation arising from the expiry of this exemption.
  - Entities in the financial services industry would need to comply with all the requirements in the *Tax Agent Services Act 2009*.
  - The current exemption could be extended.
  - A co-regulatory model between the Tax Practitioners Board and the Australian Securities and Investments Commission could be implemented to streamline the regulation of entities in the financial services industry that provide tax advice.
- A co-regulatory framework best meets the objectives of ensuring the consistent regulation of all forms of tax advice and minimising the compliance costs on entities in the financial services industry.

Improving the transparency of Australia's business tax system

Schedule 5 to this Bill amends the *Taxation Administration Act 1953* to:

- require the Commissioner of Taxation to publish limited information about the tax affairs of large corporate taxpayers;
- allow for the publication of certain aggregate tax information irrespective of whether the publication, in conjunction with

publicly available information, may be reasonably capable of being attributed to a particular taxpayer (other than a natural person); and

- allow for enhanced information sharing between Government agencies in relation to decisions under the *Foreign Acquisitions and Takeovers Act 1975* and Australia's Foreign Investment Policy.

Date of effect: These amendments apply to the 2013-14 income year and later income years.

Proposal announced: On 4 February 2013, the Assistant Treasurer announced the Government's intention to improve the transparency of the business tax system. These measures were canvassed in a discussion paper that was released on 3 April 2013.

Financial impact: Nil.

Human rights implications: Schedule 5 to this Bill does not raise any human rights issues, as the amendments contained therein do not affect individuals. The amendments in item 5 of Schedule 5 could potentially apply to individuals and therefore engage the right to privacy under Article 17 of the *International Covenant on Civil and Political Rights*. See *Statement of Compatibility with Human Rights* — Chapter 5, paragraphs 5.70 to 5.81

Compliance cost impact: Nil. The amendments relate only to information that is already reported to the Commissioner of Taxation. No additional information will be sought from taxpayers under this amendment.

Petroleum Resource Rent Tax

Schedule 6 of the Bill amends *the Petroleum Resource Rent Tax Assessment Act 1987* to address the unintended impacts arising from the decision of the Full Federal Court *in Esso Australia Resources Pty Ltd v Commissioner of Taxation* [2012] FCAFC 5.

Date of effect: The amendments apply generally to payments made in relation to petroleum projects from the applicable commencement date of the petroleum project. For most projects the applicable commencement date is 1 July 1986.

However, for payments made to a third party to procure project services, the relevant amendments apply from 1 July 2012 where the petroleum resource rent tax (PRRT) taxpayer has furnished a PRRT return in relation to their project interest prior to 14 December 2012.

The amendments apply retrospectively to address the outcomes of a Full Federal Court decision which would otherwise impose significant and unintended compliance and tax burdens on industry.

Proposal announced: This measure was announced in the Joint Media Release No.166 dated 14 December 2012 by the Deputy Prime Minister and Treasurer, the Minister for Resources and Energy and the Assistant Treasurer.

Financial impact: This measure has the following revenue implications:

2012-13	***2013-14***	***2014-15***	***2015-16***	***2016-17***
-$50m	-$40m	-$10m	-$10m	-$10m

Human rights implications: This Schedule does not raise any human rights issue. See *Statement of Compatibility with Human Rights* — Chapter 6, paragraphs 6.74 to 6.77.

Compliance cost impact: The amendments reduce compliance costs for most PRRT taxpayers. Removing the capital gains tax discount for foreign individuals

Removing the Capital Gains Tax Discount for Foreign Individuals

Schedule 7 to this Bill amends the *Income Tax Assessment Act 1997* (ITAA 1997) to remove the capital gains tax (CGT) discount on discount capital gains accrued after 8 May 2012 for foreign resident and temporary resident individuals.

This Schedule also makes consequential amendments to the ITAA 1997.

Date of effect: This measure applies to disposals of CGT assets after 8 May 2012.

Proposal announced: The measure was announced as part of the 2012-2013 Budget and by the Assistant Treasurer, Minister Assisting for Deregulation's Media Release No. 026 of 8 May 2012.

Financial impact: This measure is estimated to have a $55.0 million gain to revenue over the forward estimates period.

Human rights implications: This Bill does not raise any human rights issue. See *Statement of Compatibility with Human Rights* — Chapter 7, paragraphs 7.68 to 7.75.

Compliance cost impact: This measure is expected to impose small compliance costs on affected entities.

Tax exemption for payments under the Defence Abuse Reparation Scheme

Schedule 8 to this Bill amends the *Income Tax Assessment Act 1997* to exempt from income tax, payments made under the Defence Abuse Reparation Scheme.

Date of effect: This measure applies to the 2012-13 income year and later income years.

Proposal announced: This measure was announced in the 2013-14 Budget.

Financial impact: Nil.

Human rights implications: This Schedule does not raise any human rights issues. See *Statement of Compatibility with Human Rights* — Chapter 8, paragraphs 8.14 to 8.17.

Compliance cost impact: Nil.

GST-free treatment for National Disability Insurance Scheme funded supports

Schedule 9 to this Bill ensures that certain services and other things supplied to a participant as a part of a National Disability Insurance Scheme (NDIS) plan under the *National Disability Insurance Scheme Act 2013* (NDIS Act) are GST-free.

Date of effect: The amendments made by this Schedule apply in relation to supplies made on or after the proclamation date for when an NDIS plan is in effect under the NDIS Act.

Proposal announced: This measure was announced on 14 May 2013 as part of the 2013-14 Budget.

Financial impact: This measure is estimated to have a negligible revenue impact over the forward estimates period.

Human rights implications: Schedule 9 to this Bill is compatible with human rights. See *Statement of Compatibility with Human Rights* — Chapter 9, paragraphs 9.29 to 9.36.

Compliance cost impact: This measure is expected to have a low overall compliance cost impact, comprising a low implementation impact and a low increase in ongoing compliance costs relative to the affected group.

Deductible gift recipients

Schedule 10 to this Bill amends the *Income Tax Assessment Act 1997* (ITAA 1997) to update the list of specifically listed deductible gift recipients (DGRs).

Date of effect: The listing of United Way Australia applies to gifts made after 25 April 2013. The listings of Australian Neighbourhood Houses & Centres Association (ANHCA) Inc., the Australia Foundation in support of Human Rights Watch Limited, Layne Beachley — Aim for the Stars Foundation Limited and Aurora Education Foundation Limited apply to gifts made after 30 June 2013. The existing listings of the Charlie Perkins Scholarship Trust and Roberta Sykes Indigenous Education Foundation have been extended indefinitely.

Proposal announced: The listing of United Way Australia was announced on 14 May 2013 as part of the 2013-14 Budget. The listings of Australian Neighbourhood Houses & Centres Association (ANHCA) Inc., the Australia Foundation in support of Human Rights Watch Limited, Layne Beachley — Aim for the Stars Foundation Limited and Aurora Education Foundation Limited, and the extension of the existing listings for the Charlie Perkins Scholarship Trust and Roberta Sykes Indigenous Education Foundation, have not been previously announced.

Financial impact: The revenue implications of this measure are as follows:

Organisation	***2013-14***	***2014-15***	***2015-16***	***2016-17***
United Way Australia	Nil	Nil	Nil	Nil
Australian	Nil	–$0.3m	–$0.4m	–$0.4m

Organisation	*2013-14*	*2014-15*	*2015-16*	*2016-17*
Neighbourhood Houses & Centres Association (ANHCA) Inc.				
The Australia Foundation in support of Human Rights Watch Limited	Nil	–$0.09m	–$0.10m	–$0.11m
Layne Beachley — Aim for the Stars Foundation Limited	Nil	–$0.02m	–$0.03m	–$0.03m
The Charlie Perkins Scholarship Trust	Nil	–$0.01m	–$0.01m	–$0.01m
Roberta Sykes Indigenous Education Foundation	Nil	–$0.01m	–$0.01m	–$0.01m
Aurora Education Foundation Limited	Nil	–$0.04m	–$0.045m	–$0.045m

Human rights implications: This Schedule does not raise any human rights issues. See *Statement of Compatibility with Human Rights* — Chapter 10, paragraphs 10.28 to 10.34.

Compliance cost impact: Nil.

Miscellaneous amendments

Schedule 11 to this Bill makes a number of miscellaneous amendments to the taxation and superannuation laws. These amendments are part of the Government's commitment to the care and maintenance of the taxation and superannuation systems.

These amendments include: clarifying the tax treatment of native title benefits distributed through charities (Part 2); ensuring the fringe benefits tax rebate operates as intended (Part 3); and updating a number of significant taxation and superannuation thresholds to reflect reporting changes made by the Australian Bureau of Statistics (Part 4).

Date of effect: The amendments have various application dates that are explained in detail in this explanatory memorandum. While some of these

amendments have retrospective application, taxpayers should not be adversely impacted.

Proposal announced: The amendments in Part 4 (indexation updates) were foreshadowed by the release of a proposals paper on the Treasury website on 17 April 2013. The amendment in Part 5 that clarifies the operation of the research and development provisions was foreshadowed on the Treasury website on 12 April 2013 as part of the consultation process for the quarterly credits exposure draft. The other amendments have not previously been announced.

Financial impact: These amendments are expected to have a minimal or nil revenue impact. However, some of the amendments are integrity measures that protect what could be substantial amounts of revenue.

Human rights implications: This Schedule does not raise any human rights issue. See *Statement of Compatibility with Human Rights* — Chapter 11, paragraphs 11.69 to 11.80.

Compliance cost impact: Negligible.

Chapter 1
Monthly Pay As You Go instalments

Outline of chapter

1.1 This Schedule amends Division 45 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) to require certain large entities to pay Pay As You Go (PAYG) instalments monthly.

1.2 All legislative references in this chapter are to Schedule 1 to the TAA 1953, unless otherwise stated.

Context of amendments

1.3 The PAYG instalment system requires entities with business or investment income to pay instalments towards their income tax liability. It is designed to ensure the efficient collection of income tax, including the Medicare levy, Higher Education Loans Program (HELP) debts, and debts under the Student Financial Supplement Scheme and the Aboriginal Study Assistance Scheme (ABSTUDY). This continues a process of reform over decades to better align the timeliness of tax collections with economic activity, better match the regular nature of Government payments and to prevent taxpayers having large debts at the end of the income year.

1.4 Currently, most entities in the PAYG instalment system are required to pay instalments on a quarterly basis. If certain criteria are met, instalments may be made annually or biannually. Many of these entities are currently required to report and pay the goods and services tax (GST) on a monthly basis.

1.5 In the 2012-13 Mid-Year Economic Financial Outlook (MYEFO), the Government announced a process to reform the timing of PAYG instalment payments by large corporate entities. The purpose of the reform is to allow PAYG instalments to be more responsive to the economic conditions faced by businesses, and to better align PAYG instalment payments with the GST payments for most large companies. In response to concerns raised in consultation on the design of this measure, the Government announced in the 2013-14 Budget that it would extend the reforms to all large entities.

1.6 On 25 March 2012 the Government announced that it has commissioned Treasury and the Australian Taxation Office (ATO) to work with interested parties on longer term reforms to improve the PAYG system. This process will provide an opportunity for a more detailed examination of proposals that were submitted in response to the February 2013 Consultation Paper on this topic. It will also provide an opportunity for non-corporate entities to identify any improvements that would assist their transition to monthly payment arrangements, which commences from 1 January 2016.

Summary of new law

1.7 These amendments require large entities to pay PAYG instalments monthly rather than quarterly or annually. Entities will be transitioned into the monthly PAYG instalment system over a four year period, depending on the size and type of the entity:

- from 1 January 2014, corporate tax entities (being companies, corporate limited partnerships, corporate unit trusts or public trading trusts) that meet or exceed the $1 billion threshold will be required to pay PAYG instalments monthly;
- from 1 January 2015, corporate tax entities that meet or exceed the $100 million threshold will be required to pay PAYG instalments monthly;
- from 1 January 2016:
  - all other entities, including superannuation funds, trusts and individuals, that meet or exceed the $1 billion threshold will be required to pay PAYG instalments monthly; and
  - corporate tax entities that meet or exceed the $20 million threshold may be required to pay PAYG instalments monthly; and
- from 1 January 2017, all other entities, including corporate tax entities, superannuation funds, trusts and individuals that meet or exceed the $20 million threshold may be required to pay PAYG instalments monthly.

1.8 Entities that are not currently required to report and pay GST monthly will not be required to move to monthly PAYG instalments if

they do not meet the $100 million threshold and are not a head company of a consolidated group or a provisional head company of a multiple entry consolidated group (MEC group). This exemption better aligns the reporting of GST and PAYG instalments for those entities.

1.9 The threshold used is the amount of base assessment instalment income (BAII) that the entity has for a particular income year. The meaning of BAII is discussed further at paragraph 1.27.

1.10 To ensure the threshold applies equitably to all entities, those entities that have financial arrangements to which Division 230 of the *Income Tax Assessment Act 1997* (ITAA 1997) applies (hereafter referred to as Taxation on Financial Arrangements (TOFA) entities) may be required use an 'adjusted' BAII calculation.

1.11 Therefore, under these amendments TOFA entities whose BAII provided by the Commissioner of Taxation (Commissioner) does not exceed the threshold amount, are required to do a further calculation of their BAII using the gross income of their financial arrangements (rather than net amounts). This amended calculation of the BAII is referred to throughout this Chapter as the 'adjusted' BAII.

1.12 The amount of a PAYG monthly instalment is a function of the instalment income of the entity for the relevant month. The Commissioner has the power to determine alternative methods for monthly payers to calculate their instalment income. This flexibility facilitates efficient implementation of these changes, whilst maintaining the integrity of the PAYG instalment regime.

Comparison of key features of new law and current law

New law	*Current law*
An entity will be liable for monthly PAYG instalments if it exceeds a certain threshold. The threshold at: • 1 January 2014, for corporate tax entities is $1 billion or more; • 1 January 2015, corporate tax entities is $100 million or more; and • 1 January 2016: – for corporate tax entities is	Entities are liable for PAYG instalments quarterly, unless they are eligible to become an annual or biannual payer.

New law	Current law
$20 million or more; or – for all other entities is $1 billion or more, • 1 January 2017, for all other entities is $20 million. An entity with a threshold amount of less than $100 million, who is a quarterly or annual GST reporter (or their GST representative is), and is not a head company of a consolidated group or a provisional head company of a MEC group, will not be required to pay monthly PAYG instalments.	

Detailed explanation of new law

1.13 These amendments introduce the monthly PAYG instalment rules. Under these rules, certain large entities will be liable for PAYG instalments on a monthly basis rather than quarterly or annually.

1.14 Generally, an entity that meets the monthly payer requirement at a particular time is a 'monthly payer' and liable for monthly PAYG instalments from the start of the first month of their next income year.

1.15 Monthly payers continue to be liable for monthly PAYG instalments until they no longer meet the monthly payer requirement and give notice to the Commissioner that they will no longer pay their monthly. Where notice has been given to the Commissioner the entity remains a monthly payer until the next income year. ***[Schedule 1, items 3 to 8 and 19, sections 45-5, 45-20, 45-50 and 45-136]***

1.16 Under the general provisions, the amount of a monthly instalment is the applicable instalment rate multiplied by the instalment income of the monthly payer for that instalment month. Instalment month means a month that starts on the first day of an income year and each subsequent month, which equates to each calendar month of the year. ***[Schedule 1, items 9 and 11, section 45-65 and subsection 45-114(1)]***

1.17 The Commissioner calculates and provides the entity with an applicable instalment rate. Where the entity has chosen to use a varied instalment rate, then that is the applicable instalment rate. Furthermore, the rules that apply to the operation and administration of quarterly PAYG instalment payers also apply to monthly payers, including penalties where the varied instalment rate is too low. ***[Schedule 1, items 11 and 21 to 24, sections 45-200 and 45-225 and subsection 45-114(2)]***

1.18 Instalment income for an instalment month is broadly equivalent to the entity's ordinary income derived during that calendar month (section 45-120). However, the Commissioner may determine by legislative instrument additional methods for calculating the amount of a monthly instalment. The Commissioner may also, in providing an additional method, restrict the eligibility of a certain method to a specific class of entity or circumstance and specify the period in which an entity is required to use the additional method. ***[Schedule 1, item 11, subsections 45-114(3) to (6)]***

1.19 Where the Commissioner has provided additional methods for the calculation of an instalment amount, a monthly payer may choose to use an additional method (if eligible) or alternatively calculate their instalment income under the general provisions. An entity will not be restricted in changing methods for any month, unless such a restriction is prescribed by the Commissioner in the relevant instrument. ***[Schedule 1, item 11, section 45-114]***

Example 1.1

> The Commissioner specifies by legislative instrument an additional method that superannuation funds may use to determine the amount of their monthly instalment. Also contained in this instrument is a requirement that, if a fund chooses to use that method, they must commence using that method at the start of a month and can choose no other method for the relevant income year.

1.20 Notification and payments of monthly PAYG instalments must be undertaken electronically on or before the 21st day of the next month, unless specified by other means by the Commissioner. If a monthly payer is a deferred Business Activity Statement (BAS) payer the payment must be made by the 28th day of the next month. ***[Schedule 1, items 5, 9 and 10, sections 45-67 and 45-72 and subsection 45-20(2)]***

1.21 The payment, by a deferred BAS payer, of a December monthly PAYG instalment must be made on or before the 28th of February. ***[Schedule 1, item 9, subsection 45-67(2)]***

The general monthly PAYG instalment rules

Who is required to be a monthly PAYG instalment payer?

1.22 An entity will generally be a monthly payer if its threshold amount is equal to or greater than $20 million (note that the threshold is different under the transitional rules, which are discussed at paragraph 1.45). The threshold level broadly aligns with the GST threshold for being a monthly GST reporter. ***[Schedule 1, item 19, subsection 45-138(1)]***

1.23 However, if a taxpayer lodges a GST return on a quarterly or annual basis, they will only become a monthly payer if their threshold amount is equal to or exceeds $100 million. This exemption better aligns the GST reporting and PAYG instalment obligations of entities with a threshold amount of over $20 million and under $100 million. Where an entity is part of a GST group, it is the GST group representative member's GST reporting obligation that is relevant for determining eligibility for the exemption. ***[Schedule 1, item 19, subsection 45-138(2)]***

1.24 A head company of a consolidated group or a provisional head company of a MEC group will be a monthly payer if their threshold amount is equal to or greater than the $20 million threshold, regardless of their GST reporting requirements. ***[Schedule 1, item 19, paragraph 45-138(2)(b)]***

What is the threshold?

1.25 The threshold is a measure of an entity's economic activity, designed to identify large entities required to pay PAYG instalments monthly. The threshold is measured by reference to an entity's BAII.

1.26 For most entities, the threshold will be their BAII as provided by the Commissioner. For TOFA entities, whose BAII given by the Commissioner does not exceed the threshold; their threshold amount is their 'adjusted' BAII.

1.27 Broadly speaking, the BAII of an entity is so much of the entity's assessable income for a year (base year), as worked out for the purposes of the base assessment, as the Commissioner determines is instalment income (subsection 45-320(2)). In general, instalment income is the amount of ordinary income less exempt and non-assessable non-exempt income. Some entities have statutory income included in their instalment income. The Commissioner calculates the BAII when producing an instalment rate for an entity.

Special rules for calculating BAII for some TOFA entities

1.28 TOFA entities, whose BAII given by the Commissioner does not exceed the threshold, must calculate their 'adjusted' BAII disregarding the impact of being a TOFA entity on the calculation. This 'adjusted' BAII is relevant for both determining if the entity exceeds the threshold and if it is eligible for the exemption for quarterly GST payers with a threshold amount under $100 million. ***[Schedule 1, item 19, subsections 45-138(5) to (7)]***

1.29 For TOFA entities, the BAII given to them by the Commissioner may use net calculations for their TOFA arrangements rather than gross figures (subsection 45-120(2C)). Using the net amount of income from financial arrangements significantly reduces the BAII of TOFA entities.

Requiring TOFA entities to test their 'adjusted' BAII ensues that the threshold is applied equitably to both TOFA and non-TOFA entities.

1.30 However, unlike the BAII that is provided by the Commissioner, this 'adjusted' BAII amount will need to be determined by the entity.

1.31 TOFA entities, that do not have a BAII exceeding the threshold but are monthly payers because of their 'adjusted' BAII, are required to notify the Commissioner that they are a monthly payer.

1.32 If the TOFA entity was already a PAYG instalment payer, it must notify the Commissioner before the start of its next income year. ***[Schedule 1, item 19, paragraph 45-138(2)(b)]***

1.33 If the TOFA entity was not already a PAYG instalment payer, it must notify the Commissioner on or before the end of the entity's starting instalment month. That is, by the end of the month after the month in which the rate is given to the entity by the Commissioner.

1.34 Failure to notify the Commissioner as required may result in the imposition of penalties. ***[Schedule 1, item 19, paragraph 45-138(2)(a)]***

Monthly Payer Requirement Test Day

1.35 For the purposes of meeting the monthly payer requirement, the threshold amount and GST reporting status of the taxpayer are tested at a particular point in time — which is the start of the entity's monthly payer requirement test day (MPR test day). When a MPR test day occurs will depend on whether or not the entity is already paying PAYG instalments.

1.36 The status of the entity on the MPR test day is absolute. Retrospective changes in the treatment of an entity that affect the monthly payer criteria, such as backdating of a GST registration, are disregarded. ***[Schedule 1, item 19, subsection 45-138(3)]***

MPR test day — Entities already paying PAYG instalments

1.37 The MPR test day, for an entity already in the PAYG instalment regime, is the first day at the start of the third last month of the previous income year. Essentially, the test to be a monthly payer for a particular year is conducted at a point in time in an earlier year. The intervening three months between the test time and the start of the next income year allows the entity to prepare to be a monthly payer. ***[Schedule 1, item 19, paragraph 45-138(4)(b)]***

1.38 For a standard balancer (income year ending 30 June), the MPR test day for the 2017-18 income year will be 1 April 2017. For entities

that are on substituted accounting periods, the MPR test day will depend on when their income year ends.

Example 1.2

> In 2018, King Ltd is a quarterly PAYG instalment payer and a standard (30 June) balancer. When testing whether King Ltd is required to be a monthly payer for the 2018-19 income year, the MPR test day is 1 April 2018. This allows King Ltd three months to modify its accounting and payment systems in order to cater for the change to monthly instalments from the 1 July 2018.

<u>MPR test day — Entities not currently paying PAYG instalments</u>

1.39 For entities entering the PAYG instalment regime (those given an instalment rate by the Commissioner for the first time), the MPR test day is the last day of the month in which the Commissioner has given them the instalment rate. The MPR test day is the last day of the month to allow for all of the criteria for determining if the entity is to be a monthly payer to be considered, including the entity's GST reporting cycle. ***[Schedule 1, item 19, paragraph 45-138(4)(a)]***

Example 1.3

> Lalvey Ltd is given an instalment rate by the Commissioner on 10 February 2018. The MPR test day for Lalvey Ltd is 28 February 2018, being the last day of the month in which the instalment rate was given to Lalvey Ltd by the Commissioner.

When you become a monthly PAYG instalment payer

1.40 An entity currently paying PAYG instalments that satisfies the monthly payer requirement on a MPR test day becomes a monthly payer from the commencement of its next income year (the last day of the starting instalment month). That is, the income year commencing immediately after the MPR test day. If you are a PAYG payer on the last day of the month making you are liable to pay a PAYG instalment for that month. ***[Schedule 1, item 19, subsection 45-136(3) and paragraph 45-136(2)(b)]***

Example 1.4.

> From Example 1.2, if King Ltd satisfies the monthly payer requirement on 1 April 2018, then it will become a monthly payer from 31 July 2018 (the last day of the starting instalment month in its next income year). The effect of this is that King Ltd will have an instalment for the month of July which is payable in the following month of August.

1.41 Entities not currently paying PAYG instalments, that satisfy the monthly payer requirement at the relevant time, will become monthly payers from the last day of the month (the starting instalment month) after the month in which the Commissioner gives the entity their first instalment rate. This is the first month commencing immediately after the MPR test day. The entity may have to pay an instalment for that month. ***[Schedule 1, item 19, paragraph 45-136(2)(a)]***

Example 1.5

From Example 1.3, if Lalvey Ltd satisfies the monthly payer requirement on 28 February 2018, then it will become a monthly payer from 31 March 2018. The effect of this is that Lalvey Ltd will have a PAYG instalment liability for the month of March which is payable in the following month of April.

1.42 Once an entity is a monthly payer, they continue to be a monthly payer until such a time that they provide the Commissioner with a valid MP stop notice, as discussed at paragraph 1.43. ***[Schedule 1, item 19, paragraph 45-136(4)(b)]***

Example 1.6

XYZ is a non-TOFA entity with an income year that ends on 30 June. On 1 March the Commissioner gives XYZ its latest BAII relevant to its latest income tax year assessment. The BAII is above the $20 million threshold. Therefore XYZ is a monthly payer from the start of its next income year.

Example 1.7

ABC is a TOFA entity and a monthly GST reporter with an income year that ends on 30 June. On 1 March the Commissioner gives ABC its latest BAII for its latest income tax year assessment, which is below the $20 million threshold. ABC must consider the effect of its TOFA income on its instalment income for the last income tax return to which the Commissioner's BAII relates. ABC calculates it 'adjusted' BAII by disregarding the rules in subsection 45-120(2C) concerning the treatment of TOFA income for instalment income purposes.

ABC's 'adjusted' BAII exceeds the $20 million threshold. ABC notifies the Commissioner on 1 June that it is a monthly payer with effect from the start of its next income year.

If ABC was a quarterly GST reporter and its 'adjusted' BAII was under $100 million, then it would not be a monthly payer from the start of its next income year. Nor would it be required to notify the Commissioner.

How and when you stop being a monthly PAYG instalment payer

1.43 Where a monthly payer no longer meets the monthly payer requirement on a MPR test day, it may elect to stop paying monthly PAYG instalments. This election is made by notifying the Commissioner in the approved form. ***[Schedule 1, item 19, subsection 45-136(4)]***

1.44 This notification (referred to as a MP stop notice) must be provided to the Commissioner prior to the commencement of the next income year. Where an MP stop notice is not provided, the entity will remain a monthly payer for the next income year. The entity will again need to satisfy the relevant criteria for giving a MP stop notice in the next year (re-test) before it can validly notify the Commissioner they elect to stop being a monthly payer.

Example 1.8: Non-TOFA entities

> Catleap Enterprises is a corporate tax entity that has a substituted accounting period ending on 31 July. It is not a TOFA entity and is a monthly payer. At 1 May 2018 (the MPR test day), Catleap Enterprises has a BAII of $18 million and therefore does not meet the monthly payer requirement. Catleap Enterprises notifies the Commissioner that it no longer wishes to be a monthly payer on 18 May 2018 and subsequently becomes a quarterly payer from 31 August 2018 (the last day of the starting instalment month for quarterly payers in the next income year). However, the month of August will form part of the first instalment quarter for Catleap Enterprises.
>
> If Catleap Enterprises had not notified the Commissioner by way of MP stop notice or notifies the Commissioner on or after 1 August 2018, it would remain a monthly payer for the 2018-19 income year.

Example 1.9: TOFA entity

> Assume Catleap Enterprises in Example 1.8 is a TOFA entity. Although Catleap Enterprises has a BAII under $20 million, it must determine its 'adjusted' BAII amount as it is a TOFA entity.
>
> Catleap Enterprises determines that for the base year of its most recent BAII provided by the Commissioner, its 'adjusted' BAII amount is $60 million. Therefore, Catleap Enterprises is not eligible to issue the Commissioner with an MP stop notice and must continue to be a monthly payer for the 2018-19 income year.

The transitional rules

Who is required to be a monthly PAYG instalment payer during the transitional period

1.45 As announced by the Government in the 2013-14 Budget, the measure will be phased in over four years (the transitional period).

- from 1 January 2014, all corporate tax entities with a threshold amount of $1 billion or more will be required to pay PAYG instalments monthly;
- from 1 January 2015, all corporate tax entities with a threshold amount of $100 million or more will be required pay PAYG instalments monthly;
- from 1 January 2016:
  - all corporate tax entities with a threshold amount of $20 million or more will be required pay PAYG instalments monthly (subject to the GST reporting exemption discussed in paragraph 1.23); and
  - all non-corporate tax entities with a threshold amount of $1 billion or more will be required pay PAYG instalments monthly; and
- from 1 January 2017, all non-corporate tax entities with a threshold amount of $20 million or more will be required to pay PAYG instalments monthly (subject to the GST reporting exemption).

[Schedule 1, item 45 and subitem 47(1)]

1.46 During the transitional period, entities that meet the monthly payer requirement may become monthly payers by either of two MPR test day rules:

- *a MPR test day under the general monthly PAYG instalment rules* — the start of the third last month of the income year, or the last day of the month in which the Commissioner gives the entity its first instalment rate; or
- *an additional (transitional) MPR test day* — as set out in paragraph 1.47 which tests whether an entity is required to become a monthly payer, from either 1 January 2014, 1 January 2015, 1 January 2016 and 1 January 2017.

Additional MPR test day

1.47 To ensure that, during the transitional period, an entity that meets the monthly payer requirement becomes a monthly payer from the relevant 1 January, rather than at the commencement of the next income year, there is an *additional* MPR test day for each stage in the transition period. These *additional* MPR test days are aligned with the phase in of the measure and occur on:

- 1 October 2013;
- 1 October 2014;
- 1 October 2015; and
- 1 October 2016.

[Schedule 1, subitems 48(1) and (2)]

1.48 The phase in of the transitional threshold applies the *additional* MPR test days as follows:

- 1 October 2013 — corporate tax entities with a threshold amount equal to or exceeding $1 billion will be required to be monthly payers from 1 January 2014;
- 1 October 2014 — corporate tax entities with a threshold amount equal to or exceeding $100 million will be required to be monthly payers from 1 January 2015;
- 1 October 2015 — corporate tax entities with a threshold amount equal to or exceeding $20 million, and all other entities with a threshold equal to or exceeding $1 billion, will be required to be monthly payers from 1 January 2016 (subject to the GST reporting exemption); and
- 1 October 2016 —all entities with a threshold equal to or exceeding $20 million will be required to be monthly payers from 1 January 2017 (subject to the GST reporting exemption).

[Schedule 1, item 48, and subitem 47(1)]

1.49 Where a MPR test day (under the general monthly PAYG instalment rules) occurs between the additional MPR test days, the threshold applied at the earlier date is relevant.

1.50 For instance, the general MPR test day of a corporate tax entity falls on 1 August 2014. The threshold amount for a corporate tax entity to become a monthly payer on or after 1 October 2013 is $1 billion. The $100 million threshold only applies from the additional MPR test day on or after 1 October 2014.

1.51 TOFA entities that satisfy the monthly payer requirement on an *additional* MPR test day because of their 'adjusted' BAII (where the BAII given to them by the Commissioner does not exceed the threshold), commence being a monthly payer and are required to notify the Commissioner before 1 January. This is similar to the notification requirement under the general provisions. ***[Schedule 1, subitem 49(2)]***

How and when you become a monthly PAYG instalment payer during the transitional period

1.52 Where an entity satisfies the monthly payer requirement on a MPR test day, it will commence being a monthly payer in accordance with the general monthly PAYG instalment rules.

1.53 If an entity is not already a monthly payer and it satisfies the monthly payer requirement on an *additional* MPR test day, it will start being a monthly payer from the last day of its first instalment month commencing after 1 January. However, entities will not be required to start monthly instalments partway through an instalment quarter.

- For standard 30 June balancers, this means that they will be liable for monthly instalments from January of the following year and each subsequent month. This is because their previous instalment quarter ends on 31 December.

- Entities with substituted accounting periods, with an instalment quarter that does not commence on one of the specified application days (that is, with an instalment quarter of 1 November to 31 January), will begin paying monthly instalments once their current instalment quarter has ended.

- For annual instalment payers, they will commence being a monthly payer from the start of their next income year.

[Schedule 1, subitems 48(3) and (4)]

Example 1.10: Standard 30 June balancer

Wishart Co. is a corporate tax entity, a quarterly PAYG instalment payer, not a TOFA entity and is a standard 30 June balancer. On 1 October 2013, Wishart Co. has a BAII of $1.2 billion. As Wishart Co.'s BAII exceeds $1 billion and its PAYG instalment

quarter ends on 31 December 2013 (the next instalment quarter commences on 1 January 2014). It will be a monthly payer from 31 January 2014 and be liable for a PAYG instalment for the month of January, being its starting instalment month.

Example 1.11: Substituted accounting period balancer

Assume Wishart Co. in Example 1.10 has a substituted accounting period with an income year ending on 30 August. Consequently, Wishart Co. has an instalment quarter that ends on 28 February 2014. As Wishart Co. satisfied the requirements on 1 October 2013 to be a monthly payer, it will have monthly PAYG instalments from 1 March 2014 instead of 1 January 2014. This is because it does not commence being a monthly payer until the end of its instalment quarter.

Example 1.12: Annual payer

Assume Wishart Co. in Example 1.10 is an annual PAYG instalment payer. On 1 October 2013, Wishart Co. has a BAII of $1.2 billion. As Wishart Co.'s BAII exceeds $1 billion and is an annual PAYG instalment payer, it will have monthly instalments from 1 July 2014.

1.54 The following examples demonstrate how the monthly payer rules will apply during the transitional period.

Example 1.13: Standard 30 June balancer

TBlack is a corporate tax entity that is the head company of a consolidated group. TBlack pays its PAYG instalments quarterly and is a standard 30 June balancer. At 1 January 2013 TBlack's BAII, as provided by the Commissioner, is $18 million.

TBlack has an *additional* MPR test day on 1 October 2013. As TBlack's BAII is under $1 billion it is not a monthly payer from 1 January 2014.

On 20 January 2014, TBlack is provided by the Commissioner with a BAII of $21 million.

On 1 April 2014, which is three months before the end of its current income year, TBlack has a MPR test day to determine whether it is a monthly payer for the 2014-15 income year. As TBlack's BAII is under $1 billion, it is not required to be a monthly payer from the commencement of the 2014-15 income year.

TBlack has an *additional* MPR test day on 1 October 2014. As TBlack's BAII is under $100 million it is not a monthly payer from 1 January 2015.

On 25 January 2015, TBlack is provided by the Commissioner with a BAII of $18 million.

On 1 April 2015, TBlack has a MPR test day to determine whether it is a monthly payer for the 2015-16 income year. As TBlack's BAII is under $100 million, it is not required to be a monthly payer from the commencement of the 2015-16 income year.

TBlack has an *additional* MPR test day on 1 October 2015. As TBlack's BAII is under $20 million it is not a monthly payer from 1 January 2016.

On 25 January 2016, TBlack is provided by the Commissioner with a BAII of $21 million.

On 1 April 2016, TBlack has a MPR test day to determine whether it is a monthly payer for the next income year (2016-2017). As TBlack's BAII is over $20 million and it is the head company of a consolidated group, it is not eligible for the exemption relating to GST reporting. Therefore, TBlack is required to be a monthly payer from the commencement of the 2016-17 income year.

TBlack's starting instalment month is July 2016. TBlack will be liable for its first monthly PAYG instalment (for the month of July 2016) on 21 August 2016 or if it is a deferred BAS payer, the 28 August 2016.

Example 1.14: Standard 30 June balancer (TOFA entity)

Peter Potts is a high wealth sole trader who pays PAYG instalments and pays GST quarterly. Peter is a TOFA entity whose income year ends on 30 June. On 1 January 2015 Peter is provided by the Commissioner with a BAII of $18 million, based on his 2013-14 income year.

On 1 October 2015, Peter has an *additional* MPR test day. Peter's BAII has remained $18 million. As Peter is a TOFA entity he must determine his 'adjusted' BAII. As Peter has a substantial amount of financial arrangements subject to Division 230 of the ITAA 1997, his 'adjusted' BAII is determined by him to be $70 million for the base year of 2013-14. As both Peter's BAII as provided by the Commissioner and his 'adjusted' BAII (because he is a TOFA entity) as determined by him are under $1 billion, he is not a monthly payer from 1 January 2016.

On 15 February 2016, the Commissioner provides Peter with a new BAII of $17 million, based on his 2014-15 income year.

On 1 April 2016, Peter has a MPR test day to determine whether he is a monthly payer for the 2016-17 income year. Although Peter's has a BAII under $1 billion, he must still determine whether his 'adjusted' BAII amount exceeds $20 million. Peter determines that his 'adjusted'

BAII amount is $60 million. As both his BAII as provided by the Commissioner and 'adjusted' BAII amounts are under $1 billion, he is not required to be a monthly payer from the commencement of his 2016-17 income year.

On 1 October 2016, Peter has an *additional* MPR test day. Peter's BAII is still $17 million and his 'adjusted' BAII amount remains $60 million. Although Peter's 'adjusted' BAII amount exceeds $20 million, Peter is a quarterly GST reporter and payer and he is not required to be a monthly payer from 1 January 2017.

If Peter was a monthly GST reporter and payer on 1 October 2016, he would be required to become a monthly payer from 1 January 2017. He would also be required, as a TOFA entity, before 1 January 2017, to provide the Commissioner with notification that that he is required to be a monthly payer. This is because his 'adjusted' BAII amount exceeds the threshold test of $20 million (and his BAII from the Commissioner was under $20 million).

Example 1.15: Substituted accounting period balancer

Adam Co. is a corporate tax entity, pays PAYG instalments quarterly, is not part of a consolidated group, is not a TOFA entity and reports and pays GST monthly. Adam Co. is on a substituted accounting period and its income year ends on 30 April. At 1 January 2013 Adam Co.'s BAII as provided by the Commissioner is $25 million.

Adam Co. has an *additional* MPR test day on 1 October 2013. As Adam Co.'s BAII is under $1 billion it is not a monthly payer from 1 January 2014.

On 20 November 2013, Adam Co. is provided by the Commissioner with a BAII of $21 million.

On 1 February 2014, being Adam Co.'s third month before the end of its current income year, Adam Co. has a MPR test day to determine whether it is a monthly payer for the 2014-15 next income year (2014-2015). As Adam Co.'s BAII is under $1 billion, it is not required to be a monthly payer from the commencement of the 2014-15 income year.

Adam Co. has an *additional* MPR test day on 1 October 2014. As Adam Co.'s BAII is under $100 million it is not a monthly payer from 1 January 2015.

On 19 November 2014, Adam Co. is provided by the Commissioner with a BAII of $28 million.

On 1 February 2015, Adam Co. has a MPR test day to test whether it is a monthly payer for the 2015-2016. As Adam Co.'s BAII is under

$100 million, it is not required to be a monthly payer from the commencement of the 2015-16 income year.

Adam Co. has an *additional* MPR test day on 1 October 2015. As Adam Co.'s is a monthly GST reporter and payer, it is not eligible for exemption from being a monthly payer. Therefore, because Adam Co.'s BAII is over $20 million it will, at first instance, be treated as a monthly payer from 1 January 2016.

However, Adam Co.'s starting instalment month is February 2016. This is because Adam Co. has an instalment quarter that includes 1 January 2016 but does not start on that day (the quarter runs from 1 November to 31 January).

Adam Co. will be liable for its first monthly instalment payment (for the month of February 2016) on 21 March 2016, or if it is a deferred BAS payer, the 28 March 2016.

Example 1.16: Annual payer

Assume Adam Co. in Example 1.15 is an annual instalment payer with its income year ending on 30 April.

Adam Co. has an *additional* MPR test day on 1 October 2015. As Adam Co.'s BAII as provided by the Commissioner is over $20 million and it is a monthly GST reporter and payer, it is not eligible for the exemption from being a monthly payer. Adam Co. will be, at first instance, a monthly payer for from 1 January 2016.

However, because Adam Co. is an annual instalment payer, its starting instalment month is May 2016 (which is the commencement of its next income year).

Adam Co. will be liable for its first monthly instalment payment (for the month of May 2016) on 21 June 2016 or if it is a deferred BAS payer, on 28 June 2016.

How and when you stop being a monthly PAYG instalment payer — additional MPR

1.55 Entities will not be able to give the Commissioner a MP stop notice as a result of the operation of any one of the *additional* MPR test days. Entities that are monthly payers will only be able to give the Commissioner a MP stop notice because they did not satisfy the monthly payer requirement on the relevant MPR test day under the general monthly instalment rules. ***[Schedule 1, subitem 47(5)]***

1.56 The higher transitional period thresholds are not relevant to the giving of a MP stop notice at any time. Entities can only give the Commissioner a MP stop notice where their threshold amount falls below

$20 million at the specified test time, or alternatively, they qualify for the additional exemption. The additional exemption applies if an entity, at the relevant test time, is a quarterly (or annual) GST reporter and payer with a threshold amount that is under $100 million. ***[Schedule 1, subitem 47(4)]***

Example 1.17

> Kemp Consulting is a corporate tax entity, a PAYG quarterly payer, not a TOFA entity and also pays GST monthly. Kemp Consulting has an income year commencing on 1 July. On 1 October 2014 (the *additional* MPR test day), Kemp Consulting has been given a BAII of $105 million. Therefore, Kemp Consulting is required to be a monthly payer from 1 January 2015 (because it is a 30 June balancer, its last quarterly tax period ends on 31 December 2014).
>
> On 25 January 2015, Kemp Consulting is provided by the Commissioner with a BAII of $98 million.
>
> On 1 April 2015 (the MPR test day being the first day of the third month before the end of the income year), Kemp Consulting has a BAII that is over $20 million. As Kemp Consulting is a monthly GST reporter and payer it will remain a monthly payer for the next income year.
>
> If Kemp Consulting, at 1 April 2015, was a quarterly GST reporter and payer, then it could give the Commissioner an MP stop notice (prior to the commencement of the next income year on 1 July 2015). The effect of the notice is that it is no longer a monthly payer from the commencement of the next income year.

Example 1.18

> Assume Kemp Consulting was a TOFA entity and a quarterly GST payer. On 1 April 2015, it is required to also calculate its ‘adjusted’ BAII amount. The ‘adjusted’ BAII is determined by reference to the TOFA income relevant to its last tax return that corresponds to the BAII provided by the Commissioner. This amount is determined to be $200 million. As Kemp Consulting has an ‘adjusted’ BAII that exceeds $100 million, it is required to remain a monthly payer for the 2015-16 income year.

1.57 Only allowing an MP stop notice where the $20 million threshold is not met ensures that entities that become monthly payers in the transition period do not change back to quarterly instalments because they no longer meet the transitional threshold, only to be required once again to become a monthly payer when the $20 million threshold applies.

Application and transitional provisions

1.58 The amendments apply to corporate tax entities from 1 January 2014. ***[Schedule 1, subitem 46]***

1.59 The amendments apply to all other entities from 1 January 2016. ***[Schedule 1, subitem 46]***

Consequential amendments

1.60 Consequential amendments are made to:

- update the relevant guide provisions in Division 45;
- update the definitions in the ITAA 1997;
- update liability for payment of tax provisions in Division 721 of the ITAA 1997;
- modify the current provisions to ensure monthly PAYG payers cannot also be quarterly or annual PAYG payers; and
- update the PAYG instalment provisions to give the same effect as they would a quarterly payer in relation to a quarter, for a monthly payer in relation to a month for:
  – variation of instalment rates (Subdivision 45-F);
  – the application of the general interest charge to instalment shortfalls (Subdivision 45-G);
  – the anti-avoidance rules (Subdivision 45-P);
  – the general and special consolidations rules (Subdivisions 45-Q and 45-R); and
  – the MEC group rules (Subdivision 45-S).

[Schedule 1, items 1 to 2, 11 to 17 and 18 to 44, sections 45-1, 45-125, 45-130, 45-200, 45-205, 45-225, 45-597, 45-703, 45-715 and 45-870, subsections 45-132(4), 45-200(2), 45-705(4) and 45-915 of Schedule 1 to the TAA 1953, and sections 721-10 and 995-1 of the ITAA 1997]

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Monthly Pay as You Go instalments

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

Overview

1.62 Schedule 1 to this Bill amends Division 45 of Schedule 1 to the *Taxation Administration Act 1953* to require certain large entities to pay Pay As You Go instalments monthly.

1.63 The PAYG instalment system requires entities with business or investment income to pay instalments towards their income tax liability. It is designed to ensure the efficient collection of income tax, including the Medicare levy, Higher Education Loans Program (HELP) debts, and debts under the Student Financial Supplement Scheme and the Aboriginal Study Assistance Scheme (ABSTUDY). This change does not increase the overall tax liability of an entity. Rather it makes PAYG instalments more responsive to the economic position of an entity and better aligns the timing of PAYG instalments with Government payments. This reduces the risk of an entity accumulating large tax debts.

1.64 Schedule 1 to this Bill requires large entities to pay PAYG instalments monthly rather than quarterly or annually. Entities will be transitioned into the monthly PAYG instalment system over a four year period:

- from 1 January 2014, corporate tax entities (being companies, corporate limited partnerships, corporate unit trusts or public trading trusts) that meet or exceed the $1 billion threshold will be required to pay PAYG instalments monthly;
- from 1 January 2015, corporate tax entities that meet or exceed the $100 million threshold will be required to pay PAYG instalments monthly;

- from 1 January 2016:
  - all entities, including superannuation funds, trusts and individuals, that meet or exceed the $1 billion threshold will be required to pay PAYG instalments monthly;
  - corporate tax entities that meet or exceed the $20 million threshold may be required to pay PAYG instalments monthly; and
- from 1 January 2017, all entities, including corporate tax entities, superannuation funds, trusts and individuals that meet or exceed the $20 million threshold may be required to pay PAYG instalments monthly.

1.65 Entities that are not currently required to report and pay GST monthly will not be required to move to monthly PAYG instalments if they do not meet the $100 million threshold and are not a head company of a consolidated group or a provisional head company of a multiple entry consolidated group (MEC group). This exemption better aligns the reporting of GST and PAYG instalments for those entities.

Human rights implications

1.66 The Schedule does not engage any of the applicable rights or freedoms.

Conclusion

1.67 This Schedule is compatible with human rights as it does not raise any human rights issues.

Assistant Treasurer, the Hon David Bradbury

Chapter 2
Tax loss incentive for designated infrastructure projects

Outline of chapter

2.1 Schedule 2 to this Bill amends the *Income Tax Assessment Act 1997* (ITAA 1997) to provide a tax incentive for entities that carry on a nationally significant infrastructure project that has been designated by the Infrastructure Coordinator (Coordinator).

2.2 The tax incentive:

- uplifts the value of such entities' carry forward tax losses by the long-term bond rate;
- exempts such entities that are companies from the continuity of ownership and same business tests; and
- exempts such entities that are fixed trusts from the trust loss and bad debt deduction tests.

2.3 All references to legislative provisions in this chapter are to the ITAA 1997, unless otherwise stated.

Context of amendments

2.4 Investment in high quality infrastructure projects is critical to improving national productivity and underpinning economic growth. The Government is investing a record $60 billion in nationally significant land transport infrastructure projects under the Nation Building Program.

2.5 Infrastructure projects often experience long lead times between incurring deductible expenditure in the construction phase and earning assessable income in the operational phase. Tax losses are therefore accumulated and carried forward to later income years awaiting the receipt of income.

2.6 As such, the present value of losses may be eroded over time, disadvantaging infrastructure investment compared to other types of investment.

2.7 Furthermore, infrastructure projects may move through a number of phases as they move from the construction phase to the operational phase, and the entity may have different owners as it moves through its different phases.

2.8 These changes could result in the entity no longer being able to use its tax losses to offset against future income, eroding the value of the losses altogether. Broadly, existing integrity rules in the income tax laws only allow the use of past tax losses where an entity maintains the same majority ownership (the continuity of ownership test) or is carrying on the same business (the same business test).

2.9 This measure will encourage private investment in nationally significant infrastructure projects by:

- ensuring that investors are not discouraged from investing in infrastructure because of the reduction in the present value of losses over time; and
- increasing the likelihood that the losses can be used to offset future earnings and benefit investors in the project, whether the original investors or new investors in the project.

Summary of new law

2.10 This Schedule allows an entity that is carried on exclusively for the purpose of a 'designated infrastructure project' (DIP) to:

- uplift tax losses by the long-term government bond rate; and
- carry forward tax losses and claim bad debt deductions even though it does not satisfy the continuity of ownership and same business tests for companies and equivalent tests for trusts.

2.11 This Schedule allows the Coordinator to designate an infrastructure project of national significance to be a DIP on or before 30 June 2017 where:

- the project satisfies any requirements prescribed by the Minister; or
- if there are no prescribed requirements:
  - the project must be nationally significant; and

– the financing arrangements for the project must have been made or be imminent.

2.12 The Coordinator can only designate a project if the total capital expenditure of all designated projects (including provisionally designated projects) would not exceed $25 billion (or a higher prescribed amount).

Comparison of key features of new law and current law

New law	*Current law*
A company or fixed trust that solely carries on a single project designated by the Coordinator as a DIP can utilise prior year losses and deduct bad debts without needing to satisfy the continuity of ownership (including the 50 per cent stake test for trusts), the control test or same business test (if applicable). The Coordinator may designate a project as a DIP in prescribed circumstances or, if none are prescribed, where it is nationally significant and financial close has happened or is imminent and granting the project DIP status will not cause the estimated global expenditure cap to be exceeded.	An entity must satisfy a continuity of ownership test (including the 50 per cent stake test for trusts) or the same business test (if applicable) before it can utilise losses from past years or deduct bad debts.
The value of losses carried forward by an entity is uplifted by the long-term Government bond rate if the entity solely carries on a single DIP.	The value of carried forward losses is based on their nominal value.

Detailed explanation of new law

2.13 This Schedule allows an entity that is carried on exclusively for the purpose of a DIP to:

- uplift tax losses by the long-term government bond rate (paragraphs 2.15 to 2.30); and
- carry forward tax losses and claim bad debt deductions even though it does not satisfy the continuity of ownership and

same business tests for companies and equivalent tests for trusts (paragraphs 2.31 to 2.69).

2.14 These concessions are available to certain entities known as DIP entities (paragraphs 2.70 to 2.76). A DIP entity must carry on a project that has been designated by the Coordinator as a DIP (paragraphs 2.77 to 2.100). The Coordinator can only designate projects up to a certain capital expenditure cap (paragraphs 2.101 to 2.110).

Tax benefits for designated infrastructure project entities

2.15 Companies and fixed trusts that carry on a DIP are able to uplift their tax losses from earlier years. These companies can also deduct those tax losses and their bad debts even if they do not satisfy the ‘continuity of ownership’ and ‘same business’ tests. These trusts can also deduct their tax losses and bad debts even if they do not satisfy the trust equivalent of those tests.

Uplifting losses

2.16 A company or a fixed trust that is a DIP entity in an income year uplifts its unutilised tax losses from the 2012-13 and later income years before deducting them. ***[Schedule 2, items 4, 47 and 48, subsection 415-15(1), paragraph 415-20(1)(a) and section 415-10 of the Income Tax (Transitional Provisions) Act 1997]***

2.17 Losses are ‘utilised’ when they are deducted against assessable income or exempt income (see subsection 707-110(2)). For the purposes of this measure, they are also utilised when the amount of forgiven commercial debts is applied to reduce them. ***[Schedule 2, item 4, subsection 415-15(6)]***

2.18 This measure is intended to promote investment in *new* infrastructure. As such, the uplift is not available for losses incurred before the 2012-13 income year or for projects that commenced before making an application for designation. ***[Schedule 2, items 4, 47 and 48, subsection 415-55(1) and section 415-10 of the Income Tax (Transitional Provisions) Act 1997]***

2.19 An entity will not be a DIP entity and will therefore not be able to uplift its losses if it carries on activities that are not for the purpose of the DIP. This single entity — single project approach is simpler for entities because they will not have some losses that are able to be uplifted and some that are not. ***[Schedule 2, item 4, paragraphs 415-20(1)(b), (c) and (d)]***

2.20 An entity may qualify as a DIP entity when the project has not yet been designated, or the entity has not yet begun carrying on the

project, as long as the project becomes designated and the entity begins carrying it on. That means that an entity is able to uplift losses in relation to past years once it has qualified as a DIP entity. These entities would not need their past assessments amended (unless they have already utilised some of the losses), but should notify the Australian Taxation Office of the revised carry forward amounts. ***[Schedule 2, item 4, paragraphs 415-20(1)(b) and (2)(a)]***

2.21 Those losses will continue being uplifted in future years until the entity either fully deducts them or stops being a DIP entity. After the entity stops being a DIP entity, the previous uplifts are retained; they are just not uplifted further. ***[Schedule 2, items 39 and 40, subsection 995-1(1) paragraphs (a) and (d) of the definition of tax loss]***

2.22 The losses are uplifted by the income year's long-term bond rate, which is the year's average yield for 10-year non-rebate Australian Treasury bonds. This rate is chosen, rather than, say, the Consumer Price Index rate, to compensate the infrastructure entity for the cost of not being able to invest the tax saved from its loss in the most profitable investment available, adjusted for risk. In other words, the treatment is equivalent to the entity lending the money represented by the tax loss to the government for a long term. ***[Schedule 2, item 4, subsection 415-15(1)]***

Example 2.1: Uplifting tax losses

Wolf Transport Projects carries on a project that is designated as a DIP on 1 January 2016. The entity has no other business activities and qualifies as a DIP entity. The entity first incurred a loss of $6 million in the 2013-14 income year.

In the 2014-15 income year it made a small profit that utilised $1.5 million of its 2013-14 tax loss. The long term bond rate for 2014-15 is 5.5 per cent.

In the 2015-16 income year, the entity makes a loss of $76 million and the long term bond rate is 5.8 per cent.

Wolf Transport Projects calculates its carry forward loss from the 2013-14 income year by uplifting it for the 2014-15 income year and then reducing it by the utilised amount (that is, $6 million × 1.055 − $1.5 million = $4,830,000). The unutilised portion is then uplifted again for the 2015-16 income year ($4,830,000 × 1.058 = $5,110,140).

The 2015-16 loss was only incurred that year and so is not uplifted. The unutilised losses of $5,110,140 and $76 million will be uplifted before being applied against any taxable income and any net exempt income in the next income year.

2.23 If an entity is a DIP entity only for part of an income year in which the uplift occurs, the uplift is apportioned according to the number of days in the year for which it was such an entity. ***[Schedule 2, item 4, subsection 415-15(1)]***

Example 2.2: Apportioning the uplift

In the previous example, if Wolf Transport Projects was only a DIP entity for 100 days during 2015-16, the uplift is adjusted according to the eligible portion of the income year ($4,830,000 x 0.058 x 100/366 = $76,541), so the uplifted amount is $4,906,541 (= $76,541 + 4,830,000).

The uplift and consolidated groups

2.24 When an entity joins a consolidated group, the part of the income year that ends just before the entity joins (the non-membership period) is usually treated as a whole income year (paragraph 701-30(3)(a)). The provisions ensure that a joining entity cannot get a full year's uplift for only part of an income year. Instead, the joining entity must pro rata the uplift as though it was only a DIP entity for that part (the non-membership period) of the income year. ***[Schedule 2, item 4, subsection 415-15(4)]***

2.25 Usually, losses transferred from a joining entity to a head company are treated as being incurred by the head company in the transfer year (section 707-140). If this rule applied, then the head company would not be able to uplift losses in the transfer year even though the joining entity would have been able to uplift them if it had not joined the consolidated group. To avoid that, this measure allows the head company to treat previous years losses transferred from the joining entity as prior year losses. ***[Schedule 2, item 4, subsection 415-15(5)]***

2.26 However, the head company must also apportion the uplift so that the transferred loss is only uplifted for the part of the income year after the transfer occurs. ***[Schedule 2, item 4, paragraph 415-10(5)(b)]***

Example 2.3: Tax losses transferred to the head company of a consolidated group

Joseph Co (a DIP entity) is the head company of a consolidated group ('the Joseph Co consolidated group'). Alan Co is a DIP entity in relation to the same project as Joseph Co. On 1 January 2015 Alan Co becomes a member of the Joseph Co consolidated group.

In the 2013-14 income year, Alan Co made a tax loss of $10 million and in the period from 1 July 2014 to 31 December 2014 (its non-membership period), it made a tax loss of $4 million.

In the 2014-15 income year, the long-term bond rate is 5.5 per cent.

Alan Co uplifts its 2013-14 loss at the end of its non-membership period (which is treated as an income year). The uplift is pro-rated having regard to the number of days in the non-membership period. The uplift is calculated as
$10 million x 5.5% x 184/365 = $277,260.

Therefore, when Alan Co becomes a member of the Joseph Co consolidated group, the following tax losses are transferred (noting that their subsequent utilisation by Joseph Co will not be subject to an available fraction):

- $10,277,260 (from the 2013-2014 income year)
- $4 million (from the non-membership period ending on 31 December 2014).

Example 2.4: Subsequent uplift of transferred tax loss

Continuing the previous example, at the end of the 2014-15 income year, Joseph Co (which remains a designated infrastructure project entity), uplifts the transferred tax loss actually made by Alan Co in the 2013-14 income year. The uplift is pro-rated having regard to the number of days from the time the loss is transferred. The uplift is calculated as $10,277,260 x 5.5% x 181/365 = 280,302.

The tax loss is increased to $10,557,562 (before any utilisation in the 2014-15 income year).

The transferred tax loss of $4 million was actually made by Alan Co in its non-membership period just before the transfer to Joseph Co. Therefore Joseph Co does not uplift this transferred loss at the end of the 2014-15 income year.

Joseph Co does not have any net exempt income or taxable income in the 2014-15 income year. The unutilised transferred tax losses from Alan Co of $10,557,562 and $4 million are carried forward and will be uplifted at the end of the 2015-16 income year before any utilisation of the losses in that year.

Any group losses made by Joseph Co have been ignored in this example in order to illustrate how the transferred tax losses are uplifted when the joining entity joins partway through the income year of the head company.

Notifying the Commissioner

2.27 In order to access the uplift, the entity must notify the Commissioner of Taxation (Commissioner), in the approved form, that it

is a DIP entity. There are a number of things that must happen before an entity will know that it is a DIP entity and these things may happen in a different order depending on the particular circumstances. The day that notice must be provided by accommodate these different circumstances. The entity will be able to access the uplift as long as it provides notice before the latest day listed. ***[Schedule 2, item 4, subsections 415-15(2) and (3)]***

2.28 Notice will generally be due by the time the entity first lodges a tax return seeking to uplift a loss. If the entity was not required to lodge a tax return then the entity must notify the Commissioner by the time it would have been required to lodge it. However, if the entity does not receive notification that a project has been designated as a DIP until after it lodged its tax return with the Commissioner, notice may be provided up to 28 days after the project has been designated as a DIP. ***[Schedule 2, item 4, subsection 415-15(2) and paragraphs 415-15(3)(a) and (c)]***

2.29 In addition, an entity cannot be sure that it is eligible for the uplift until it commences carrying on activities for the purposes of the DIP. As such, if there is a gap between the entity incurring costs, in relation to applying for designation for example, and commencing carrying on activities in relation to the DIP, notice does not need to be provided until up to 28 days after the activities have commenced. ***[Schedule 2, item 4, paragraph 415-15(3)(b)]***

2.30 In addition, the Commissioner may allow the notice to be lodged at a later time. ***[Schedule 2, item 4, subsection 415-15(2) and paragraph 415-15(3)(d)]***

Utilising past losses

Continuity of ownership test

2.31 Companies are normally prevented from deducting a tax loss for an income year if they have not maintained a sufficient continuity of ownership from the start of the year the loss arose until the end of the year they want to deduct it. There will be a sufficient continuity of ownership if the same persons hold more than 50 per cent of the voting power in the company, and rights to more than 50 per cent of its dividends and capital distributions, throughout that period.

2.32 The amendments ensure that a DIP entity does not have to satisfy this test in order to deduct its tax losses from the 2012-13 and later income years as long as it remains a DIP entity. ***[Schedule 2, items 4 and 47, subsection 415-35(3) and paragraph 415-10(a) of the Income Tax (Transitional Provisions) Act 1997]***

2.33 The amendments also do this by adjusting the test period used to work out whether the company has failed the continuity of ownership test.

Instead of the period running from the start of the loss year until the end of the deduction income year, the period runs from:

- the first time in or after the loss year that the company stopped being a DIP entity; or
- the end of the deduction year if it has not stopped being such an entity.

In either case, the period ends at the end of the deduction year. ***[Schedule 2, item 4, subsection 415-35(2)]***

2.34 In the first case, the entity would only fail the continuity of ownership test if there was the necessary 50 per cent or greater change in rights *after* the entity stopped being a DIP entity. Changes before that time would be ignored.

2.35 In the second case, the test period would start and stop at the same moment, so the continuity of ownership test would always be passed. ***[Schedule 2, item 4, subsections 415-35(2) and (3)]***

Example 2.5: Adjusted continuity of ownership test period

Brine Enterprises Pty Ltd (Brine), a DIP entity has carry forward losses from the 2013-14 income year. On 15 May 2014, the shareholders of Brine sell all their shares. Brine seeks to utilise some of the uplifted losses (after applying the uplift) at the end of the 2014-15 income year.

Brine would normally have failed the continuity of ownership test in 2014-15 because there was not a 50 per cent or greater maintenance in continuity of interest from the start of the loss years until the end of 2014-15. However, because it was a DIP entity, the test period collapses into a single point at the end of 2014-15 and Brine is deemed to satisfy the continuity of ownership test.

On 9 November 2015, Brine stops being a DIP entity. On 15 January 2016, the shareholders sell a 60 per cent stake in Brine.

In 2015-16, Brine again seeks to utilise some of the unutilised losses. Brine stopped being a DIP entity on 9 November 2015, so the ownership test period runs from that day until the end of 2015-16 (30 June 2016). Since there was a 60 per cent change in ownership during that reduced test period, Brine fails the continuity of ownership test in 2015-16 and can only utilise the losses if the same business test is satisfied.

2.36 Widely held companies and eligible Division 166 companies (companies in which more than a 50 per cent interest is held, directly or indirectly, by widely held companies, non-profit companies, charities, or

complying superannuation funds and similar entities) apply the continuity of ownership test in a modified way. Division 166 makes it easier for them to pass the test by only testing for continuity of ownership at the start of the loss year, at the end of each year up to the end of the deduction income year, and at each intervening time there is a substantial corporate change. Unlike other companies, these companies do not have to test for all intervening points.

2.37 The measure adjusts the start of the test period for these companies if they are DIP entities in the same way it adjusts it for other companies that are DIP entities. ***[Schedule 2, item 4, subsection 415-35(2)]***

Same business test

2.38 If a company does not satisfy the continuity of ownership test or it is not practicable to demonstrate that the company meets the continuity of ownership test, it may still be able to deduct the tax loss if it passes the same business test by carrying on the same business throughout the deduction income year that it carried on just before it failed the continuity of ownership test.

2.39 The measure also adjusts the period used to test whether the company passes the same business test if it stopped being a DIP entity in the deduction year. Instead of testing for the whole of the deduction year, a company only has to test for the part of the year that it was not a DIP entity until the end of the income year in which it seeks to utilise the loss. It needs to be carrying on the same business that it carried on just before it stopped being a DIP entity if that time is later than the test time would otherwise occur. ***[Schedule 2, item 4, subsections 415-35(4) and (5)***

Example 2.6: Same business test

> Following on from the previous example, to satisfy the same business test, Brine would need to show that it carried on the same business for the period from when it stopped being a DIP entity to the end of the income year (the same business test period) because, apart from the modification, the test would apply from an earlier time (the start of the income year). This business would need to be the same as the business carried on just before the ownership change on 15 January 2016 (the test time) because, apart from the modification, the test times would be just before the ownership change on 15 May 2014. So Brine would need to carry on the same business during the period 9 November 2015 to 30 June 2016 as it carried on just before the ownership change on 15 January 2016.

Special control test

2.40 Even if a company passes the continuity of ownership test or the same business test, it still might not be able to deduct a tax loss if

someone who did not, and could not, directly or indirectly control the voting power in the company during the loss year began to so control it, or became able to control it on or after the end of the loss year for the purpose of getting an income tax benefit (subsection 165-15(1)). In such a case, the entity must to satisfy a modified same business test in order to deduct the loss (subsections 165-15(2) and (3)).

2.41 This special control test will also be reduced to a single point in time where the entity stays a DIP entity from the loss year to the end of the deduction year. In these circumstances the test will always be satisfied. ***[Schedule 2, item 4, subsection 415-35(6)]***

2.42 Where the entity stops being a DIP entity between the loss year and the deduction year then not only are the ownership test period, same business test period and test times modified, but the loss year is also treated as modified to ensure that the test applies in relation to losses incurred while it was a DIP entity after it stops being a DIP entity. In particular, the loss year is treated as starting after the entity stopped being a DIP entity and as ending at the end of that income year. ***[Schedule 2, item 4, subsections 415-35(4) to (6)]***

Application of tests during year of ownership change

2.43 The income tax law provides special rules for working out the taxable income or loss of a company that changes ownership during the income year. That year is divided into periods, each of which ends when there is a sufficient change of ownership. Broadly, the loss or gain for each period is worked out as if the period was a separate income year (but periods are treated as a single period if the same business is carried on throughout those periods). The company's taxable income for the year does not include deductions for the tax losses of any of those periods (see Subdivision 165-B).

2.44 However, if the company is a DIP entity from the start of that year, the first period cannot end before the company stops being a DIP entity. If it does not stop being such an entity during the year, the year would be treated as a single period and the normal rules would apply to work out its taxable income. ***[Schedule 2, items 2 to 4, paragraphs 165-35(b) and (c), and subsection 415-35(7)]***

Example 2.7: Application of tests during year of ownership change

> Tiny Town Pty Ltd is a DIP entity from the start of the income year (1 July 2013) to 10 April 2014. During the income year, Tiny Town changes ownership on 12 August 2013, 10 December 2013, and 5 June 2014. Tiny Town would need to divide its year up into parts and apply the continuity of ownership test (COT) and same business test (SBT) to each of those. The first period would start on 1 July 2013

and would end on 5 June 2014 and the second period would go from 6 June to 30 June 2014.

Company losses and income injection

2.45 The tax law includes anti-avoidance provisions that allow the Commissioner to disallow deductions for losses against income that the company would not have received but for a tax benefit unless the company satisfies the same business test or the benefit is received by the shareholders that allowed the entity to satisfy the continuity of ownership test (see Subdivision 175-A). This measure does not adjust those rules for DIP entities. ***[Schedule 2, item 4, subsection 415-35(8)]***

Capital losses and companies

2.46 Rules similar to the rules for tax losses apply to the use of net capital losses by a company when there is a sufficient change in its ownership (see Subdivisions 165-CA, 165-CB and 175-CA). This measure only provides concessions in relation to tax losses and does not adjust those rules for DIP entities. ***[Schedule 2, item 4, subsection 415-35(8)]***

Deducting bad debts

2.47 A taxpayer that derives an amount of assessable income because a debt is owed to the taxpayer can generally claim a deduction if it is unable to collect the amount it is owed. This deduction for a 'bad debt' reverses the original inclusion of the amount in the taxpayer's assessable income. However, a company can only get the deduction if it satisfies continuity of ownership and same business tests similar to those that apply for deducting its tax losses.

2.48 If the debt goes bad in the same year the amount was derived, the company must satisfy the continuity of ownership test for the whole year. If the amount was derived in an earlier year, it must satisfy the test from the time the amount was derived until the end of the deduction year. If it fails that continuity of ownership test (or cannot work out if it can satisfy the continuity of ownership test), it can still deduct the bad debt if it satisfies the same business test. (See Subdivision 165-C.)

2.49 The measure provides that an entity that was a DIP entity when it derived the original amount does not normally have to satisfy this test in order to deduct its bad debts for so long as it remains a DIP entity. It does that by adjusting the rules that limit a company's capacity to deduct a bad debt in a similar way to the way it adjusts its capacity to deduct tax losses. ***[Schedule 2, item 4, section 415-40]***

2.50 For the purposes of the continuity of ownership test, the start of the test period is delayed until the company stops being a DIP entity. If it

has not stopped being such an entity, the start of the test period merges with the end of the deduction income year, so that the test is passed. ***[Schedule 2, item 4, subsections 415-40(2) and (3)]***

2.51 For the purposes of the same business test, the same business test period and test time are modified so that they cannot commence until the entity stopped being a DIP entity. The same business test period and the test time have their normal application if they would not otherwise overlap with a period when the entity was a DIP entity. ***[Schedule 2, item 4, subsections 415-40(4) and (5)]***

Example 2.8: Bad debts and the same business test

> Roary Co is a DIP entity for the 2013-14 income year.
> On 30 June 2013, Roary Co included an amount of $1 million in its assessable income that was owed to it by another entity, Lightning Trust. On 15 July 2014, Roary Co included an amount of $2 million in its assessable income that is owed to it by Lightning Trust.
> On 10 December 2014 Roary Co stops being a DIP entity.
> On 12 December Roary Co has a change of ownership.
> On 20 December 2014, Roary Co includes an amount of $4 million in its assessable income because of a debt owed by Lightning Trust.
> Lightning Trust subsequently becomes bankrupts and Roary Co writes the three debts owed to it off on 30 June 2015.
>
> In relation to the $1 million and $2 million debts, Roary Co must demonstrate that it carried on the same business during the period from 10 December 2014 to 30 June 2015 as it carried on just before the change of ownership on 12 December 2014.
>
> In relation to the $4 million debt, Roary needs to show that it carried on the same business in the period from when it stopped being a DIP entity on 10 December 2014 to the end of the income year as it carried on just before the change of ownership on 12 December 2014.

2.52 If a company deducts a bad debt only because it passes the same business test, and that deduction creates or increases a tax loss, then the tax loss (or the increase) can only be deducted in a later year if the company passes the same business test again for that later year (see section 165-132). The measure adjusts the test period used for that purpose in the same way. ***[Schedule 2, item 4, subsection 415-40(4)]***

Example 2.9: Bad debts that become losses

> Following on from the previous example, Roary Co made a loss of $6 million in the 2014-15 income year as a result of the bad debt deductions. Roary Co seeks to utilise some of those losses in the 2015-16 income year. Roary Co must show that it carried on the same business during the 2015-16 income year that it

carried on just before the change of ownership
on 12 December 2014 before it can utilise the losses.

2.53 The operation of the continuity of ownership test and the same business test for widely held companies and eligible Division 166 companies, which is modified for DIP entities that are deducting a tax loss, is modified in the same way if they seek to deduct a bad debt. ***[Schedule 2, item 4, subsections 415-40(2), (4) and (5)]***

2.54 Companies that are DIP entities are still subject to the integrity rules in Subdivision 175-C. These rules allow the Commissioner to disallow a deduction for a debt if income was injected in to the company that would not have been injected if the deduction was not available. ***[Schedule 2, item 4, subsection 415-40(8)]***

Bad debts and the special control test

2.55 The special control test that can prevent a company deducting a tax loss even if it passes the continuity of ownership test or the same business test also applies for a company deducting bad debts (see section 165-129). The special control test usually looks at whether the people who controlled the voting power in the company, either when the debt was incurred (if the debt was incurred in the deduction year) or at the end of the year the debt was incurred (if it was incurred in an earlier year), also control it at the end of the deduction year.

2.56 This test is modified to ensure that the test is always satisfied if the entity is a DIP entity from when the debt is incurred until the deduction year. However, it is also modified to ensure that it will begin to apply to an entity that stops being a DIP entity before the deduction year. In such a case, the special control test can prevent the entity from deducting the debt if the people that control the entity at the end of the income year did not control it immediately after it stopped being a DIP entity. ***[Schedule 2, item 4, subsection 415-40(6)]***

2.57 If the entity did not have the same controllers it may still be able to deduct the debt if it carries on the same business at the end of the deduction year (or the whole deduction year if the debt was incurred in an earlier year) as it was carrying on either just before the person started to control the entity or just before the entity stopped being a DIP entity, whichever is earlier. ***[Schedule 2, item 4, subsections 415-40(2) and (3)]***

2.58 The tax law also has anti-avoidance provisions which permit the Commissioner to disallow a deduction for a bad debt if it is to be used against a capital gain or income that the company would not have derived if the deduction, loss or net capital loss was not available or where there was a scheme to receive a tax benefit (Division 175). The Commissioner

cannot disallow the deduction where the company satisfies the same business test. These income injection tests continue to apply to DIP entities. ***[Schedule 2, item 4, subsection 415-35(8)]***

Tax losses and bad debts of trusts

2.59 Trusts that are not 'excepted trusts' for the whole income year also need to pass certain tests relating to ownership and control or abnormal trading in its units set out in Schedule 2F to the *Income Tax Assessment Act 1936* (ITAA 1936) before deducting prior year losses and debt deductions. The measure ensures that a DIP entity that is a trust does not need to satisfy these tests by making the entity an 'excepted trust'. ***[Schedule 2, item 1, section 272-100 in Schedule 2F to the ITAA 1936]***

2.60 However, a trust may stop being a DIP entity because, for example, it has stopped being a fixed trust, has stopped carrying on a DIP or has commenced other activities. If a trust stops being a DIP entity during the income year, then it will need to satisfy the tests relating to continuity of ownership (the '50 per cent stake test') or abnormal trading in its units because it is not an excepted trust for the whole income year.

2.61 These tests are modified in a similar way to the modifications to the tests for companies. That is, generally, the test period starts just after the entity stops being a DIP entity. The test period is not changed if it would usually start after the entity stopped being a DIP entity. For example, if the test period was in the year after the entity stopped being a DIP entity because the loss was incurred in a later year. ***[Schedule 2, item 4, sections 415-25 and 415-30]***

Consolidated groups

2.62 The head company of a consolidated group may be a DIP entity only if none of the members of the consolidated group carries on, or has ever carried on, activities that do not relate to the same DIP. ***[Schedule 2, item 4, subsection 415-20(1)]***

2.63 When an entity joins a consolidated group the head company is usually taken as having done everything that the joining member did at that time (see section 701-5). That means that, usually, activities done by the joining entity before it joined the group would affect whether the head company was a DIP entity in those years (that is, before the entity joined the group).

2.64 This measure ensures that the activities carried on by a joining member before it joined the group do not stop the head company from being a DIP entity before the entity joined the group. However, consistent with the policy that the entity has only ever engaged in activities that

relate to a single DIP, the head company will stop being a DIP entity from the joining time if the joining entity carried on activities that did not relate to the head company's DIP. The head company will not stop being a DIP entity if the joining entity has only carried on activities that relate to the same DIP as the head company. ***[Schedule 2, item 4, subsection 415-20(5)]***

2.65 When an entity joins a consolidated group it generally transfers its tax losses, film losses and net capital losses to the group's head company but only to the extent that the joining entity could have used the loss itself if its income year had ended just after the joining time (and assuming it had enough income or gains against which to offset the loss).

2.66 Under the consolidation rules, it is possible for the head company to choose to cancel the transfer of a loss. A loss that is not transferred to the head company cannot be utilised by any entity for an income year ending after the joining time.

2.67 If a DIP entity joins a consolidated group then the joining entity's tax losses (including any uplifted amount) can be transferred to the head company without having to consider whether the joining entity could otherwise have used the losses itself. ***[Schedule 2, items 5 and 6, subsections 707-120(5) and 719-265(3A)]***

2.68 The fact that a non-fixed trust joins a consolidated group will also not stop the head company from being a DIP entity provided that the trust has only carried on activities in relation to the same DIP. However, any losses of the trust will be subject to the ordinary transfer rules. As such, they can only be uplifted from the joining time and the head company will only be able to use the losses to the extent that the trust could otherwise have used the losses itself.

2.69 An entity that leaves a consolidated group can be a DIP entity even though it carried on activities that did not relate to the entity's DIP while it was a member of the consolidated group. Activities carried on by other members of the consolidated group will also not affect whether the leaving entity can be a DIP entity. ***[Schedule 2, item 4, subsection 415-20(6)]***

What is a designated infrastructure project entity?

2.70 A company or a fixed trust can be a ***designated infrastructure project entity*** (a DIP entity) if it carries on, or later begins to carry on, a single DIP. ***[Schedule 2, item 4, paragraphs 415-20(1)(a) and (b)]***

2.71 The project does not need to have been designated at the time the entity engages in activities in relation to it as long as the project becomes designated. This ensures that an entity can access the uplift, for example, in relation to deductible expenses incurred in applying for

designation. However, designation can only apply in relation to a *proposed* project (that is, a project that has not yet commenced). This ensures that the tax concessions are only available for new projects. ***[Schedule 2, item 4, paragraph 415-20(2)(a) and subsection 415-55(1)]***

2.72 Each DIP entity can only carry on one single DIP. This is consistent with industry practice in which entities that carry on a DIP are generally special purposes vehicles set up to carry on a single project, and offers greater simplicity for taxpayers. However, some projects are conducted in stages. An entity may carry on more than one stage of a single infrastructure project that is listed on an Infrastructure Priority List made under paragraph 5(2)(b) of the *Infrastructure Australia Act 2008*. ***[Schedule 2, item 4, paragraphs 415-20(2)(b), (c) and (d)]***

Example 2.10: Single projects

> A motorway between two major cities is placed on an Infrastructure Priority List in July 2013. Road Co successfully tenders to construct the regional city bypass stage of the motorway in September 2013. The bypass stage of the motorway is then designated by the Coordinator as a DIP. Road Co engages Bridge Co to build a bridge in relation to the bypass. Bridge Co and Road Co are each carrying on part of a DIP.
>
> After completing the regional city bypass, Road Co commences work on another stage of the motorway: the road joining the bypass to one of the major cities. This stage of the project is also designated as a DIP. Because the bypass and the road are both part of the motorway, which is listed on an Infrastructure Priority List, they will be treated as a single project and Road Co can still be a DIP entity as long as it does not carry on any other activities.

2.73 To ensure that the entity is not able to benefit from the uplift and modifications to the loss utilisation rules for activities that do not relate to the DIP, an entity cannot be a DIP entity if it has previously carried on activities that do not relate to the single DIP and the entity will stop being a DIP entity as soon as it starts carrying on other activities. ***[Schedule 2, item 4, paragraph 415-20(1)(d)]***

2.74 This restriction reflects the fact that the concessional treatment of the entity's losses is only intended to encourage investment in infrastructure projects. If the entity were able to carry on other activities, it would be necessary to partition the entity's tax affairs into an infrastructure component and a residual component. That would create additional complexity and increase compliance costs, which is avoided by the 'single activity' approach. It would also be risky for the DIP entity because, if an entity could carry on more than one project and one project stopped being a DIP, then the entity would lose its access to the tax concessions. The chosen approach is also consistent with usual industry

practice in which infrastructure projects are typically conducted by special purpose vehicles.

2.75 Exactly what activities the entity can engage in will depend on the scope of the project designated by the Coordinator. The Coordinator may amend a designation in accordance with the infrastructure project designation rules. The Coordinator may make the amendment take effect retrospectively, for example where the applicant had assumed that the activities would be seen as carrying on the project and the Coordinator agrees. Alternatively, it may apply prospectively, for example, where the project needs to be carried on in a different way because of an unexpected change of circumstances. ***[Schedule 2, item 4, subsections 415-65(3) and (4), and 415-70(4) to (6)]***

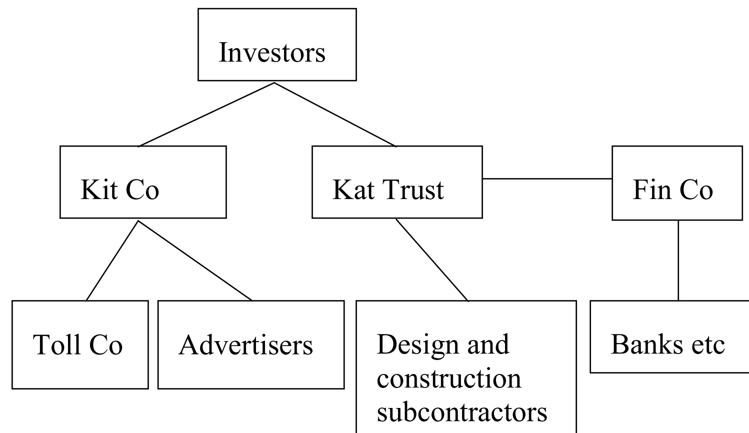
Example 2.11: Designated infrastructure project entities

The Victorian State Government has applied for a major upgrade to an Interstate Highway to be designated as a DIP. The Coordinator provisionally designates the Interstate Highway Project. Kit Co successfully tenders for the project and applies to the Coordinator to finally designate the project. The Coordinator designates the project as set out in Kit Co's application for designation, including the design, construction, project management, holding assets for use in the design and construction of the upgrade to the Interstate Highway, financing through a related special purpose finance entity that will borrow money from a syndicate of third party banks, generating revenue through advertising along the road and operation and maintenance of the upgrade to the Interstate Highway as a designated infrastructure project.

Kit Co is responsible for the project management. Kit Co has secured finance from a number of lenders, including the Victorian Government and Farmer's Bank. Kit Co arranges for the loans to be made to a special purposes vehicle, Fin Co, which is set up to manage finance for the project, including applying for loans and on-lending to entities in the group and managing ongoing compliance with the requirements of the lenders under relevant facility documents (which Fin Co may arrange to be undertaken through the appointment of powers of attorney to other group entities). From time to time, Fin Co receives interest on the monies it holds prior to on lending the funds. Earning interest, while not a specifically listed activity in the project description, is incidental to the project's finance activities. Fin Co lends money to Kat Trust, which is stapled to Kit Co, to construct or purchase assets for the project and to lease them to Kit Co for the purpose of carrying on the project. During the course of the project, Kat Trust also engages a number of subcontractors to design and construct the project.

Kit Co earns revenue from the collection of tolls and engages Toll Co to collect tolls as agent on Kit Co's behalf. Kit Co also enters into a

subcontract with Toll Co to operate and maintain the road. Kit Co earns income to partially fund its operating activities by placing advertising billboards on the side of the road.



Kit Co and Kat Trust will both be DIP entities (as long as they do not carry on any other activities) because they are each carrying on the project as designated by the Coordinator, that is (1) the project management, operation and maintenance, and (2) the design and construction, and holding and leasing of assets respectively. The fact that Kit Co earns income from advertising along the road does not prevent it from being a DIP entity because that activity has been designated by the Coordinator as being a relevant activity in carrying on the project (as set out in the business case put forward in Kit Co's application for designation). The entities that pay Kit Co to advertise their products, however, will not be DIP entities because they are not carrying on the project or a part of it as designated by the Coordinator.

Fin Co will also be a DIP entity as Fin Co's activities amount to carrying on the project as designated by the Coordinator. In particular, it is a special purpose vehicle established to source project finance for the group and to manage ongoing finance obligations. The fact that Fin Co may do so through the appointment of powers of attorney to other group entities does not affect this position.

The shareholders of Kit Co and unitholders of Kat Trust, who are also effectively providing finance for the project, do not qualify as DIP entities because they are not carrying on the DIP as designated by the Coordinator. The mere holding of shares/units is not carrying on an activity for the purposes of the project.

The banks that lend to Fin Co are also not DIP entities because they are not carrying on the DIP as designated by the Coordinator.

Whether the design and construction subcontractor qualifies as a DIP entity will depend on whether the subcontractor carries on the project

or part of the project or is merely acting as agent for Kit Co (in addition, it could only be a DIP entity provided it is not carrying on, and has not carried on, other activities).

Toll Co will be a DIP entity, as it delivers project operation and maintenance services as subcontractor to Kit Co, provided it does not carry on, and has not carried on, other activities. The mere collection of tolls as agent on behalf of Kit Co would not itself quality Toll Co as a DIP entity because those are legally the activities of Kit Co.

The Victorian State Government will not qualify as a DIP entity even if it is operating through a government enterprise that is a company or fixed trust because it carries on other activities and would not benefit from the concessions in any case.

Partnerships

2.76 Partnerships are not legal entities and do not have carry forward losses. As such, they cannot benefit directly from the measure. However, the measure allows the partners in a partnership to be treated as DIP entities if they can satisfy the criteria for being a DIP entity after the activities of the partnership are attributed to them in their own right. That is, the partner must be a company or fixed trust, must carry on a DIP and must not engage in any other activities. The fact that one of the other partners is not a DIP entity (because it engaged in other activities or is not a company or fixed trust) will not prevent the other partners from being DIP entities. The draft legislation ensures that the carrying on of the DIP is attributed to the individual partners. ***[Schedule 2, item 4, subsections 415-20(3) and (4)]***

Designated infrastructure projects

2.77 A ***designated infrastructure project*** is an investment in, or enhancement to, infrastructure that is designated by the Coordinator. ***[Schedule 2, items 4 and 35, section 415-70 and subsection 995-1(1)]***

2.78 The Coordinator is a statutory office created by section 27 of the *Infrastructure Australia Act 2008*.

The designation process

Applications

2.79 An entity must apply to the Coordinator to have a proposed infrastructure project designated. The application must:

- be in the form the Coordinator requires;

- be accompanied by any fee that has been prescribed; and
- include an estimate of the infrastructure project's capital expenditure.

[Schedule 2, item 4, subsections 415-55(1), (2) and (4)]

2.80 The Coordinator may designate projects as provisional or final DIPs before 1 July 2017 unless a later date is prescribed. This reflects that the measure is only intended to be a short term encouragement for infrastructure investments. ***[Schedule 2, item 4, subsection 415-60(5)]***

2.81 The Coordinator will consider applications in the order prescribed or, if no rules are made for provisional designation, the order in which the applications are made. The rules may prescribe other requirements for dealing with applications, such as how quickly applications must be dealt with and how incomplete or otherwise inadequate applications should be dealt with. ***[Schedule 2, item 4, subsections 415-60(1), (2) and (4)]***

2.82 The designation process would normally involve two stages: provisional designation if the project satisfies the necessary conditions; and final designation if the project continues to satisfy the conditions and financial close on it has occurred or is imminent. If financial close has occurred when the Coordinator considers the application, the project could go straight to final designation. ***[Schedule 2, item 4, subsections 415-60(3), 415-65(1) and 415-70(1) and (2)]***

Provisional designation

2.83 Provisional designation is a process by which a project can secure its entitlement to the tax benefits provided by the measure even though it has not yet satisfied the financial condition. It also allows the entity to advise its potential financial backers that the project will obtain the tax benefits if they provide the necessary finance. An entity cannot, however, access the concessions unless the project receives final designation.

2.84 For the project to be provisionally designated, the Coordinator must accept the capital expenditure estimate in the application and that estimate must not breach the $25 billion capital expenditure cap. The designation must be made in writing and provide prescribed details. The Coordinator may amend a provisional designation in prescribed circumstances. ***[Schedule 2, item 4, paragraphs 415-65(1)(a) to (c) and subsections 415-65(2) to (4)]***

2.85 Any conditions prescribed by the infrastructure project designation rules must also be satisfied. If no conditions are prescribed,

the Coordinator must be satisfied that the project is of 'national significance'. That is an expression from the *Infrastructure Australia Act 2008* that includes a transport, energy, communications or water project that will improve national productivity. ***[Schedule 2, item 4, paragraph 415-65(1)(d))]***

2.86 If the project does not satisfy the required conditions, the Coordinator will refuse to designate it. The applicant can ask the Administrative Appeals Tribunal to review that refusal. ***[Schedule 2, item 4, subsections 415-60(2) and (3) and paragraph 415-85(a)]***

2.87 The Coordinator will always revoke a project's provisional designation when the project receives final designation. This ensures that the capital expenditure estimate for a project does not count towards the cap twice (once when it is provisionally designated and once when it is finally designated). If the Coordinator decides not to finally designate a project, its provisional designation will also be revoked ***[Schedule 2, item 4, subsection 415-65(2)]***

2.88 A provisional designation can otherwise only be revoked in the circumstances prescribed in the infrastructure project designation rules. Those circumstances could include, for example, the entity failing to provide the Coordinator with the information it requires to make its decision about designating the project or failing to observe any conditions that attach to the project continuing to be provisionally designated. ***[Schedule 2, item 4, subsections 415-65(5) to (7)]***

2.89 An entity can ask the Administrative Appeals Tribunal to review a decision to revoke its project's provisional designation. ***[Schedule 2, item 4, paragraph 415-85(b)]***

Final designation

2.90 A project will get a final designation if it continues to satisfy the conditions necessary for provisional designation plus any additional conditions that are prescribed in the infrastructure project designation rules. ***[Schedule 2, item 4, subsections 415-70(1) and (2)]***

2.91 The rules may permit the Coordinator to impose rules on a project that must be met before the project receives final designation. The Coordinator may only impose conditions in accordance with the rules. ***[Schedule 2, item 4, subsections 415-70(8)]***

2.92 If no additional conditions have been prescribed, final designation will depend on the Coordinator being satisfied that the applicant is legally able to access the funds required for the project (called 'financial close' on the project) or that its ability to do so is imminent (for example, because its bankers or investors have committed to providing the

money and only the formal execution of documents remains to be done). ***[Schedule 2, item 4, paragraph 415-70(2)(b)]***

2.93 If the project does not satisfy the required conditions, the Coordinator will refuse to designate it. The applicant can ask the Administrative Appeals Tribunal to review that refusal. ***[Schedule 2, item 4, subsections 415-60(2) and (3) and paragraph 415-85(c)]***

2.94 A final designation can only be revoked in circumstances prescribed in the infrastructure project designation rules. Those circumstances could include, for example, the entity failing to provide the Coordinator with any information required under the rules or breaching conditions set for the project to remain designated. ***[Schedule 2, item 4, subsections 415-70(6) and (7)]***

2.95 When the Coordinator finally designates a project, or revokes a project's designation, the Coordinator must advise the Commissioner within 28 days. ***[Schedule 2, item 4, subsection 415-70(9)]***

2.96 An entity can ask the Administrative Appeals Tribunal to review the Coordinator's decision to revoke its project's final designation. Section 27A of the *Administrative Appeals Tribunal Act 1975* provides for applicants to be notified about a decision to designate, not designate, or revoke the designation of a project and their rights of review. ***[Schedule 2, item 4, paragraph 415-85(d)]***

The infrastructure project designation rules

2.97 The ***infrastructure project designation rules*** are legislative instruments Treasury ministers can make that provide subsidiary detail affecting the scope and operation of the DIP regime. ***[Schedule 2, item 4, subsection 415-100(1)]***

2.98 In particular, the infrastructure project designation rules can:

- provide for, and set the amount of, application fees;
- provide for the order in which applications for designation are to be determined;
- set the conditions that must be satisfied for provisional or final designation of a project or for it to remain so designated;
- permit the Coordinator to impose additional conditions and to specify what those conditions might include;

- set the conditions for amendment to or revocation of a provisional or final designation;
- set the conditions for the Coordinator accepting an application's estimate of a project's capital expenditure;
- set the requirements for an applicant amending its capital expenditure estimate;
- modify what counts towards a capital expenditure estimate;
- increase the size of the capital expenditure cap; and
- set the requirements for publishing information about infrastructure projects and the capital expenditure cap.

[Schedule 2, item 4, subsections 415-55(4), 415-60(1), 415-65(2), and (3), 415-70(4) and (8) and 415-80(1), (3), (4) and (5) and sections 415-65, 415-70 and 415-90]

2.99 Because the infrastructure project designation rules are legislative instruments, they are subject to the *Legislative Instruments Act 2003*. In particular, they only become enforceable once they are registered on the Federal Register of Legislative Instruments and they cease to apply if they are disallowed by either House of Parliament under a notice of motion made within 15 sitting days after the instrument is tabled in that House (which must occur within 6 sitting days after it is registered).

2.100 The operation of the *Legislative Instruments Act 2003* is modified in one respect for the infrastructure project designation rules. The rules are permitted to incorporate other documents issued by Infrastructure Australia as they exist from time to time. The *Legislative Instruments Act 2003* provides a default position that disallows the incorporation of certain documents unless the contrary intention appears. Expressly permitting that to be done provides that contrary intention. This capacity could be used, for example, to allow the rules to incorporate Infrastructure Australia's published list of nationally significant projects, which is available on the internet. ***[Schedule 2, item 4, subsection 415-100(2)]***

The capital expenditure cap

2.101 The tax benefits available for DIPs are deliberately limited in order to contain the overall cost to the Commonwealth revenue. The Minister may prescribe rules about how projects that will qualify for the tax concessions will be selected. Otherwise, projects will be selected on a first come-first served basis. While capping total estimated capital expenditure does not directly limit the cost to Commonwealth revenue, it

does so indirectly because it effectively limits the total magnitude of projects that are able to access the concessions. ***[Schedule 2, item 4, paragraphs 415-65(1)(c) and (d), and 415-70(1)(c) and (d)]***

2.102 In some cases, part of a project on an infrastructure priority list will be designated as a project in its own right. This might occur, for example, because financial close has occurred in relation to that part of the project while other parts of the project are not ready to commence. However, when other parts of the project are ready to commence it may be appropriate to have the whole project designated, rather than just the remaining parts. In order to ensure that the capital expenditure in relation to the same infrastructure is not counted twice, the capital expenditure estimate of the larger project is reduced by any amount that relates to the smaller project. ***[Schedule 2, item 4, subsection 415-75(3)]***

Example 2.12: Calculating the cap for overlapping projects

In 2013 the Coordinator grants provisional designation to an infrastructure project 'The 'East-West Corridor' that is listed on an Infrastructure Priority List. The estimated capital expenditure for the East-West Corridor at the time of the application was $4 billion. In 2014, Phoenix Company agrees to take on half of the project. Phoenix Company estimates that the capital expenditure on its part of the project will be $2.5 billion. This may happen because, by the time the projects reach financial close, the estimated capital expenditure has increased.

The total estimated capital expenditure for the three projects is $6.5 billion. However, in determining whether the capital expenditure cap has been breached, the Coordinator may disregard the part of the estimate for the listed project (that is, the East West Corridor) that relates to another designated project. In this case, the $2 billion (that is, half) of the original $4 billion can be disregarded because that is the portion of the original estimate that relates to the other project. So then, the total amount that counts towards the capital expenditure cap is $4.5 billion (= $2 billion + $2.5 billion).

2.103 A project cannot be designated, or provisionally designated, if the designation would mean that the total estimated capital expenditure on all designated and provisionally designated projects would exceed the cap. ***[Schedule 2, item 4, paragraphs 415-65(1)(c) and 415-70(1)(c) and subsection 415-75(1)]***

2.104 The cap is set at $25 billion but this can be increased by the infrastructure project designation rules. ***[Schedule 2, item 4, subsection 415-75(2)]***

2.105 If a designation, or provisional designation is revoked, the expenditure estimate for that project would no longer count against the cap, freeing up an amount that could be used to designate another project.

Capital expenditure estimates

2.106 An application to have a project designated must be accompanied by an estimate of the infrastructure project's capital expenditure. This is the total expected capital expenditure on the project unless otherwise prescribed. ***[Schedule 2, item 4, subsection 415-55(2) and 415-75(4)]***

2.107 The capital expenditure estimate does not include an amount that is paid for by an Australian government agency because the cap is intended to be limited to private investment. So, for example, a capital expenditure estimate should be reduced by an amount of a government grant or an amount that is directly paid for by a government agency (such as where the government agency pays a subcontractor to conduct part of the project). ***[Schedule 2, item 4, subsection 415-55(3)]***

2.108 The Coordinator must accept that estimate if it complies with the conditions in the infrastructure project designation rules (if any). If the rules contain no such conditions, the Coordinator has to be satisfied that the estimate is acceptable. ***[Schedule 2, item 4, subsection 415-80(1)]***

2.109 Applicants can amend their estimates at any time before the project is finally designated if the Coordinator, having regard to the prescribed circumstances, requests an amendment. The Coordinator can prescribe circumstances in which it can request the applicant to amend their estimate. An amended estimate is treated as though it was the original estimate. ***[Schedule 2, item 4, subsections 415-80(5) and (6)]***

2.110 The Coordinator can only revoke an acceptance of an estimate before the project is finally designated and only in accordance with the prescribed rules. ***[Schedule 2, item 4, subsections 415-80(2) to (4)]***

Publishing information

2.111 The Coordinator can, and must, publish information about provisionally and finally designated infrastructure projects and about the capital expenditure cap if required to do so by the infrastructure project designation rules. ***[Schedule 2, item 4, section 415-90]***

Delegating the Infrastructure Coordinator's powers

2.112 The Coordinator is empowered to execute a written delegation of his or her powers to an officer who is, or is acting as, an SES employee

in the staff provided by the Department of Infrastructure and Transport to assist the Coordinator. ***[Schedule 2, item 4, section 415-95]***

Application and transitional provisions

2.113 The measure applies to tax losses for the 2012-13 and later income years and to debts that were originally incurred in those years and later became bad debts of the entity. ***[Schedule 2, items 47 and 48, section 415-10 of the Income Tax (Transitional Provisions) Act 1997]***

2.114 The measure uplifts *unutilised* tax losses and relies on the existing meaning of the term 'utilise' in doing so. It extends that meaning to include reducing losses because of forgiven commercial debts. The definition of 'utilise' is being amended in a similar way by the loss carry-back measure in the Tax and Superannuation Laws Amendment (2013 Measures No. 1) Bill 2013 (see item 34 of Schedule 6 to that Bill). When that Bill is given the Royal Assent, this Bill's extension of the meaning of the term is repealed and the term will take the meaning that then applies throughout the ITAA 1997. If that Bill were not given the Royal Assent, the extension would not be repealed. ***[Schedule 2, item 66 and clause 2 (table item 3)]***

Consequential amendments

Definitions

2.115 A number of defined terms are created for the purposes of this measure. The Dictionary to the ITAA 1997 is amended to include references to each of those definitions. ***[Schedule 2, items 35 and 37, subsection 995-1(1) (definitions of 'designated infrastructure project', 'designated infrastructure project entity', 'infrastructure project capital expenditure', 'infrastructure project designation rules' and 'provisionally designated infrastructure project')]***

2.116 The use of one of those terms in the ITAA 1936 is defined to have the same meaning as it does in the ITAA 1997. ***[Schedule 2, item 16, subsection 272-140(1) in Schedule 2F to the ITAA 1936 (definition of 'designated infrastructure project entity')]***

2.117 Some other definitions are amended to reflect changes made by the DIP regime. ***[Schedule 2, items 17 and 36 and 38 to 42, subsection 272-140(1) definition of 'tax loss', subsection 995-1(1) definitions of 'ownership test period', 'same business test period', 'test period', 'tax loss' and 'test time']***

Guide material

2.118 Guide material is inserted to give readers an overview of what the provisions do. ***[Schedule 2, item 4, sections 415-1, 415-5, 415-10 and 415-50]***

2.119 A number of non-operative tables, which are designed to point readers to relevant provisions, are updated to reflect the addition of this measure. ***[Schedule 2, items 18 to 23, tables in sections 12-5 and 36-25]***

2.120 Notes are added to provisions about deducting tax losses, bad debts and trust losses to alert readers to the fact that the conditions for those deductions do not apply to a designated infrastructure entity. ***[Schedule 2, items 7 to 14, 14A, 14B, 14C, 24, 28 and 32, sections 266-15, 266-30, 266-65, 266-80, 266-100, 266-115, 266-140, 266-155, 267-15, 267-55 and 267-60 in Schedule 2F to the ITAA 1936, and sections 165-5, 165-117 and 707-300 (notes)]***

The role of the Infrastructure Coordinator

2.121 The provisions of the *Infrastructure Australia Act 2008* that establish the role of the Coordinator are amended to reflect that its role includes functions conferred on it by other laws. This reflects the fact that this measure relies on the Coordinator designating infrastructure projects as eligible for the special taxation treatment the measure provides for. The amendments provide that the Coordinator's role includes all legislative extensions (rather than just this particular extension) so that any future legislative extension does not require further consequential amendment of the *Infrastructure Australia Act 2008*. ***[Schedule 2, item 43, subsection 28(2) of the Infrastructure Australia Act 2008]***

2.122 The existing power of the Minister for Infrastructure and Transport to extend the Coordinator's role by written direction is retained but is located in a differently numbered provision. The validity of those existing directions, which may refer to the provision's previous numbering, is preserved as if they had been made under the new provision. ***[Schedule 2, items 43 to 46, subsections 28(2) to (4) and 40(1) of the Infrastructure Australia Act 2008]***

Other

2.123 Subsection 268-20(4) in Schedule 2F to the ITAA 1936 has been re-worded to clarify that, for the purposes of applying the trust loss provisions, a period that might otherwise constitute multiple periods may be treated as one period if the same business test is satisfied. This may be relevant to an entity that stops being a DIP entity during the test period. ***[Schedule 2, item 15, Subsection 268-20(4) in Schedule 2F to the ITAA 1936]***

2.124 Section 707-120 has also been reworded to make the meaning clearer and to fit in with the DIP regime. Consequential amendments are made to reflect the re-numbering of the section. ***[Schedule 2, items 29 to 31, subsections 707-120(1), and 707-130(1) and paragraph 707-125(1)(b)]***

2.125 Other changes are also made to insert references to new sections. ***[Schedule 2, items 33 and 34, paragraph 707-265(1)(a), and subsection 719-265(7)]***

2.126 The terms 'start', 'starts' and 'starting' have been replaced with the words 'begin', 'begins' and 'beginning' respectively in parts of the trust loss provisions to provide more consistent terminology across the provisions. ***[Schedule 2, items 49 to 65, subsections 266-185(1), 267-90(1), 268-10(2), 268-15(2), 268-20(2), 268-25(2), 268-75(1), 268-85(5), 269-65(1), 269-25(1) and paragraphs 269-25(1)(a), 269-100(4)(a), 271-80(a), 272-80(6B)(a) and (b) and 272-85(5C)(a) and (b) and subparagraph 272-80(6A)(i) of Schedule 2F to the ITAA 1936]***

Regulation impact statement

Introduction

2.127 This Regulation Impact Statement, which was prepared by the Department of the Treasury at the original decision-making stage, was assessed as adequate by the Office of Best Practice Regulation and publicly released on 23 May 2011.

2.128 After the RIS was published, a discussion paper 'Tax loss incentive for designated infrastructure projects' was released for six weeks consultation, closing on 9 December 2011. The exposure draft legislation and accompanying explanatory material was available for consultation from 18 April 2013 to 30 April 2013. A private consultant was engaged to advise on the design of the measure and face to face consultations were also conducted with key stakeholders.

Background

2.129 Well-targeted investment in physical infrastructure can play an important role in the economy by facilitating other productive activities. For example, port infrastructure allows Australian production to be moved around the country or exported, as well as providing a means for inputs to reach producers.

2.130 However, governments' abilities to finance new infrastructure are constrained by competing demands on public finances within the overarching constraints of desired budget outcomes.

2.131 Consequently, progress in addressing infrastructure bottlenecks will depend significantly on private financing being attracted to projects. Private financing depends on the expected commercial return from the project being sufficient relative to the risks involved.

2.132 In recent years there have been increased opportunities for private investment in infrastructure, in particular where the private sector can anticipate an acceptable return on its investment (for example, airports and ports).

2.133 Because private financing depends on the expected commercial return from the project being sufficient relative to the risks involved, it is important the government creates an environment conducive to well targeted infrastructure investment. In particular, this includes ensuring impediments — whether they are tax, regulatory, or market imperfections — do not prevent or distort private investment in infrastructure where it would otherwise have taken place.

2.134 Infrastructure projects are typically long term, highly risky investments, that can often have a long lead times between when expenditure is incurred and when a project starts earning income. One way that infrastructure projects typically deal with these risks is to allow different entities that specialise in different aspects of infrastructure (for example, construction, operation, maintenance) to deliver different stages of a project. However under current tax arrangements there is a risk that, if there is a substantial ownership change in the project and a change in business operation, then the new owners may be unable to access previous years' losses.

2.135 The private return on investment in infrastructure can also be reduced if the tax system does not adequately recognise costs. Under current arrangements the tax value of expenditures is reduced by the delay in being able to use them as tax deductions against project income, because of inflation and the time value of money.

Objectives of government action

2.136 To remove barriers to efficient private investment in public infrastructure of national significance caused by the operation of the tax system consistent with the Government's fiscal strategy.

Options that may achieve the objective

2.137 The identified problems suggest two broad approaches.

2.138 One approach would be to specifically address the problem of not being able to immediately use potential tax deductions relating to project expenditures.

2.139 The other approach would be to provide tax allowances or explicit subsidies that effectively reduce the rate of return required for a project to proceed — reducing the impact of the distortion arising from the current restrictions on loss utilisation. Although this approach would not directly address the distortion, it could provide a benefit that offsets its impact.

2.140 These approaches are overlapping, in that increasing the present value of tax deductions may improve the effective return from the project, while tax allowances and explicit subsidies could provide a benefit that may offset the impact of the current loss restrictions.

2.141 Direct Commonwealth Government subsidies to projects would not be consistent with the objective.

2.142 Within these two broad approaches there is also a question around what projects and what quantum of investment should receive the new tax treatment. To manage the potential cost to revenue and ensure that the highest value projects are supported it is proposed that measure focus on projects of national significance up to $25 billion of capital investment for five years (2012-13 to 2016-17).

2.143 Given this constraint a number of factors are important in order to maximise value for money, including that:

- the absolute size of the net gain to the community from the projects is of national significance;
- the benefit to the community from the new tax provision is maximised by choosing between competing projects;
- projects have appropriate corporate governance arrangements in place; and
- the project is available to multiple users and benefits the broader community.

2.144 In the absence of a cap, one option would be to let infrastructure projects self-assess against such criteria. However, to manage the

potential cost to revenue while ensuring that the highest value projects are supported, it is proposed a decision maker be established to deem certain projects as Designated Infrastructure Projects (DIPs).

2.145 A clear and objective process for selecting DIPs will be important for the initiative to meet its objective.

2.146 To ensure that only nationally significant projects are considered a pre-condition would be that they must be listed on Infrastructure Australia's (IA) National Priority List of projects considered 'Ready to Proceed' or 'Threshold'. In addition to meeting this pre-condition a decision maker and set of criteria will be established to decide whether a project should be a granted DIP status for the purpose of the new tax treatment.

2.147 Governance arrangements for the decision maker and more detailed criteria will be developed through further consultation with industry and other stakeholders. Issues likely to be canvassed in that process include:

- the relationship between the decision maker and Infrastructure Australia (in particular their ability to share information);
- the process of appointing a decision maker and what skills and qualifications they should have; and
- the specificity of the selection criteria (for example, should the criteria include a 'hurdle' rate of return to the economy as a whole).

New Tax Treatment Option 1 — Loss maintenance

2.148 This option directly targets the concerns that early stage tax deductions (which in the first instance feed into carry forward losses) might not ever be used due to changes of ownership, or if used will have declined in value due to inflation and the time value of money.

2.149 Under this option, DIPs would enjoy maintenance of the value of carry forward losses and increased flexibility in utilising those losses.

2.150 Before being applied to the entity's income for an income year, any prior year losses would be uplifted at the government bond rate.

2.151 Losses attributable to the DIP would be exempted from the continuity of ownership test (COT) and same business test (SBT). That is,

any uplifted losses would still be deductible against future income if the entity experienced a change in ownership or business.

2.152 Although consultation will be undertaken on the design and implementation of the proposal, the simplest approach would be to require the DIP to be held by a separate entity, which would work out its income and deductions (that is, calculate its losses) under the ordinary income tax law, subject to any special rules that may be required. This would avoid the need to identify which part of the assessable income and allowable deductions for an entity (worked out under the ordinary income tax law) are directly attributable to the DIP for an income year.

2.153 The entity would (in principle) work out its income and deductions — and hence any eligible losses — under the current income tax law. Any exceptions or variations to the ordinary rules would be reflected in the enabling legislation, not subject to the decision maker's discretion.

2.154 Loss integrity rules other than the COT and SBT would still be applied. In addition, specific integrity rules may be required to ensure that the amounts taken into account are at arm's length.

2.155 Overall, this option has the potential to reduce the weighted average cost of capital for eligible projects and hence, relative to the status quo, more projects should go ahead. Compliance costs will be reduced by the removal of the COT and SBT, although there would be a cost in meeting other integrity rules and seeking DIP status. However, these costs are likely to be small relative to the size of the DIP and the sophisticated nature of the players involved. Since this option eliminates the risk that losses are trapped and maintains their value until they can be utilised, the end result is that the project will pay the intended rate of tax on its profits, which represents an appropriate cost to revenue.

New Tax Treatment Option 2 — Flow through shares

2.156 This option would allow tax losses from DIPs to flow through to Australian resident investors.

2.157 Allowing investors direct access to losses (to be used immediately to offset income from other sources) will effectively increase potential private (after tax) returns of eligible projects and hence make them more attractive to investors.

2.158 By bringing forward, rather than merely ensuring access to and preserving the value of potential deductions, this option would also have a significant, near-term revenue impact. Since the marginal tax rates of

potential investors cannot be predicted with any real accuracy, the fiscal cost of a flow through shares scheme is also highly uncertain.

2.159 This option would also require strong integrity rules to prevent projects from becoming vehicles for tax avoidance. Such integrity rules are likely to make compliance costs high, particularly as some of the compliance is likely to fall on smaller investors.

2.160 The AFTS Review examined a flow through shares scheme for mining exploration. The Review found that such a scheme would be complicated and therefore likely to result in high administration and compliance costs. The Review also noted it would not assist in attracting investment from non-resident investors.

2.161 Overall, a flow through shares scheme would be expected to have a positive impact on private investment in infrastructure relative to the status quo. However, a flow through shares scheme would impose an onerous compliance burden on business and investors as well as having a significant, but highly uncertain, impact on revenue.

New Tax Treatment Option 3 — Infrastructure subsidy

2.162 This option would provide a ‘bonus tax deduction’ to eligible projects to increase the potential private returns and hence make them more attractive to investors.

2.163 The entity conducting a DIP would be able to claim a bonus deduction of the lesser of actual project expenditure and approved project expenditure. Approved project expenditure could be less than the expected actual project expenditure, reflecting the national priority the decision-maker attributes to the project.

2.164 In general terms, expenditure would need to be directly attributable to the DIP to be eligible for the investment allowance. Generally, eligible expenditure would be limited to capital expenditure for which a deduction is available under the income tax law. However, financing costs, such as interest payments, would be excluded.

2.165 The investment allowance would have no impact on deductions for expenditures incurred or on the timing or amount of capital allowance deductions for depreciating assets, the timing and amount of deductions for capital works, or on any balancing adjustments when such assets are sold, scrapped or abandoned.

2.166 It is expected that the bonus deduction would be claimable on completion of project milestones (such as when sections of the infrastructure come into public use) specified in the instrument conferring

DIP status on the project. The relevant project milestones would be specified in the instrument approving the project as a DIP. There would be a mechanism for amending project milestones in light of unforeseen events and developments.

2.167 Overall, providing a subsidy that reduces the weighted average cost of capital for eligible projects should, relative to the status quo, mean more projects go ahead. Compliance costs would arise from meeting integrity rules and seeking DIP status. However, these costs would be relatively small compared to the size of the DIP and the sophistication of the players involved. Because this approach does not directly address the distortion arising from the current restrictions on loss utilisation it has a higher cost to revenue.

Consultation

2.168 On the broad issue of restrictions on the use of tax losses, the AFTS Review undertook extensive consultation to develop the principle that ‘the treatment of business losses should reduce biases against risk taking by treating income and losses symmetrically. This must be balanced against problems arising from the mismeasurement of losses from difficulties in measuring economic income, artificial loss creation schemes or from other forms of tax avoidance.’

2.169 In the context of infrastructure, confidential consultation with selected industry stakeholders was undertaken in March and April of 2011 on the three options that were identified as potentially capable of meeting the objective of removing barriers to efficient private investment in public infrastructure of national significance caused by the operation of the tax system consistent with the Government's fiscal strategy.

2.170 This consultation suggested that industry’s preference was for a flow through shares scheme that would allow tax losses from DIPs to flow through to Australian resident investors. Some stakeholders considered that if this was not possible, then their preference was for a combination of option 1 and option 3 that would deliver both certainty of losses and a subsidy for DIPs.

2.171 Eliminating uncertainty around the ability to utilise future losses (that is, removing the COT and SBT) was considered valuable. If implemented correctly, participants considered this had the potential to reduce the weighted average cost of capital for eligible projects. That is, the losses option would more clearly reduce the risks of investing in selected projects.

2.172 While uplifting losses or an investment allowance was also considered desirable, some participants expected these benefits to be competed away through the bidding process for a project, and others highlighted that without certainty around access to future losses, uplifts or allowances were of limited value.

2.173 Consultations reinforced that tax structures involved in infrastructure projects are often complex and that ongoing consultation during the development and implementation of the tax measure will be crucial.

Implementation and review

2.174 Implementation will proceed in a number of stages.

2.175 A consultation paper will be issued shortly after the measure is announced in the 2011-12 Budget.

2.176 A period of between four and six weeks will be provided for interested members of the public to make a submission on the consultation paper. Meetings with key stakeholders may also occur during the consultation period.

2.177 Responses to the consultation paper will inform further policy decisions by the Government (on issues like the decision maker and selection criteria) and the preparation of draft legislation. Subject to Government's overall drafting priorities, the draft legislation could be exposed for public comment by the end of 2011.

2.178 As with the consultation paper, interested members of the public would have between four and six weeks to make a submission on the exposure draft legislation. Meetings with key stakeholders may occur during the consultation period.

2.179 Responses to the draft legislation will determine how quickly the legislation could then be finalised for introduction in the Parliament. However, the implementation process would be undertaken with a view to the legislation being introduced in the first half of 2012.

2.180 It is expected that a post-implementation review of the measure would be conducted once the legislation has been in place for at least two years. This would provide an opportunity to review both the implementation process and the preliminary evidence on the efficacy of the legislation and the effectiveness of the measure.

Conclusion

2.181 Based on an assessment of the costs and benefits of each option, the 'loss maintenance' approach appears most like to deliver a net benefit to the Australian economy. In the current budgetary environment, it is appropriate to place a cap on the quantum of capital investment that is supported by the incentive. The decision maker will effectively be asked to construct a portfolio of infrastructure projects that will deliver the maximum possible benefits for the nation as a whole. In this way, the incentive will be focussed on ensuring that private investment in public infrastructure of national significance is not deterred by impediments in the tax system.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Incentives for designated infrastructure projects

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

Overview

2.183 Schedule 2 to this Bill amends the *Income Tax Assessment Act 1997* to provide a tax incentive for companies and fixed trusts that carry on a nationally significant infrastructure project.

2.184 The tax incentives uplift the value of such entities' carry forward tax losses by the long term bond rate; and exempt them from the loss and bad debt utilisation rules (sometimes referred to as the continuity of ownership and same business tests).

Human rights implications

2.185 This Schedule does not engage any of the applicable rights or freedoms. The measure has a concessional retrospective element.

Conclusion

2.186 This Schedule is compatible with human rights as it does not raise any human rights issues.

Assistant Treasurer, the Hon David Bradbury

Chapter 3
Creating a regulatory framework for tax (financial) advice services and other amendments

Outline of chapter

3.1 Schedule 3 to this Bill amends the *Tax Agent Services Act 2009* (TASA 2009) to bring entities that give tax advice in the course of giving advice that is usually provided by financial services licensees within the regulatory regime administered by the Tax Practitioners Board (TPB). This ensures the consistent regulation of all forms of tax advice, irrespective of whether it is provided by a tax agent, a BAS agent or an entity in the financial services industry.

3.2 In addition, Schedule 4 to this Bill makes a number of other amendments to the TASA 2009 to correct a range of technical issues.

3.3 Unless otherwise noted, all legislative references in this chapter are to the TASA 2009.

Context of amendments

The current regulatory regime for tax agents and BAS agents

3.4 With effect from 1 March 2010, the TASA 2009 introduced a national regulatory regime for tax agents and BAS agents to ensure that providers of tax agent services to the public meet appropriate professional and ethical standards. A sound regulatory environment gives confidence to the public about the quality of the service they receive and strengthens the integrity of the tax system.

Tax agents and tax agent services

3.5 There are three key elements that form the basis of the regulatory regime for tax agents. These are:

- the definition of what constitutes a tax agent service;
- the registration requirements and Code of Professional Conduct that applies to registered tax agents; and

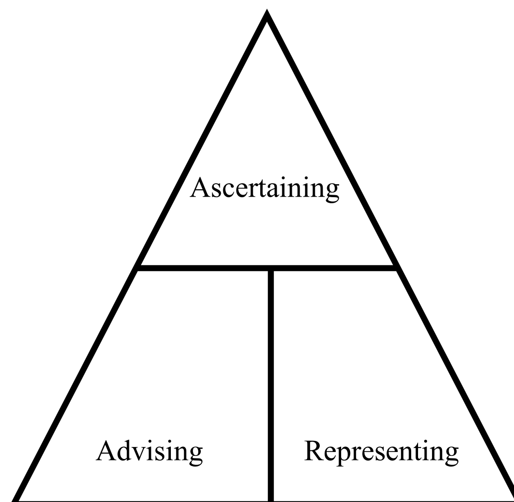
- the civil penalties that may apply to unregistered tax agents.

3.6 The TASA 2009 broadly defines tax agent services by reference to a series of service-related elements. Essentially, a tax agent service is a service provided in circumstances in which an entity can reasonably expect to rely on it for tax purposes, and it relates to:

- ascertaining an entity's tax liabilities;
- advising an entity about their tax liabilities and potential tax liabilities; or
- representing an entity in their dealings with the Commissioner of Taxation (Commissioner).

The triangle in Diagram 3.1 illustrates each of these three elements.

Diagram 3.1



3.7 The TASA 2009 generally requires entities that provide tax agent services to register with the TPB. The registration requirements ensure that the individuals who provide or are accountable for these services meet standards of fitness and propriety and have relevant qualifications and experience. Registered entities are also subject to a Code of Professional Conduct which includes the requirement to provide services competently.

3.8 Different registration requirements apply to partnerships and companies that provide tax agent services. These requirements ensure

that these entities have a sufficient number of registered individuals within the organisation to provide tax agent services to a competent standard and to carry out supervisory arrangements.

- This means that whilst a number of employees may need to be registered tax agents to meet this sufficient number requirement, there is no obligation for all employees who may provide tax agent services to be registered with the TPB (unless they provide services in their own right).

- The entity may also use other individuals that are registered tax agents such as partners, directors, contractors and staff provided under service trust arrangements to meet this sufficient number requirement.

3.9 Generally, entities that provide tax agent services for fee or other reward whilst unregistered contravene the TASA 2009 and may be liable to civil penalties.

3.10 The TPB provides guidelines and other information about how this framework operates, as well as information about what services may or may not be tax agent services. For example, providing general tax information or tax advice to a client that does not involve the application or interpretation of the taxation laws to their personal circumstances are not tax agent services.

BAS agents and BAS services

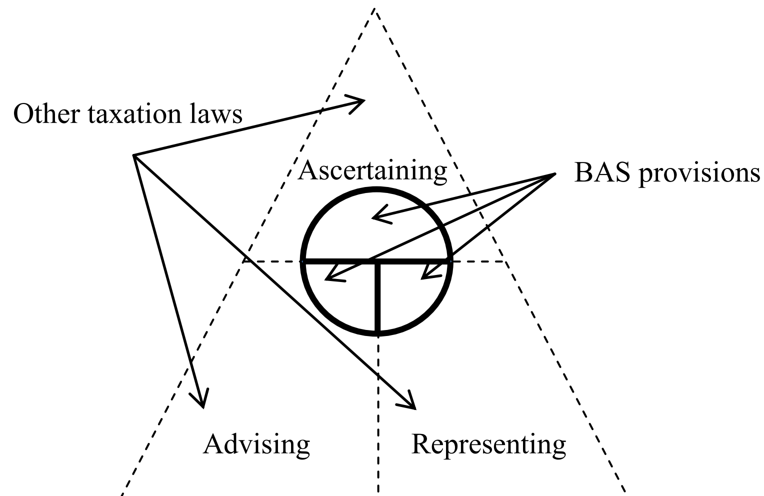
3.11 The TASA 2009 also establishes a similar regulatory regime for BAS agents. It does this by defining a BAS service as a tax agent service that is limited in its application to BAS provisions in the taxation laws.

- Entities that wish to provide BAS services need to register with the TPB as a BAS agent (or a tax agent) and meet the same standards of fitness and propriety as well as have relevant qualifications and experience. Registered BAS agents are also subject to the same Code of Professional Conduct.

- Entities that provide BAS services for fee or other reward whilst unregistered contravene the TASA 2009 and may be liable to civil penalties.

3.12 The circle in Diagram 3.2 illustrates how BAS services interrelate with the broader concept of tax agent services.

Diagram 3.2



Tax agent services provided in the course of advice that is usually provided by financial services licensees

3.13 In practice, a core part of giving well-considered and comprehensive advice about an entity's financial affairs will often include information about the tax implications of certain strategies and investments. However, giving this information will not necessarily be a tax agent service.

3.14 As noted in paragraph 3.6, a service can only constitute a tax agent service if the entity receiving the service can reasonably expect to rely on it for tax-related purposes. This point was articulated in paragraph 2.36 of the explanatory memorandum to the Tax Agent Services Bill 2008:

> 'Where it is reasonable to expect that advice is to be relied upon for purposes other than to satisfy tax obligations…such as making an informed financial or business decision, assessing risks or determining income tax provisions in an audited account, the advice is not a tax agent service. This applies to, for example, certain advice provided by a financial services licensee under the Corporations Act on the tax implications of financial products or financial transactions, or advice relating to ascertaining tax liabilities for the purpose of calculating a future income stream. It would also include advice provided by an actuary on a risk assessment of a particular product or entity that takes into account the tax implications.'

3.15 Nonetheless, it is often a fine line between whether an entity is merely providing general information about the tax implications of particular financial products or giving tax advice that could reasonably be expected to be relied on and therefore a tax agent service. This conceptual distinction was articulated in Examples 2.7, 2.8 and 2.10 of the explanatory memorandum to the Tax Agent Services Bill 2008.

3.16 As an interim measure, and to provide time to develop a suitable regulatory framework that takes into account the existing regulatory regime in the *Corporations Act 2001* (Corporations Act) applying to those in the financial services industry, the Government carved out tax agent services provided by financial services licensees and their authorised representatives from the TASA 2009 regulatory regime. This exemption, contained in subregulation 13(2) of the *Tax Agent Services Regulations 2009* (TASR 2009), applies when the entity providing financial product advice:

- accompanies it with a statement that they are not a registered tax agent; and
- advises the recipient that they should seek the services of a registered tax agent if they wish to rely on the advice.

3.17 This carve-out automatically ends on 30 June 2013.

3.18 From after that date, and in the absence of any amendments, financial services licensees and their representatives will potentially be liable to civil penalties if:

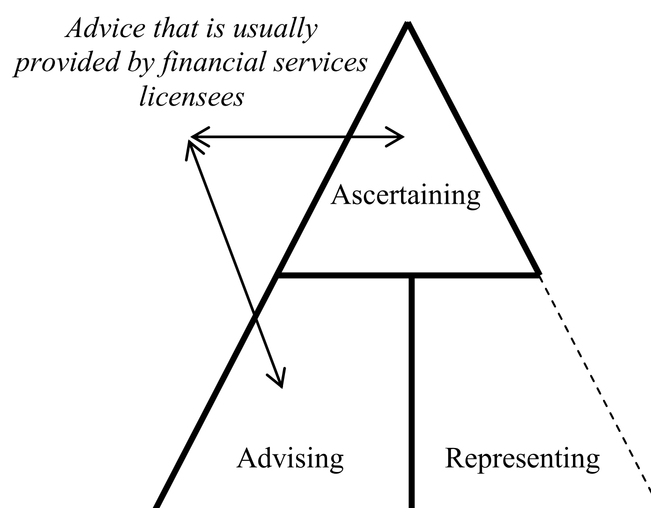
- they provide tax advice that can reasonably be expected to be relied on by the recipient for tax purposes (and therefore would ordinarily meet the definition of a tax agent service) for a fee or other reward; and

- they are not registered with the TPB as a registered tax agent.

3.19 The purpose of these amendments is to bring entities in the financial services industry that are regulated by the Corporations Act and that provide tax agent services within the TASA 2009 regulatory regime. Entities in the financial services industry that do not provide tax agent services will not be affected by this regulatory regime.

3.20 Diagram 3.3 illustrates the link between the relevant elements of the definition of a tax agent service and the concept of advice that is usually provided by financial services licensees. Of note, there may be other forms of advice that do not constitute tax agent services and so fall outside the triangle.

Diagram 3.3



3.21 A key objective of this new regulatory regime is to minimise compliance costs by avoiding regulatory overlap between the TPB and Australian Securities and Investments Commission (ASIC). This is achieved, in part, by removing legislative impediments to the TPB and ASIC sharing information about those entities regulated by both agencies.

Other enhancements to the TASA 2009 regulatory framework

3.22 These amendments also provide a timely opportunity to improve the TPB's administration of the TASA 2009.

3.23 After being in operation for over three years, the TPB has identified a number of amendments to the TASA 2009 that would enhance the regulatory framework more generally (including in relation to registered tax agents and registered BAS agents) and streamline a range of administrative processes.

Summary of new law

3.24 These amendments consist of two Schedules: Schedule 3 and Schedule 4.

3.25 Schedule 3 creates the new regulatory regime within the TASA 2009 for entities in the financial services industry that give tax advice. It does this by creating a new type of regulated service in the TASA 2009 — that of a 'tax (financial) advice service'. Schedule 3 consists of three Parts.

- Part 1 consists of the main amendments.
  - This Part defines a tax (financial) advice service and incorporates it, as appropriate, into the existing registration framework and Code of Professional Conduct that applies to registered tax agents and registered BAS agents.
  - Subject to the transitional arrangements in Part 3, this Part also establishes a civil penalty regime that applies to unregistered entities that provide tax (financial) advice services in much the same way as the existing civil penalty regime applies to unregistered entities that provide tax agent services or BAS services.
  - This Part also allows the TPB to disclose official information to ASIC for the purpose of ASIC performing any of its functions or exercising its powers.
- Part 2 makes several consequential amendments to the *Income Tax Assessment Act 1997* (ITAA 1997) arising from the creation of this new type of service.

- Part 3 contains the transitional provisions for entities providing tax (financial) advice services from 1 July 2013 through to 30 June 2016. This consists of an initial 18 month notification period followed by an 18 month transitional period.
  - During the notification period, entities in the financial services industry need not immediately register with the TPB. Unregistered financial services licensees and their representatives may provide these services provided they accompany them by a disclaimer similar to that contained in subregulation 13(2) of the TASR 2009.
  - In addition, financial services licensees and authorised representatives that provide tax (financial) advice services may prospectively register with the TPB without having to meet any ongoing registration requirements (such as those relating to qualification and experience) during the notification period.
  - During the transitional period, any other unregistered financial services licensees or representatives may apply to the TPB to be registered. During this time, the ongoing registration requirements will be eased.

3.26 Schedule 4 addresses the various technical issues in the TASA 2009. These include:

- making it a registration requirement, rather than a separately imposed TPB requirement, for registered entities to maintain professional indemnity insurance (PI insurance) that meets the TPB's requirements and, for individuals renewing their registration, making it a registration requirement to meet the TPB's continuing professional education (CPE) requirements;
- allowing the TPB not to accept a registered entity's surrendered registration if that entity is subject to an investigation;
- allowing the TPB to broaden the scope of what services constitute a BAS service, by issuing legislative guidelines;
- allowing the TPB to provide information about a registered entity, if that entity is a member of an accredited professional association, to that professional association; and

- allowing the TPB to disclose information to the Commissioner for the purposes of administering a taxation law.

Comparison of key features of new law and current law

New law	*Current law*
Entities that give tax advice in the course of giving advice that is usually provided by financial services licensees will need to register with the TPB and comply with various regulatory requirements. Subject to specific transitional rules, unregistered entities that give this advice whilst unregistered may be subject to civil penalties.	Until 30 June 2013, financial services licensees and their authorised representatives need not register with the TPB if they provide tax advice in the course of providing financial product advice, unless they provide a broader range of tax agent services or BAS services.
The TPB may also provide official information to ASIC where that information is for the purpose of ASIC performing any of its functions or exercising its powers.	The TPB may provide official information to the Commissioner and other law enforcement agencies for a range of law enforcement-related purposes.

Detailed explanation of new law

Creating a regulatory framework for tax (financial) advice services

3.27 Under the existing legislative framework of the TASA 2009, only entities seeking to provide tax agent services, including BAS services, for fee or other reward must register with the TPB to avoid potential civil penalties. Entities that do not provide these services do not need to register.

3.28 These amendments adopt the same approach for entities seeking to provide 'tax (financial) advice services'.

3.29 The amendments do this by defining a tax (financial) advice service and then extending, as appropriate, the current registration framework in the TASA 2009 to entities — individuals, partnerships and companies — seeking to be registered with the TPB to provide these services.

3.30 The amendments define this new type of registered entity as a 'registered tax (financial) adviser'.

3.31 Unregistered entities that provide tax (financial) advice services may be liable for civil penalties.

What is a tax (financial) advice service?

3.32 A tax (financial) advice service consists of two elements — that of providing a tax agent service, and providing that service in the course of giving advice that is of a kind usually given by a financial services licensee or a representative.

Giving advice of a kind usually given by a financial services licensee or a representative

3.33 Entities in the financial services industry usually provide their clients with a range of advice and strategies for managing their financial affairs including in relation to wealth management, retirement planning, estate planning and risk management.

3.34 Under the Corporations Act, an entity that carries on a financial services business in Australia needs to hold an 'Australian financial services licence' (AFSL), unless an exemption applies. For example, an entity does not need to hold a licence to provide financial services as a representative of a financial services licensee (an entity that holds such a licence).

3.35 A representative (of a financial services licensee) is defined in paragraph 910A(a) of the Corporations Act and includes an authorised representative. An authorised representative is defined in section 761A of the Corporations Act to be a person authorised to provide financial services on behalf of a financial services licensee.

3.36 Section 5B of the Corporations Act provides ASIC with the general administration of that Act.

3.37 An entity provides a financial service if, amongst other things, it provides financial product advice as defined in section 766B of the Corporations Act. A recommendation, a statement of opinion or a report of either of these things, constitutes financial product advice if it:

- is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products, or could reasonably be regarded as being intended to have such an influence; and

- is not otherwise exempt from the definition of financial product advice.

3.38 There are a range of circumstances when such an exemption may apply. For example, paragraph 766A(2)(b) of the Corporations Act allows the Corporations Regulations to specify circumstances when a person is taken not to be providing a financial service and, therefore, potentially, not to be providing financial product advice.

3.39 In addition, section 926A of the Corporations Act allows ASIC to exempt a person or class of person from specific provisions in Part 7.6 of the Corporations Act, exempt financial products from specific provisions in Part 7.6 or otherwise modify or vary the application of the relevant provisions. Section 926B of the Corporations Act provides for the Corporations Regulations to make similar exceptions and modifications.

3.40 In addition, dealing in a financial product is also a financial service. Section 766C of the Corporations Act sets out the circumstances when conduct constitutes dealing in a financial product. This includes:

- applying for, or acquiring, a financial product;
- issuing a financial product;
- varying a financial product; or
- disposing of a financial product.

3.41 For the purposes of these amendments, it does not matter whether this advice is financial product advice or dealing in a financial product (as defined in the Corporations Act). The relevant test is whether the tax agent service is given in the course of advice that is usually given by a financial services licensee or a representative. This broader advice is a necessary condition as it provides the context for the tax agent service and distinguishes tax (financial) advice services from other tax agent services. In effect, this means that the tax agent services will usually take the form of tax advice that can reasonably be expected to be relied on for tax purposes that is given for the purpose of helping to fully inform a client about their current and future financial affairs. As such, it could be given:

- as part of a strategic discussion about a client’s long-term financial objectives;
- in the course of advising a client about the relative merits of particular financial products or other investments; or

- in the course of advising a client about non-financial products such as real property.

[Schedule 3, item 43, subsection 90-15(1)]

Example 3.1

Cate goes to her financial adviser to learn more about self managed superannuation funds (SMSFs). The financial adviser provides Cate with some factual information on what is generally understood to be an SMSF and how they operate. To the extent this constitutes purely factual information does not influence her decision, it is not financial product advice.

Should Cate's financial adviser then provide her with advice on why an SMSF favourably compares to an Australian Prudential Regulation Authority regulated fund, given her financial objectives, then such advice may constitute financial product advice.

This advice is usually provided by financial services licensees and representatives.

Example 3.2

Lachlan is considering buying an investment property and goes to see his financial adviser, seeking advice about the merits of such an investment. Buying and selling a direct interest in real property is not a financial product.

However, this advice is usually provided by financial services licensees and representatives.

Example 3.3

Cecil owns a small business and goes to see his financial adviser to discuss his options for commencing a transition to retirement strategy. Part of the discussion relates to the capital gains tax discount and the small business tax concessions.

3.42 This advice is usually provided by financial services licensees and representatives. Registered tax agents and registered BAS agents, unless they provide tax agent services in the course of this broader advice service, will not provide tax (financial) advice services.

Example 3.4

Katrina, a registered tax agent, provides her clients with a range of tax agent services, including the preparation and lodgement of tax returns. Katrina also advises her clients about the tax consequences of specific

transactions and recommends various tax-effective strategies. Katrina is not licensed by ASIC to provide financial services.

To the extent that Katrina's advice does not take into account her client's financial affairs and objectives more generally (and therefore is not advice that is usually provided by financial services licensees or representatives), any tax agent services that Katrina provides will not be tax (financial) advice services.

3.43 However, even if a registered tax agent does provide a tax agent service in the course of giving advice that is usually provided by a financial services licensee or a representative, they do not need to separately register with the TPB as a registered tax (financial) adviser. This is because registered tax agents can also provide tax (financial) advice services for fee or other reward without contravening the TASA 2009. Paragraph 3.99 provides further information about this.

Providing tax agent services

3.44 Consistent with the legislative approach in defining a BAS service as a tax agent service, a tax (financial) advice service is also defined as a tax agent service. This integrates tax (financial) advice services within the existing legislative framework of the TASA 2009 where the concept of a tax agent service defines and limits those services regulated by the TPB. ***[Schedule 3, item 43, subsection 90-15(1)]***

3.45 Services that are not tax agent services will not be tax (financial) advice services — even if they are provided in the course of giving advice that is usually provided by financial services licensees.

3.46 For example, subregulation 13(1) of the TASR 2009 specifies particular services that are not tax agent services for the purpose of the TASA 2009. In particular, paragraph 13(1)(i) of the TASR 2009 provides that custodial services or depository services provided by a financial services licensee or an authorised representative are not tax agent services. As such, these services will not be tax (financial) advice services either.

3.47 To the extent that an entity in the financial services industry gives a client tax-related factual information (and therefore not providing a tax agent service) then that advice will not be a tax (financial) advice service.

Example 3.5

Financial and Investments Ltd holds an AFSL authorising it to provide financial product advice in relation to managed investment schemes.

Tim is a client of Financial and Investments Ltd. In the course of receiving financial product advice, Tim receives some general information about the tax consequences that usually arise from holding interests in managed investment schemes.

To the extent that this information is not a tax agent service, Financial and Investments Ltd is not providing Tim with a tax (financial) advice service.

3.48 Entities that are unsure if particular forms of tax advice may be a tax agent service should seek guidance from the TPB. Of note, the TPB envisages updating its guidance material to clarify the types of tax agent services that an entity in the financial services industry may provide.

3.49 Consistent with the existing concept of a tax agent service, an entity that provides tax advice will provide a tax (financial) advice service only in circumstances where the entity receiving the advice can reasonably expect to rely on it to:

- satisfy obligations or liabilities that arise, or could arise, under the taxation laws;
- claim entitlements that arise, or could arise, under the taxation laws; or
- satisfy obligations or liabilities and claim entitlements that arise, or could arise, under the taxation laws.

[Schedule 3, item 43, paragraph 90-15(1)(b)]

3.50 To the extent that a service — such as an online calculator — does not take into account all of an entity's relevant circumstances so that it is not reasonable for the entity to expect to rely on it for tax purposes, such a service will not be a tax (financial) advice service.

Example 3.6

Further to Example 3.2.

Lachlan's financial adviser confirms that various costs associated with rental properties, such as real estate agent management fees, are generally tax deductible but advises Lachlan to obtain tax advice specific to his needs.

Even though this advice relates to Lachlan managing his financial affairs and may usually be provided by financial services licensees, this advice is not a tax (financial) advice service.

3.51 Ultimately it will be a matter of fact as to whether an entity is providing a tax (financial) advice service. However, as the relevant test is whether the entity could reasonably expect to rely on the advice to satisfy obligations or claim entitlements under a taxation law, there is no need for the obligations or entitlements to immediately arise, or in some cases, to arise at all.

Example 3.7

Further to Example 3.5.

Tim seeks more detailed advice from Financial and Investments Ltd about two specific managed investment schemes — Scheme A and Scheme B.

Accordingly, Financial and Investments Ltd provides Tim with financial product advice and specific advice about his tax consequences of investing in either of these managed investment schemes. This advice is extensive and sufficiently detailed for Tim to reflect it in his income tax return should he choose to invest in either product.

In these circumstances, Financial and Investments Ltd provides Tim with a tax (financial) advice service in relation to both Scheme A and Scheme B, regardless of whether Tim subsequently chooses to invest in either, or both, schemes.

3.52 However, a tax (financial) advice service does not incorporate all three elements of a tax agent service. The key tax-related differences between a tax agent service and a tax (financial) advice service is that the latter service only relates to:

- ascertaining an entity's actual, or potential, tax liabilities, obligations or entitlements under a taxation law; or
- advising an entity about their actual, or potential, tax liabilities, obligations or entitlements under a taxation law.

[Schedule 3, item 43, paragraph 90-15(1)(a)]

3.53 Therefore an entity that represents a taxpayer in their dealings with the Commissioner, such as by lodging a tax return or a statement in the nature of a return, provides a tax agent service that is not a tax (financial) advice service.

3.54 Also, a tax (financial) advice service does not include preparing a return or a statement in the nature of a return. ***[Schedule 3, item 43, paragraph 90-15(3)(b)]***

3.55 Accordingly, entities that wish to provide such services — even if they are provided in the course of giving advice that is usually provided by a financial services licensee or a representative — may need to register with the TPB as a registered tax agent or, if applicable, a registered BAS agent.

- A registered tax (financial) adviser, for example, that provides tax agent services may be liable to civil penalties under subsection 50-5(1) if they are not also a registered tax agent.
- Similarly, a registered tax (financial) adviser that provides BAS services may be liable to civil penalties under subsection 50-5(2) if they are not also a registered tax agent or a registered BAS agent.

Providing flexibility as to what may constitute a tax (financial) advice service in the future

3.56 Paragraph 60-15(d) allows the TPB to issue guidelines (in the form of legislative instruments) to assist in administering the system for the registration of tax agents, BAS agents and tax (financial) advisers. ***[Schedule 3, item 33]***

3.57 To provide ongoing flexibility as to what constitutes a tax (financial) advice service and ensure that the regulatory framework continues to reflect industry practice, the TPB will be able to specify any other services that are to also be tax (financial) advice services by issuing a legislative instrument. ***[Schedule 3, item 43, subsection 90-15(2)]***

3.58 In addition, and consistent with the current approach in relation to BAS services, the regulations may prescribe services that are not tax (financial) services. ***[Schedule 3, item 43, paragraph 90-15(3)(b)]***

3.59 The reason for specifying services that are not tax (financial) advice services in the regulations, rather than allowing the TPB to issue legislative instruments, is that the consequence of just specifying a service to not be a tax (financial) advice service is that it will remain a tax agent service. Allowing the TPB to specify additional tax (financial) advice services will not have a detrimental effect on already registered tax agents but amending the regulations to specify services that are to not be tax (financial) advice services may have such an effect on registered tax (financial) advisers. This is because all registered tax agents may provide tax (financial) advice services but registered tax (financial) advisers may not provide all tax agent services.

Registering with the TPB to provide tax (financial) advice services

3.60 An entity that applies to become a registered tax (financial) adviser will need to do so in the form approved by the TPB. This allows the TPB to minimise the compliance costs on entities seeking to become registered tax (financial) advisers. ***[Schedule 3, item 10]***

3.61 Applications will need to be accompanied by an application fee, the amount of which will be prescribed by the regulations.

3.62 An entity may apply to the Administrative Appeals Tribunal (AAT) under section 70-10, for the review of a decision by the TPB to reject an application for registration (including rejecting a renewal of registration) or to specify a condition to which the registration is subject.

The eligibility framework for individuals seeking registration

3.63 The eligibility framework for an individual seeking to become a registered tax (financial) adviser will be the same as an individual seeking to become a registered tax agent or a registered BAS agent. This includes being at least 18 years of age and satisfying the fit and proper person test. Specific eligibility requirements, such as those relating to qualifications and experience, will be prescribed by the regulations. This could also include other eligibility requirements, such as the requirement to be a financial services licensee or a representative such a licensee to ensure a regulatory connection with the Corporations Act. ***[Schedule 3, item 4]***

3.64 The TPB may also impose conditions on an individual's registration as a registered tax (financial) adviser and, on application from the registered entity, vary these conditions. ***[Schedule 3, items 11 and 13]***

The eligibility framework for partnerships and companies seeking registration

3.65 Similarly, the eligibility framework for a partnership or a company seeking to become a registered tax (financial) adviser will be the same as for a partnership or company seeking to become a registered tax agent or a registered BAS agent. This means each partner who is an individual has to be at least 18 years of age and each partner, or company director (including situations where a company is a partner), must satisfy the fit and proper person test. In addition, any companies must not be under external administration or have been convicted of a serious taxation offence, or an offence involving fraud or dishonesty, in the previous five years. ***[Schedule 3, items 5 and 7]***

Example 3.8

Further to Example 3.5.

Financial and Investments Ltd applies to the TPB to become a registered tax (financial) adviser. Financial and Investments Ltd has three directors — Erin, Jamie and Diana — and twenty employees in four offices throughout New South Wales.

In deciding whether to register Financial and Investments Ltd, the TPB must be satisfied that:

- Erin, Jamie and Diana are all fit and proper persons;
- Financial and Investments Ltd is not under external administration; and
- Financial and Investments Ltd has not been convicted of a serious taxation offence or an offence involving fraud or dishonesty in the past five years.

3.66 In addition, the partnership or company will need to satisfy the TPB that it has a sufficient number of individuals, either registered tax (financial) advisers or registered tax agents, to provide tax (financial) advice services to a competent standard and carry out supervisory arrangements. ***[Schedule 3, items 6 and 8]***

3.67 Allowing partnerships and companies to use registered tax agents to satisfy the TPB of this sufficient number requirement is consistent with a tax (financial) advice service being a type of tax agent service.

3.68 Paragraphs 2.55 and 2.56 of the explanatory memorandum to the Tax Agent Services Bill 2008 explain that the sufficient number requirement ensures that the partnership or company has sufficient organisational qualifications and experience to provide tax agent services competently. In addition, paragraph 2.57 explains that whilst there is no set formula for determining the number of registered individuals, the following general factors may be taken into account by the TPB:

- the size of the business;
- the services being offered;
- any conditions imposed on the entity's registration; and
- the supervisory arrangements in place.

Example 3.9

Further to Example 3.8.

The TPB may take into account that Financial and Investments Ltd has twenty employees spread over four offices in determining if Financial and Investments Ltd has a sufficient number of registered individuals.

3.69 Complementing these general factors will be the requirement that the TPB must take into account paragraphs 912A(1)(d), 912A(1)(e) and 912A(1)(f) of the Corporations Act. ***[Schedule 3, items 6 and 8]***. Section 912A of the Corporations Act imposes a range of general obligations on financial services licensees, including:

- having available adequate resources (including financial, technological and human resources) to provide the financial services covered by the licence and to carry out supervisory arrangements — per paragraph 912A(1)(d);
- maintaining the competence to provide those financial services — per paragraph 912A(1)(e); and
- ensuring that its representatives are adequately trained, and are competent, to provide those financial services — per paragraph 912A(1)(f).

3.70 Requiring the TPB to take into account these provisions when determining a sufficient number of registered individuals ensures that the entity is not subject to undue additional regulation under the TASA 2009. This is because, in effect, the TPB will need to determine a sufficient number that takes into account the arrangements that the entity already has in place for meeting its obligations under the Corporations Act.

3.71 In practice, this means that where the entity is a financial services licensee, the TPB will need to have an understanding of its existing arrangements for ensuring both its organisational competence and technical competence.

Example 3.10

Further to Example 3.9.

Taking into account the nature, scale and complexity of its business as well as the financial services it provides and the roles that individuals play in its business, Financial and Investments Ltd has nominated two responsible managers to comply with its obligation under paragraph 912A(1)(e) of the Corporations Act. These managers are directly responsible for the significant day-to-day decisions about the

ongoing provision of financial product advice and together have appropriate knowledge and skills.

In determining whether Financial and Investments Ltd has a sufficient number of individuals who are either registered tax agents or registered tax (financial) advisers to provide tax (financial) advice services to a competent standard the TPB *must* take into account these arrangements that Financial and Investments Ltd has in place for meeting this obligation, as well as any factors listed in Example 1.8 that it *may* take into account.

Similarly, the TPB *must* take into account the arrangements Financial and Investments Ltd has in place for meeting its obligations under paragraphs 912A(1)(d) and 912A(1)(f) of the Corporations Act.

3.72 Where the entity is a representative of a financial services licensee, the TPB will need to have a comprehensive understanding of how the relevant licensee meets these obligations to the extent this affects how the representative provides services on behalf of the licensee.

3.73 This may require the TPB to consult, as appropriate, with ASIC or the entity concerned.

Ongoing registration requirements and the Code of Professional Conduct

3.74 The TASA 2009 imposes a range of obligations, including a Code of Professional Conduct on registered tax agents and registered BAS agents. Registered tax (financial) advisers will be subject to the same obligations. ***[Schedule 3, items 15 and 16]***

The Code of Professional Conduct

3.75 The Code of Professional Conduct is set out in Division 30 and includes, in part, the obligations to:

- act honestly and with integrity;
- comply with the taxation laws in conducting your personal affairs;
- act lawfully and in the best interests of your clients;
- have in place adequate arrangements for managing conflicts of interests;
- maintain client confidentiality except where otherwise required by law or permitted by the client;

- not knowingly obstructing the proper administration of the taxation laws; and
- respond to requests and directions from the TPB in a timely, responsible and reasonable manner.

3.76 The Code of Professional Conduct also imposes specific obligations in relation to tax agent services provided by registered tax agents and registered BAS agents. These obligations will similarly apply in relation to tax agent services provided by registered tax (financial) advisers. For example, subsection 30-10(7) requires registered entities to provide tax agent services competently and subsection 30-10(8) requires registered entities to maintain knowledge and skills relevant to the tax agent services they provide.

3.77 Like registered tax agents and registered BAS agents, registered tax (financial) advisers that do not comply with these statutory obligations may be subject to administrative sanctions from the TPB. These sanctions can range from a written caution through to suspension or termination of registration. ***[Schedule 3, items 17, 18 and 19]***

3.78 Currently, financial services licensees have many similar obligations under the Corporations Act. For example, section 912A of the Corporations Act requires, in part, financial services licensees to:

- do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly;
- have adequate arrangements for the management of conflicts of interest that may arise; and
- maintain the competence to provide those financial services.

3.79 A registered tax (financial) adviser that complies with these similar obligations under the Corporations Act will generally find they also comply with the relevant obligations under the TASA 2009. However, registered tax (financial) advisers should, in particular, be mindful of the additional tax-related obligations imposed by the Code of Professional Conduct.

3.80 In determining its compliance processes, the TPB should ensure these processes are as efficient as possible to avoid any unnecessary duplication with ASIC's processes.

Other events that may affect an entity's registration

3.81 In the same way that various events may affect an entity's continued registration as a registered tax agent or a registered BAS agent, these events may also affect an entity's continued registration as a registered tax (financial) adviser. These events include:

- being convicted of a serious taxation offence or an offence involving fraud or dishonesty;
- being penalised for being a promoter of a tax exploitation scheme or for implementing a scheme, that has been promoted as conforming with a product ruling, in a way that is materially different from the ruling;
- becoming an undischarged bankrupt or going into external administration; or
- being sentenced to a term of imprisonment.

[Schedule 3, item 14]

Civil penalties that may apply to registered tax (financial) advisers

3.82 Consistent with the existing civil penalties that may apply to registered tax agents and registered BAS agents, a registered tax (financial) adviser may be liable to a civil penalty if they:

- employ or use the services of a previously registered tax (financial) adviser or a previously registered tax agent; and
- know, or ought to reasonably know, that the previously registered entity's registration had been terminated within the previous year.

[Schedule 3, items 29 and 30]

3.83 The maximum penalty for each contravention is 250 penalty units for individuals and 1,250 penalty units for body corporates. Subsection 4AA(1) of the *Crimes Act 1914* stipulates the value of Commonwealth penalty units. The current penalty unit value is $170. Based on this penalty unit value, this equates to a maximum penalty of $42,500 for individuals and $212,500 for body corporates.

3.84 Paragraphs 4.48 and 4.49 of the Explanatory Memorandum to the Tax Agent Services Bill 2008 explains the rationale for such a provision as being an extension of the principle that a previously registered tax agent or a previously registered BAS agent must not

provide tax agent services for a fee or other reward where their registration has been terminated by the TPB.

3.85 Registered tax agents and registered BAS agents may also be subject to civil penalties under sections 50-20 and 50-30 if they make false or misleading statements to the Commissioner or sign declarations that are required or permitted by the taxation laws respectively. However, these additional civil penalties are not relevant for tax (financial) advice services as registered tax (financial) advisers cannot represent a taxpayer in their dealings with the Commissioner.

Giving effect to a co-regulatory regime between the TPB and ASIC

3.86 As noted in paragraphs 3.19 to 3.21, the administrative effectiveness of this new regulatory regime requires the TPB and ASIC to have a close and collaborative working relationship, particularly in relation to matters that may have regulatory consequences for entities under both the TASA 2009 and the Corporations Act. This requires both agencies to be able to share relevant information with the other.

3.87 The TPB and ASIC have advised that they are currently developing a memorandum of understanding (MOU) to underpin their future relationship, with a commitment to work closely together through an open and consultative approach and to provide each other with positive assistance wherever possible.

The role of the TPB

3.88 The TPB will have the function of administering the system for the registration and regulation of registered tax (financial) advisers and regulation of unregistered entities. ***[Schedule 3, item 33]***

3.89 This includes investigating any conduct that may contravene the TASA 2009.

3.90 As part of its administration of this system, and consistent with its obligations for administering the system for the registration of registered tax agents and registered BAS agents, the TPB will need to:

- maintain a register of registered tax (financial) advisers and those that have been deregistered in specific circumstances ***[Schedule 3, items 37 to 39]***;
- publish in the Gazette its decisions to terminate or suspend an entity's registration as a registered tax (financial) adviser ***[Schedule 3, item 40]***; and

- notify the Commissioner about its decision to register an entity as a registered tax (financial) adviser or terminate an entity's registration ***[Schedule 3, item 12, paragraph 20-30(2)(a) and item 20, paragraph 40-20(3)(a)]***.

<u>Sharing information with ASIC</u>

3.91 Subject to a limited number of exceptions, section 70-35 makes it an offence for current and former TPB members, as well as Australian Public Service (APS) employees whose services have been made available to the TPB by the Commissioner, or any other individual employed by the TPB or who provides services to the TPB, to disclose, or make a record of, official information that they acquired in the course of their duties.

3.92 These amendments provide an additional exception to this general prohibition for these entities to disclose, or make records of, official information they acquired in the course of their duties to ASIC for the purposes of ASIC performing any of its functions or exercising its powers. ***[Schedule 3, item 41]***

Example 3.11

Further to Example 3.8.

The TPB grants Financial and Investments Ltd's registration as a registered tax (financial) adviser. Three months later, Financial and Investments Ltd consolidates two of its offices to a larger office at a new premises and advises the TPB of its new contact details.

It is not an offence for Gregory, an employee whose services have been made available to the TPB by the Commissioner, to disclose Financial and Investments Ltd's new contact details to ASIC to allow ASIC to update its contact details for Financial and Investments Ltd.

3.93 In addition, the TPB will be obliged to notify ASIC:

- about its decision to register an entity as a registered tax (financial) adviser ***[Schedule 3, item 12, paragraph 20-30(2)(b)]***;
- about its decision to terminate an entity's registration as a registered tax (financial) adviser ***[Schedule 3, item 20, paragraph 40-20(3)(b)]***; and
- following an investigation into a registered tax (financial) adviser or a registered tax agent that has provided tax (financial) advice services — about its decisions or findings and the relevant reasons ***[Schedule 3, items 34 to 36]***.

The role of ASIC and obligations under the Corporations Act

3.94 These amendments do not amend the obligations imposed by the Corporations Act on financial services licensees and their representatives.

3.95 For example, financial services licensees are required by the Corporations Act to have dispute resolution systems for handling retail client complaints that consist of:

- internal dispute resolution processes that meet ASIC's approved standards and requirements and cover complaints made by retail clients in relation to the financial services provided; and
- membership of an ASIC-approved external dispute resolution scheme that covers complaints made by retail clients in relation to the financial services provided.

3.96 Under the Corporations Act, financial services licensees and representatives will remain subject to these dispute resolution obligations. Consumer complaints about any financial product advice provided by a financial services licensee or a representative may also include some aspects of any tax (financial) advice services provided by, or on behalf of, the licensee. These complaints will continue to be dealt with by the financial services licensee's internal dispute resolution and external dispute resolution systems.

3.97 There are no dispute resolution-related obligations under the TASA 2009.

3.98 Subsection 127(4) of the *Australian Securities and Investments Commission Act 2001* allows ASIC to disclose information to the TPB to enable or assist the TPB to perform its functions and exercise its powers. In most cases, ASIC will be aware that information in its possession falls within the functions or powers of the TPB and will be able to determine whether this requirement has been met. However, in some cases, ASIC may require the TPB to confirm that the disclosure of the information would enable it to perform, or exercise, one or more of its functions or powers.

Civil penalties that may apply to unregistered entities providing tax (financial) advice services

3.99 Consistent with the existing civil penalties that may apply to an unregistered entity that provides a tax agent service or a BAS service, an entity may be liable to a civil penalty if:

- they knowingly provide a tax (financial) advice service that is not a BAS service, or ought to know they are providing such a service, for a fee or other reward; and
- they are not a registered tax (financial) adviser or a registered tax agent.

[Schedule 3, item 23]

Example 3.12

Further to Example 3.11.

Lena is an employee and representative of Financial and Investments Ltd. Even though Lena provides Financial and Investments Ltd's clients with financial product advice and tax advice because she is an employee of Financial and Investments Ltd she does not provide tax (financial) advice services in her own right.

Lena, who is not a registered tax (financial) adviser, does not contravene the TASA 2009 by providing this advice.

Example 3.13

Dominique is a registered tax agent and a financial services licensee and, in return for set fees, provides her clients with both financial product advice and tax agent services. One of Dominique's clients is Leo.

In providing Leo with financial product advice, Dominique makes a recommendation that takes into account the specific tax consequences that would result from Leo making these investments.

Even though Dominique is providing Leo with a tax (financial) advice service for a fee, Dominique is not contravening the TASA 2009 as she is a registered tax agent.

Example 3.14

Further to Example 3.4.

Even if Katrina provides her clients with tax (financial) advice services, she is not contravening the TASA 2009 as she is a registered tax agent.

3.100 Paragraph 4.29 of the explanatory memorandum to the Tax Agent Services Bill 2008 notes that entities, such as legal practitioners, may provide or advertise tax agent services in certain circumstances without being a registered tax agent or a registered BAS agent.

Accordingly, if the entity provides the tax (financial) advice service as a legal service, then they may only be liable to a civil penalty if they are prohibited from providing such a service under a State or Territory law that regulates legal practice and legal services. ***[Schedule 3, item 23, paragraph 50-5(2A)(d)]***

3.101 The maximum penalty for each contravention of improperly providing a tax (financial) advice service under the TASA 2009 is 250 penalty units for individuals and 1,250 penalty units for body corporates. Based on the current penalty unit value, this equates to a maximum penalty of $42,500 for individuals and $212,500 for body corporates.

Example 3.15

In return for a set fee, Amelia provides her clients with advice about investing in particular financial products and, in making her recommendations, takes into account the specific tax consequences that would result from such investments. Amelia assures her clients that they may rely on her tax advice should they choose to invest in these products.

Amelia is not a registered tax (financial) adviser, a registered tax agent or a legal practitioner.

By providing tax (financial) advice services whilst unregistered, Amelia is contravening the TASA 2009 and may be liable to civil penalties.

Amelia may also be committing an offence under the Corporations Act if she is providing financial product advice and is not licensed by ASIC to provide that advice.

3.102 Consistent with the existing civil penalties that may apply to an unregistered entity that advertises the provision of tax agent services or BAS services, an entity may be liable to a civil penalty if:

- they advertise that they will provide a tax (financial) advice service that is not a BAS service; and
- they are not a registered tax (financial) adviser or registered tax agent.

If an entity advertises they will provide the tax (financial) advice service as a legal service, then they may only be liable to a civil penalty under the TASA 2009 if they are prohibited from providing such a service under a State or Territory law that regulates legal practice and legal services. ***[Schedule 3, item 25]***

3.103 The maximum penalty for each contravention of improperly advertising a tax (financial) advice service under the TASA 2009 is 50 penalty units for individuals and 250 penalty units for body corporates. Based on the current penalty unit value, this equates to a maximum penalty of $8,500 for individuals and $42,500 for body corporates.

3.104 Consistent with the existing civil penalty provisions that may apply to an unregistered entity that represents they are a registered tax agent or a registered BAS agent, an entity may be liable to a civil penalty if:

- they represent that they are a registered tax (financial) adviser; and
- that representation is untrue.

3.105 The maximum penalty for each contravention of improperly representing as a registered tax (financial) adviser under the TASA 2009 is 50 penalty units for individuals and 250 penalty units for body corporates. Based on the current penalty unit value, this equates to a maximum penalty of $8,500 for individuals and $42,500 for body corporates. ***[Schedule 3, item 27]***

Other amendments to incorporate tax (financial) advice services with the existing TASA 2009 regulatory regime

3.106 These amendments carve out entities that provide tax (financial) advice services from the civil penalty provisions that would otherwise apply to unregistered tax agents for providing tax agent services for fee or other reward or advertising to provide tax agent services. This ensures that a registered tax (financial) adviser does not contravene the TASA 2009 for providing, or advertising to provide, tax agent services when they are not a registered tax agent and the service is a tax (financial) advice service. ***[Schedule 3, items 22 and 24]***

3.107 A registered tax agent that employs, or uses, the services of a deregistered tax (financial) adviser may be subject to civil penalties. The maximum penalty for each contravention of the TASA 2009 is 250 penalty units for individuals and 1,250 penalty units for body corporates. Based on the current penalty unit value, this equates to a maximum penalty of $42,500 for individuals and $212,500 for body corporates. ***[Schedule 3, item 28]***

3.108 These amendments allow the regulations to provide for a system for the TPB to accredit professional associations for the purposes of recognising relevant professional qualifications and experience for the registration of registered tax (financial) advisers. The regulations

currently provide a system for the TPB to accredit professional associations for the purposes of recognising relevant qualifications and experience for the registration of registered tax agents and registered BAS agents. ***[Schedule 3, item 9]***

3.109 These amendments insert a range of tax (financial) advice service and registered tax (financial) adviser related definitions in the dictionary in subsection 90-1(1). ***[Schedule 3, item 42]***

3.110 These amendments update the objects clause, headings and guide material in the TASA 2009 so that references to tax agents and BAS agents also include a reference to tax (financial) advisers. ***[Schedule 3, items 1 to 3, 21, 26, 31 and 32]***

Other amendments to the *Tax Agent Services Act 2009*

New registration requirements

Maintaining professional indemnity insurance

3.111 Subsection 20-30(3) allows the TPB to give written notice to registered tax agents and registered BAS agents requiring them to maintain PI insurance that meets the TPB's requirements. Subsection 30-10(13) requires these entities to maintain this PI insurance as an ongoing Code of Professional Conduct requirement.

3.112 In effect, these amendments replace subsection 20-30(3) with a new ongoing registration requirement for individuals, partnerships and companies that the relevant entity maintains PI insurance that meets the TPB's requirements. Maintaining PI insurance that meets the TPB's requirements will become the ongoing Code of Professional Conduct requirement rather than the current requirement of maintaining PI insurance as required by the TPB under subsection 30-10(13). ***[Schedule 4, item 1, paragraph 20-5(1)(c) and items 2 to 4]***

Example 3.16

Liza applies to the TPB for registration as a registered tax agent.

In addition to having to satisfy the TPB that she is a fit and proper person and that she can meet the registration requirements (prescribed by the regulations), Liza will need to satisfy the TPB that she will be able to maintain PI insurance that meets its requirement as soon as she is registered.

Assuming that the TPB grants Liza's application and she becomes a registered tax agent, three years later Liza applies to the TPB to renew her registration.

As Liza already has PI insurance, she need only satisfy the TPB that this insurance meets its requirements.

3.113 In substance, these new registration requirements do not affect the obligations on registered entities to hold PI insurance — as, under subsection 20-30(3), the TPB can write to registered entities requiring them to maintain PI insurance as specified in the notice. Instead, the amendments streamline the current administrative procedures relating to maintaining PI insurance by incorporating it into the registration process. As such, there is no need to retain a separate review right of a decision by the TPB to require PI insurance. ***[Schedule 4, item 22]***

3.114 The TPB's explanatory paper 'TPB(EP)03/2010: Professional indemnity (PI) insurance' provides further information about the TPB's current requirements for PI insurance for registered tax agents and registered BAS agents.

3.115 The TPB has advised that it intends to consult with key stakeholders in developing its PI insurance requirements for tax (financial) advisers.

Satisfying continuing professional education requirements

3.116 In addition, these amendments make it a registration requirement for individuals seeking to renew their registration to have met the TPB's CPE requirements. This ensures that registered individuals maintain their skills and knowledge for the benefit of their clients. ***[Schedule 4, item 1, paragraph 20-5(1)(d)]***

Allowing the TPB to not accept an entity's surrendered registration

3.117 Under paragraph 40-5(2)(a) the TPB must terminate an individual registered tax agent or registered BAS agent's registration if that individual surrenders their registration to the TPB in writing. Subsection 40-10(2) and paragraph 40-15(2)(a) similarly apply to registered partnerships and registered companies.

3.118 As a result, registered entities that are subject to an investigation by the TPB may avoid any consequences of that investigation by surrendering their registration before the investigation is complete.

3.119 These amendments provide the TPB with the opportunity not to accept a registered entity's surrendered registration in circumstances when:

- the entity is subject to a current investigation by the TPB or was subject to a previous investigation by the TPB; and

- the TPB considers it would be inappropriate to accept the entity's surrendered registration and therefore terminate the entity's registration.

[Schedule 4, items 8-10]

Example 3.17

Paris, a registered BAS agent, completes business activity statements for her clients and, on their behalf, lodges them with the Commissioner.

However, Paris fails to provide her clients with a competent service and a number of them complain to the TPB. As a result, the TPB decides to investigate Paris.

Paris subsequently seeks to terminate her registration by surrendering it in writing to the TPB. However, due to its current investigation, the TPB considers it would be inappropriate to terminate Paris's registration and so decides not to terminate it.

As such, Paris remains a registered BAS agent.

3.120 The TPB will need to exercise its judgement in deciding whether to not accept an entity's surrendered registration. This decision will need to be informed by the available information at that point in time. Relevant information could include:

- any reasons the registered entity provides for wanting to surrender their registration;
- the nature of any complaints against the registered entity;
- the availability of evidence and other information relevant to the investigation;
- the priority of the investigation relative to the TPB's other work; and
- the need to protect consumers.

3.121 An application to review a decision by the TPB not to terminate an entity's registration may be made to the AAT. ***[Schedule 4, item 23]***

Allowing the TPB to notify accredited professional associations

3.122 After conducting an investigation into a registered entity, subsection 60-125(8) requires the TPB to notify the following entities about its decision or findings:

- the entity affected by the decision or finding;
- the complainant (if any); and
- if the decision or finding is relevant to the administration of the taxation laws — the Commissioner.

3.123 If the investigated registered entity is a member of a professional association accredited by the TPB under the regulations, then these amendments will require the TPB to notify the professional association about its decision or finding and relevant reasons. This will improve the interactions between the TPB and professional associations in dealing with inappropriate behaviour. ***[Schedule 4, items 20 and 21]***

3.124 It will be a matter for the professional association to determine what, if anything, it does with the information. However, professional associations will not be obliged to take any specific action (such as internal disciplinary action) on receipt of this information.

Example 3.18

Further to Example 3.17.

The TPB completes its investigation into Paris and finds that her conduct has breached the Code of Professional Conduct. As a result, the TPB decides to terminate Paris's registration as a BAS agent and decides, per section 40-25, that she may not to apply to be registered as a BAS agent for the following two years. The details of her termination are published on the public register under section 60-135.

Assume Paris is a voting member of the BAS Agents Alliance and that the BAS Agents Alliance is an accredited professional association. Consequently, the TPB needs to notify the BAS Agents Alliance about its finding in relation to Paris's conduct and the reasons for this finding.

However, the BAS Agents Alliance is not obliged to take any specific action on receipt of this information.

Allowing the TPB to provide a wider range of information to the ATO

3.125 Further to paragraph 3.91, section 70-40 provides a limited range of exceptions to the general prohibition against members of the TPB

and other relevant individuals from disclosing official information that they acquire in the course of their duties in administering the TASA 2009. These exceptions facilitate efficient and effective government administration and law enforcement. Specifically, subsection 70-40(3) allows disclosures of official information to the Commissioner for a range of law-enforcement purposes including investigating taxation offences and investigating contraventions of civil penalty provisions.

3.126 These amendments replace the existing specific purposes with a general purpose — that of administering a taxation law. As a result, records made, or disclosures of, official information to the Commissioner will not be an offence where the record or disclosure is for the purpose of the Commissioner administering a taxation law. As it is not generally practical to provide the information to the Commissioner personally, it may be provided to an Australian Taxation Office (ATO) officer on behalf of the Commissioner. ***[Schedule 4, item 25]***

Example 3.19

> Philippe applies to the TPB to become a registered tax agent and provides his contact details to the TPB. Six months later he moves to new premises with a new address and phone number and provides these new contact details to the TPB.
>
> The disclosure of Philippe's contact details to an ATO officer to allow the ATO to update its contact details for Philippe is not an offence.

Example 3.20

> Rita, a registered tax agent is the subject of a TPB investigation in response to allegations that she has been lodging a number of false income tax returns.
>
> During its investigation, the TPB becomes aware of information that would be relevant for the Commissioner's administration of the taxation laws.
>
> As this information relates to the administration of the taxation laws, the disclosure of the official information to an ATO officer is not an offence.

3.127 This general purpose, 'for the purpose of administering a taxation law' is a broad concept that includes both direct and indirect methods of ensuring or encouraging compliance with the taxation laws. Disclosure of information to assist the ATO initiate enforcement action, including a prosecution under other Acts, such as the *Criminal Code Act 1995*, in relation to an underlying breach of a taxation law is for the purposes of administering a taxation law.

Example 3.21

Paula, an ATO officer, is investigating a tax agent who she suspects has been lodging deliberately false income tax returns. Paula considers that a prosecution under the *Criminal Code Act 1995* may be an appropriate means of addressing the alleged breaches of the taxation law. In compiling a brief of evidence to the Commonwealth Director of Public Prosecutions, Paula requests official information from the TPB.

As Paula's investigation is for the purposes of administering a taxation law, the TPB's disclosure of this official information to Paula is not an offence.

Example 3.22

Alex, an ATO officer in the ATO's superannuation area, is examining if a registered tax agent should be disqualified under section 131 of the *Superannuation Industry (Supervision) Act 1993* from being an approved superannuation auditor in relation to the auditing of SMSFs. As part of this examination, Alex requests official information from the TPB.

As the Commissioner has the general administration of section 131 of the *Superannuation Industry (Supervision) Act 1993* in relation to SMSFs, and Alex's determination is for the purpose of administering a taxation law, the TPB's disclosure of this official information to Alex is not an offence.

Example 3.23

Scott, an ATO officer is investigating an alleged tax avoidance scheme promoted by a registered tax agent. Scott requests official information from the TPB that he believes could assist his investigation. Scott intends to use this information to pursue an order under the *Proceeds of Crime Act 2002* as one of the means to address any breaches of the taxation laws.

As this information relates to the administration of a taxation law, the TPB's disclosure of this official information to Scott is not an offence.

3.128 Allowing the TPB to provide this additional information to the Commissioner improves the ATO's administration of the taxation laws and is consistent with the object of the tax agent services regime. However, as the TPB is independent of the ATO, it will need to exercise its own judgement as to what information it would provide to the ATO under this exception.

Allowing the TPB to specify additional types of BAS service

3.129 Further to the discussion in paragraphs 1.56 to 1.59, and to provide ongoing flexibility as to what constitutes a BAS service, these amendments allow the TPB to issue legislative instruments that specify any other services that are to also be BAS services. ***[Schedule 4, item 27]***

3.130 As a consequence, it may be possible for BAS agents to provide BAS services that are not limited to just BAS provisions in the taxation laws and so this limitation in section 50-30 needs to be removed. ***[Schedule 4, items 13 to 16]***

Other amendments

Registered entities to provide the TPB with various contact details

3.131 Under subsection 30-35 registered tax agents and registered BAS agents that cease to meet specific registration requirements or other events happen to them that affect their continued registration need to notify the TPB in writing of this within 30 days.

3.132 These amendments will require registered entities to also advise the TPB in writing about any changes to their business address, email address and other contact details. ***[Schedule 4, items 5 to 7]***

3.133 Registered entities that fail to comply with these obligations may be in breach of the Code of Professional Conduct.

Evidential burdens in civil penalty provisions

3.134 An entity contravenes section 50-5 if they provide a tax agent service whilst unregistered by the TPB. An entity contravenes section 50-10 if they advertise they will provide a tax agent service and they are unregistered.

3.135 Subsection 50-5(5) imposes an evidential burden on entities to show in a civil penalty proceeding, that — per subsections 50-5(3) and 50-5(4) — the reason they did not contravene section 50-5 is that they were providing a legal service in the course of acting for a trust or deceased estate as trustee or legal personal representative.

3.136 Even though subsections 50-10(3) and 50-10(4) provide an equivalent exception in relation to a potential contravention of section 50-10, there is no equivalent evidential burden on the entity to show that the reason they did not contravene section 50-10 is that they were providing a legal service in the course of acting for a trust or deceased estate as trustee or legal personal representative.

3.137 These amendments impose an equivalent evidential burden to that contained in subsection 50-5(5) in relation to subsections 50-10(3) and 50-10(4). ***[Schedule 4, items 11, 12, 17 and 26]***

Allowing the TPB to delegate its functions

3.138 Subject to some limitations, section 70-30 allows the TPB to delegate its functions or powers to a single Board member or committee. The limitations relate to the TPB's function to issue guidelines, establish Committees or make decisions that may be reviewed by the AAT.

3.139 These amendments will also allow the TPB to also delegate its functions and powers to:

- APS employees whose services are made available to the TPB by the Commissioner; and
- other individuals engaged by the TPB.

[Schedule 4, item 24]

3.140 Allowing the TPB to make these delegations will improve its administrative effectiveness.

Allowing the Chair of the TPB to hold other part-time appointments

3.141 Subsection 60-25(2) requires the Minister to appoint one of the TPB members to the Chair subject to that individual not holding any other office or appointment under a law of the Commonwealth.

3.142 In practice, a part-time Board member who also holds another part-time office or appointment may still be able to satisfactorily discharge both appointments. However, subsection 60-25(2) does not allow this and, as a result, limits the potential pool of suitable candidates.

3.143 As such, this amendment limits this restriction so that it applies to only holding a full-time office or appointment under a law of the Commonwealth. ***[Schedule 4, item 18]***

Allowing the Minister to appoint an acting Chair and acting TPB members

3.144 These amendments allow the Minister to appoint a TPB member to act as the Chair during any vacancies or situations when the Chair is absent from duty, absent from Australia or is otherwise unable to perform the duties of office. ***[Schedule 4, item 19, subsections 60-67(1) and (2)]***

3.145 Similarly, these amendments allow the Minister to appoint an individual to act as a TPB member during any vacancies or situations when the TPB member is absent from duty, absent from Australia or is otherwise unable to perform the duties of office. ***[Schedule 4, item 19, subsection 60-67(3)]***

Application and transitional provisions

Creating a regulatory framework for tax (financial) advice services

3.146 These amendments commence on Royal Assent.

3.147 These amendments apply from 1 July 2013.

3.148 An entity that provides tax (financial) advice services for a fee or other reward from 1 July 2013 may be liable for civil penalties under the TASA 2009 unless they are:

- a registered tax agent;
- in some cases — a legal practitioner;
- a registered tax (financial) adviser; or
- an unregistered financial services licensee or representative that accompanies such a service with a disclaimer advising that:
  - they are not a registered tax (financial) adviser under the TASA 2009; and
  - if the recipient intends to rely on the advice, then they should request advice from a registered tax (financial) adviser or a registered tax agent.

[Schedule 3, items 47 and 48, subitem 48(4)]

Example 3.24

Better Fin-Plan Ltd, a financial services licensee, provides its clients with a range of financial advisory services, including financial product advice and tax advice. Better Fin-Plan Ltd is not a registered tax agent.

Assuming the provision of this advice constitutes a tax (financial) advice service, Better Fin-Plan Ltd can continue to provide such

services from 1 July 2013 as long as its advises its clients that it is not registered with the TPB and that if the client intends to rely on that advice then they should request advice from a registered tax (financial) adviser or a registered tax agent.

3.149 Unregistered financial services licensees and representatives may only provide these services accompanied by a disclaimer until 31 December 2014. From after that date, unregistered entities that continue to provide tax (financial) advice services may be liable for civil penalties. ***[Schedule 3, item 47, subitem 48(4)]***

3.150 Entities that wish to rely on the fact that they provided such a disclaimer bear an evidential burden in relation to that matter in any proceeding for contravening the TASA 2009. ***[Schedule 3, item 47, subitem 48(5)]***

3.151 Entities that wish to advertise the provision of tax (financial) advice services or represent they are registered tax (financial) advisers should first register with the TPB. These arrangements provide a balance between giving sufficient time for entities to adapt to the new regulatory regime and to encourage these entities to register before 31 December 2014.

3.152 Entities that do not provide tax (financial) advice services do not need to register with the TPB.

Example 3.25

Further to Example 3.24.

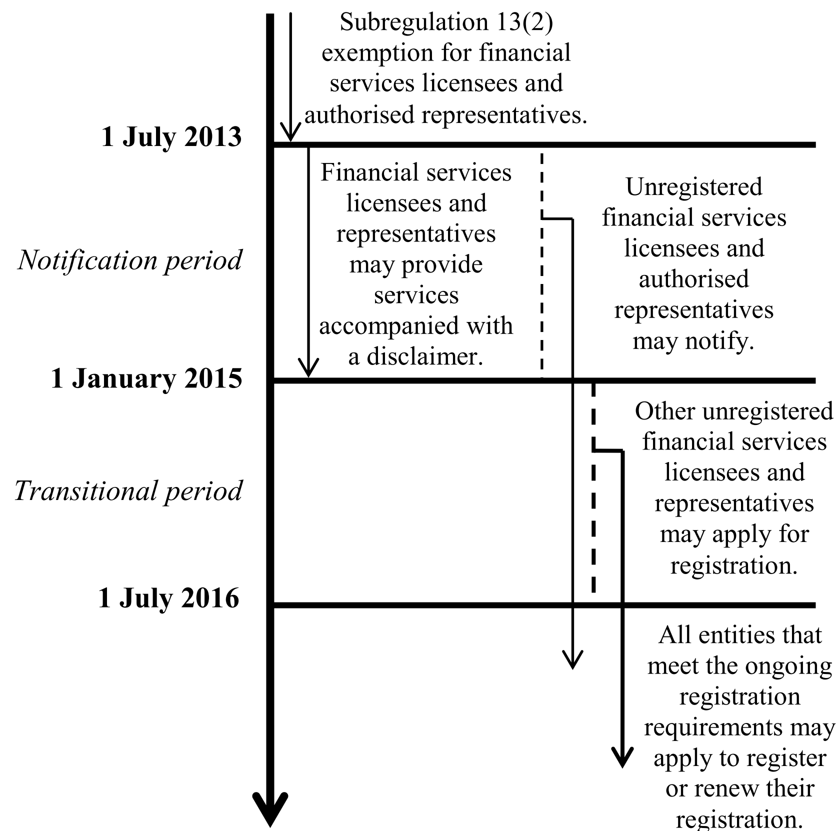
Dan, a recent university graduate, is employed by Better Fin-Plan Ltd in August 2013 and so does not provide tax (financial) advice services in his own right.

Dan does not need to register with the TPB as a registered tax (financial) adviser.

However, Better Fin-Plan Ltd needs to ensure that any tax (financial) advice services it provides, including by Dan and its other employees, is accompanied with the disclaimer that Better Fin-Plan Ltd is not registered with the TPB and that if the client intends to rely on that advice then they should request advice from a registered tax (financial) adviser or a registered tax agent.

3.153 Diagram 3.4 provides a brief overview of the different arrangements for entities seeking to become registered tax (financial) advisers.

Diagram 3.4



The notification period — 1 July 2013 to 31 December 2014

3.154 During the notification period, financial services licensees and authorised representatives that provide tax (financial) advice services may register with the TPB as registered tax (financial) advisers. To register, the entity need only notify the TPB that they are providing such services and that they are either a financial services licensee or an authorised representative. These entities will not be required to pay an application fee. ***[Schedule 3, item 47,subitem 48(1)]***

Example 3.26

Further to Examples 3.24 and 3.25.

On 17 September 2013, Better Fin-Plan Ltd notifies the TPB that it is a financial services licensee that provides tax (financial) advice services. Better Fin-Plan Ltd is taken to be a registered tax (financial) adviser from 17 September 2013 and, from that date, can provide tax (financial) advice services — including through its employees — without having to accompany those services with a disclaimer.

3.155 Limiting the entities that may register with the TPB during the notification period to financial services licensees and authorised representatives ensures that only entities that provide tax (financial) advice services in their own right need initially register with the TPB. As noted in Diagram 3.4, there is a further opportunity for unregistered financial services licensees and other unregistered representatives to register with the TPB during the transitional period before the regime commences in full from 1 July 2016.

3.156 The TPB will determine the form of the notification, including what information or documents, if any, are required. ***[Schedule 3, item 47; subitem 48(2)]***. This means the TPB could source some of the necessary information directly from ASIC, thereby minimising the information required from financial services licensees or authorised representatives. It also means that the TPB could allow financial services licensees to notify on behalf of their authorised representatives.

3.157 The entity's registration will take effect from the day they notify the TPB and the entity's registration will expire at a specific date. This expiry date will depend on when the entity notified the TPB.

- Entities that notify the TPB during the period of 1 July 2013 to 31 December 2013 will have their registration expire on 31 January 2017.
- Entities that notify the TPB during the period of 1 January 2014 to 30 June 2014 will have their registration expire on 31 October 2016.
- Entities that notify the TPB during the period of 1 July 2014 to 31 December 2014 will have their registration expire on 31 July 2016.

[Schedule 3, item 47, subitem 48(1)]

Example 3.27

Further to Example 3.26.

As Better Fin-Plan Ltd notified the TPB on 17 September 2013, its registration expires on 31 January 2017.

3.158 Once registered, the entity will be subject to the Code of Professional Conduct and other ongoing requirements imposed by the TASA 2009 on registered tax (financial) advisers. This also includes any registration conditions imposed by the TPB. ***[Schedule 3, item 47, subitem 48(3)]***

3.159 Entities that first register with the TPB during the notification period will not be able to use the relaxed registration requirements available during the transitional period should they apply to renew their registration prior to 30 June 2016.

The transitional period — 1 January 2015 to 30 June 2016

3.160 Starting from 1 January 2015, financial services licensees and their representatives may apply to the TPB to be registered as tax (financial) advisers. However, in contrast to the notification period, an entity will only become registered once the TPB has made a decision to register the entity and notifies them of this. Once the TPB makes a decision to register the entity, the entity will be registered for at least three years. ***[Schedule 3, item 47 and paragraphs 49(a) and (b)]***

3.161 During this time, these entities may apply to the TPB to be registered without having to satisfy all of the ongoing registration requirements that would otherwise apply.

- Individuals need only satisfy the TPB that they have sufficient experience to be able to provide tax (financial) advice services to a competent standard rather than satisfy any specific registration requirements prescribed by the regulations.

- Partnerships and companies need only satisfy the TPB that they have sufficient experience to be able to provide tax (financial) advice services to a competent standard rather than satisfy the requirement to have a sufficient number of registered tax (financial) advisers or registered tax agents to provide tax (financial) advice services to a competent standard and carry out supervisory arrangements.

[Schedule 3, item 47 and item 49, paragraphs 49(c) and (d)]

Example 3.28

Further to Example 3.24.

Misha, a representative of Better Fin-Plan Ltd, applies to the TPB to become a registered tax (financial) adviser on 23 February 2015. The

TPB considers Misha's application and grants her registration on 31 March 2015.

Misha is a registered tax (financial) adviser from 31 March 2015 for at least three years.

Transitional regulations

3.162 To provide flexibility during the period of 1 July 2013 to 30 June 2016, the amendments provide for the Governor-General to make regulations prescribing matters required or permitted to be prescribed and that are necessary or convenient to be prescribed. ***[Schedule 3, item 50]***

Transitioning to the full regime — 1 July 2016

Example 3.29

Further to Examples 3.24 and 3.26 to 3.28.

Better Fin-Plan Ltd's registration expires on 31 January 2017.

On 1 December 2016, Better Fin-Plan Ltd applies to the TPB to be a registered tax (financial) adviser.

Better Fin-Plan Ltd needs to satisfy the TPB that:

- each of its directors is a fit and proper person;
- it is not under external administration;
- it has not been convicted of a serious taxation offence or an offence involving fraud or dishonesty during the previous five years;
- it has a sufficient number of individuals being registered tax agents or registered tax (financial) advisers to provide tax (financial) advice services to a competent standard and carry out supervisory arrangements — in this regard it has one individual, Misha, who is a registered tax (financial) adviser; and
- it has PI insurance that meets the TPB requirements.

Other amendments to the *Tax Agent Services Act 2009*

3.163 These amendments will commence on Royal Assent and will apply from the following day. ***[Schedule 4, items 28 and 29]***

Consequential amendments

Creating a regulatory framework for tax (financial) advice services

3.164 These amendments amend the definitions in section 995-1 of the ITAA 1997 to incorporate, where relevant, the term tax (financial) adviser. ***[Schedule 3, items 44 to 46]***

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Creating a regulatory framework for tax (financial) advice services and other amendments to the Tax Agent Services Act 2009

3.165 Schedules 3 and 4 are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

3.166 Schedules 3 and 4 amend the TASA 2009 to regulate entities that give tax advice in the course of giving advice that is usually provided by a financial services licensee or a representative. This ensures the consistent regulation of all forms of tax advice, irrespective of whether it is provided by a tax agent, a BAS agent or an entity in the financial services industry.

Human rights implications

3.167 Schedules 3 and 4 engage the following human rights:

Freedom of opinion and expression

3.168 Schedule 3 regulates the content of speech and commercial expression where these relate to specialised areas of tax advice. The proposed legislation applies to situations where a person has sought advice in relation to their financial affairs and tax advice, and ensures that only persons appropriately qualified and registered are able to provide that advice.

3.169 These limitations operate to protect consumers from inadequate or inappropriate advice and reasonably require professionals seeking to provide that advice to be appropriately trained and registered to provide consumers with confidence in the advice they receive.

Privacy and reputation

3.170 Schedule 3, consistent with the existing legislative framework, provides that entities that are regulated to provide tax advice are listed on a public register to provide transparency to the public regarding the registration status of these entities. This is an important consumer protection mechanism.

3.171 The information that is made available on this register does not include intrinsically personal information about any individual. The information includes the name of the entity, registered address, registration status and membership status and allows consumers to properly identify and verify those entities regulated by the TPB.

Conclusion

3.172 Schedules 3 and 4 are compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

Assistant Treasurer, the Hon David Bradbury

Chapter 4
Regulation impact statement — Creating a regulatory framework for tax (financial) advice services and other amendments

Introduction

4.1 This Regulation Impact Statement was prepared by the Department of the Treasury at the original decision making stage and was assessed as adequate by the Office of Best Practice Regulation. It was publicly released on 8 November 2012.

4.2 A Regulation Impact Statement is a document prepared by departments and, as such, this Regulation Impact Statement reflects the Department of the Treasury's assessment of the costs and benefits of each option at the decision making stage. Accordingly, this Regulation Impact Statement does not reflect changes arising from further consultation during the legislative development of these amendments.

Regulation Impact Statement: A new regulatory framework for financial advisers[1] providing tax advice

Background

Regulation of tax advice by the Tax Agent Services Act 2009

4.3 The *Tax Agent Services Act 2009* (TASA 2009) introduced a national regulatory framework for tax agents and BAS agents. The TASA 2009 regime commenced on 1 March 2010. It consolidated previous state-based arrangements into a streamlined national regime and strengthened consumer protection available to recipients of tax agent services, including tax advice.

[1] This document uses the term 'financial adviser' to refer to Australian Financial Services License (AFSL) holders and their representatives providing financial advice services. On 20 June 2012, Minister Shorten, announced that among other things the Government is consulting on whether the term 'financial planner' or 'financial adviser' should be defined in the Corporations law.

4.4 The policy objectives of the TASA 2009 framework were to strengthen the integrity of the tax system; enhance the protection of consumers of tax agent services, thereby reducing the level of uncertainty for taxpayers and the risks associated with the self-assessment system; and to improve consistency in registration and to regulate the provision of tax agent services in an appropriate, but flexible, way.

4.5 The introduction of the TASA 2009 was accompanied by a regulation impact statement. That regulation impact statement was published in Chapter 6 of the Explanatory Memorandum accompanying the Tax Agent Services Bill 2008 (which on passage through Parliament became the TASA 2009).

4.6 Providers of tax advice are ordinarily regulated by the TASA 2009. Section 90-5 of the TASA 2009 defines a 'tax agent service' to include 'advising… about liabilities, obligations or entitlements… that arise, or could arise, under a taxation law'.

Position of financial advisers under the TASA 2009

4.7 Financial advisers may provide their clients with tax advice without being subject to the application of the TASA 2009. This is because financial advisers are legislatively exempt from the application of the TASA 2009. Anecdotal evidence suggests that there may be anywhere between 8,000 and 17,000 financial advisers who could be providing tax advice for a fee or other reward.

4.8 Because financial advisers are exempt from the TASA 2009, they are also exempt from having to comply with the professional requirements it imposes upon tax agents in order to guarantee the standard of tax advice. This creates a number of issues, which are discussed in more detail below under the 'Problem' section.

Development of a new framework for financial advisers providing tax advice

4.9 Because of the problems generated by the present exemption of financial advisers from the TASA 2009, the Government has been developing a new policy framework for regulating financial advisers who give tax advice. This is discussed in more detail in the 'Consultation' section of this regulation impact statement.

4.10 Financial advisers have been exempted from the application of the TASA 2009 to allow the Government sufficient time to settle the details of the regulatory model to be settled, resolve implementation issues associated with the new framework, and enable necessary legislation to be enacted with effect from 1 July 2013.

Problem

4.11 Financial advisers are able to provide tax advice to their clients without being subject to the ethical and professional standards imposed by the TASA 2009. This situation is undesirable. A new regulatory framework for financial advisers providing tax advice is proposed to ensure they are appropriately regulated.

4.12 The current situation is undesirable for three reasons, which are that:

- the provision of tax advice by tax agents is regulated but the provision of tax advice by financial advisers is not — this is a regulatory anomaly;
- as a result of this anomaly, the current situation poses risks to consumer protection, professional accountability, and the integrity of the tax system; and
- there is a lack of legislative clarity regarding the legal position of financial advisers who provide tax advice.

4.13 In relation to the first issue — the TASA 2009 currently applies to tax agents providing tax advice, but not to financial advisers who provide tax advice. This means that financial advisers are not subject to the professional and ethical standards that the TASA 2009 imposes on providers of tax agent services through its mandatory Code of Professional Conduct. The TASA 2009 also provides disciplinary sanctions which the Tax Practitioners Board (TPB) may apply against tax agents for breaches of the Code of Professional Conduct. Because financial advisers are not subject to the Code of Professional Conduct, they are also not subject to sanctions. This creates an inequality between financial advisers and tax agents, as tax agents are subject to more onerous professional standards.

4.14 In relation to the second issue – this situation creates several underlying risks in the absence of regulation of those financial advisers who provide tax advice. Firstly, consumer protection may be compromised as the TASA 2009 regime only affords key protections to clients of tax agents who provide tax advice (and not the clients of financial planners who provide tax advice). Secondly, there are different standards of accountability between tax agents and financial advisers providing tax advice as only tax agents can be held accountable for misconduct under the TASA 2009. Thirdly, the integrity of the tax system could be compromised by tax advice being provided by non-registered and non-regulated providers of tax agent services.

4.15 Finally, there remains a lack of legal clarity about which aspects of tax advice services will fall within the definition of a 'tax agent service' in section 90-5. When the TASA 2009 was first introduced, there were concerns regarding the nature of tax related services that may be provided by a financial adviser and how they relate to the definition of tax agent services. It remains ambiguous as to precisely what financial advice services fall within the ambit of the TASA 2009, and consequently whether financial advisers will need to register with the TPB to provide services to clients.

4.16 The current regulatory regime therefore has undesirable consequences, which the Government may wish to take policy action to remedy.

Objective of the Government

4.17 The objective of Government action is to ensure that all tax advice provided for a fee or other reward is consistently regulated, irrespective of whether that tax advice is provided by a financial adviser.

4.18 Specifically, the policy objectives of the new framework for regulating financial advisers who provide tax advice are:

- for financial advisers providing tax advice — to ensure they are regulated as providers of tax agent services in an appropriate, but flexible manner to ensure that an unfair burden is not placed on the industry;
- for taxpayers — to enhance their consumer protections and to promote the provision of quality financial advice services; and
- for the tax system — to ensure the integrity of the tax system and the tax industry are strengthened, so that providers of tax advice are treated in a similar manner.

4.19 In April 2011, the then Assistant Treasurer outlined a possible model to achieve these objectives after consultation with industry. This is the model discussed in Option 1 below.

Options that may achieve objectives

4.20 Three courses of action that could be taken in response to the present situation are:

- implementing a co-regulatory model — to streamline regulation of financial advisers to ensure that the provision of tax advice is consistently regulated;
- extending the TASA 2009 exemption for financial advisers indefinitely — so that financial advisers would be able to provide tax advice without needing to comply with the TASA 2009 requirements; or
- maintaining the status quo — when the TASA 2009 exemption expires on 30 June 2013, financial advisers will need to comply with all the requirements of the TASA 2009 regime from 1 July 2013.

Option 1: A co-regulatory framework

4.21 The regulation of financial advisers providing tax advice could be addressed using a co-regulatory framework, as discussed with industry stakeholders. Financial advisers who provide tax advice for a fee or other reward, and are not otherwise registered with the TPB as tax agents, will be required to register in order to continue providing tax advice.

4.22 The essence of this proposal is to introduce a regulatory system in which Australian Securities and Investments Commission (ASIC) and the TPB jointly regulate those financial advisers who provide tax advice as part of their financial advice services. To allow the financial services industry to adjust to the new system, the co-regulatory framework could be introduced in three separate phases. Such a co-regulatory framework would only apply to the financial advisers referred to below in paragraph 4.23 in this document (and not to the ones in paragraph 4.24).

4.23 Financial advisers who *will* be subject to the co-regulatory framework are those who can:

- provide tax advice in the context of providing personal financial advice for a fee or other reward, but not to the extent they lodge tax returns or make representations to the Commissioner of Taxation;
- provide personal financial product advice which includes tax advice that can be relied on by consumers; or

- advise clients as part of their job, profession or business in exchange for a fee (directly or indirectly) or any other reward or remuneration.

4.24 Financial advisers who *will not* be subject to the co-regulatory framework are those who:

- provide only general tax information and not tax advice tailored to a client's circumstances; or
- provide tax agent services, such as lodging tax returns and making representations to the Commissioner of Taxation, as they are currently required to be regulated by the existing the TASA 2009 framework and therefore they are (or should be) registered tax agents.

Possible features of the co-regulatory framework

4.25 Under the co-regulatory framework, financial advisers may need to be registered with the TPB and ASIC in order to provide tax advice in the context of their financial advice services.[2] These registered financial advisers may then be subject to ongoing regulation under the TASA 2009.

4.26 Under the co-regulatory framework, financial advisers providing tax advice may need to meet obligations imposed on them by both the TASA 2009 and the *Corporations Act 2001* (Corporations Act),[3] as applicable. The TASA 2009 requirements would need to be extended to cover financial advisers providing tax advice and these would need to be introduced as part of the legislative amendments.

4.27 ASIC could act as a 'shop front' facilitating the co-regulatory framework and be the initial point of contact for financial advisers and consumers in relation to the regulation or receipt of financial advice.

4.28 ASIC could on-share information with the TPB about financial advisors who are licensed or authorised under the Corporations Act. ASIC and the TPB would communicate with each other as appropriate to facilitate the success of this co-regulatory approach. Legislative changes will need to be introduced to enable the TPB to share information with ASIC and for ASIC to share information with the TPB for no fee.

---

[2] Where there are 'sufficient numbers' of registered financial advisers or tax agents in an organisation, a financial adviser may be able to provide tax advice without needing to register with the TPB. The TPB will make decisions about the existence of sufficient numbers on a case-by-case basis, taking into account the supervisory arrangements that are in place within the organisation.

[3] As well as regulations associated with the Corporations Act and the TASA 2009.

4.29 The TPB could administer the registration of financial advisers who provide tax advice, however ASIC could provide a link on its website to assist financial advisers to obtain the information about the new requirements. The TPB could also be responsible for enforcement activities and relevant professional standards for tax advice.

Possible implementation phases

4.30 Should the co-regulatory framework be implemented, it would be preferable to institute it in distinct phases, such as: a notification phase (1 July 2013 to 31 December 2014); a transitional phase (1 January 2015 to 30 June 2016); and a long-term phase (1 July 2016 onwards when the co-regulatory framework is fully implemented).

4.31 During a notification phase, no registration fee would be payable by financial advisers, but during transitional and long-term phases registration fees would be payable by financial advisers.

4.32 During notification and transitional phases, a financial adviser would not be required to meet education and experience requirements. However, during both notification and transitional phases financial advisers would need to apply for registration, meet fitness and propriety requirements, and adhere to the Code of Professional Conduct.

4.33 Once the co-regulatory framework enters into the long-term phase, applicants would also need to meet education and experience requirements in order to be able to renew their registration.

4.34 A high level overview of the different features of each implementation phase is contained in the table below.

Table 4.1: An overview of the possible requirements for financial advisers providing tax advice as part of their financial advice across three phases.

	Notification Phase 1 July 2013 — 31 December 2014	Transitional Phase 1 January 2015 — 30 June 2016	Long Term 1 July 2016 onwards
Applying for registration	✓	✓	✓
Registration fee	✗	✓	✓
Registration requirement — experience	✗	✗	✓
Registration requirement — education	✗	✗	✓
Registration requirement — fitness and proprietary	✓	✓	✓
Code of Professional Conduct	✓	✓	✓

Possible registration requirements — education and experience

4.35 Relevant financial advisers should need to demonstrate that they also have appropriate professional experience. Experience could be demonstrated by having worked with a registered tax agent or could perhaps be obtained through working with an already registered adviser. The TPB has recently launched new CPE requirements, discussed in Attachment A.

4.36 If financial advisers who provide tax advice become voting members of recognised associations, and demonstrate that they meet certain experience requirements, then they could be exempted from undertaking the additional education requirements. However, if they are not exempted, then under the co-regulatory framework they may need to complete appropriate courses from the start of a long-term period (from 1 July 2016).

4.37 Financial advisers who provide tax advice will also be expected to maintain and update their skills through a continuing professional education (CPE) regime which will complement the continuing professional development regime as outlined by ASIC. The TPB is in the process of developing a framework of CPE expectations for financial planners who provide tax advice.

Development of a co-regulatory framework option

4.38 On 23 April 2010, the Government announced that it would seek the public's view on the most suitable regulatory oversight arrangements for tax agent services and advice provided by financial planners. In November 2010, the Treasury issued an options paper, 'Regulation of tax agent services provided by financial planners', which canvassed possible options and how those options could be implemented.

4.39 The options paper presented two options for consideration:

- *Option 1* — To bring tax agent services provided by financial advisers permanently within the tax agent services regime, including regulation by the TPB, but done so as to minimise additional compliance burdens;
- *Option 2* — To investigate and implement changes to the Australian Financial Services Licence (AFSL) regime or its enforcement powers, to ensure financial advisers offering tax agent services are regulated to the same standards as those expected of tax agents. The AFSL regime does not cover the provision of tax advice. Legislative changes would need to be made to extend the ambit of the AFSL regime to cover tax advice.

4.40 On 15 December 2010 the then Assistant Treasurer met with representatives of finance and accounting bodies. The outcome of that meeting was a decision that Treasury, ASIC and the TPB would work through options using ASIC as the 'one-stop shop' to regulate financial advisers. Subsequently, the co-regulatory framework, a hybrid model application of options 1 and 2 that were presented in the November 2010 Options paper, was developed when Treasury consulted with ASIC and the TPB.

4.41 The proposed hybrid model accommodates the stakeholder views that were expressed when the two options were initially considered. In particular, it aligns the regulation of financial advisers (as ASIC regulates them) with modifications to the TASA 2009 to ensure that tax advice provided by financial advisers is consistently regulated by the TPB. This model seeks to avoid any unnecessary duplication of

administrative efforts associated with registration and enforcement activities without compromising the regulation of tax advice provided by financial advisers.

4.42 On 10 February 2011, the then Assistant Treasurer announced a number of principles that should underpin the development of the regulatory arrangements for the potential co-regulatory regime. These principles included: consumer protection, ASIC being the key agency for interacting with financial advisers and consumers in relation to tax services provided as part of their financial planning services; and ASIC being supported by a strong and collaborative arrangement with the TPB.

Option 2: Extending the financial advisers exemption from the TASA 2009

4.43 Option 2 is to indefinitely extend the exemption of financial advisers from the application of the TASA 2009, and subject them only to regulation by ASIC insofar as they provide financial product advice.

4.44 While financial advisers would continue to be subject to the AFSL regime to the extent they provide financial product advice, tax advice which financial advisers provide would not be subject to the TASA 2009 regime. As such, the quality assurance provided by the TASA 2009 would not be available for tax advice provided by financial advisers.

4.45 It is difficult to identify a sound reason why financial advisers who provide tax advice should be indefinitely exempt from the operation of the TASA 2009 regime, especially since financial advisers may provide tax advice as part of the ordinary advice they already provide to their clients. For instance, financial advisers may already provide advice in relation to the deductibility of superannuation contributions, the extent to which superannuation benefits would be subject to tax in the hands of the recipient, the implications of receiving franked dividends and income splitting. Providing such advice would constitute the delivery of ‘tax agent services’ as defined in the TASA 2009.

4.46 Currently there is an anomalous situation with financial advisers being able to provide tax advice without needing to comply with the TASA 2009 requirements, which others (who provide tax agent services) need to comply with when providing similar advice.

4.47 This is the preferred option, as financial advisers would face no compliance requirements and benefit from not being subject to the TASA 2009 when they provide tax advice. This is contrary to the Government’s objective to improve consumer protection.

4.48 The *Tax Agent Services Regulations 2009* (TASR 2009) subregulation 13(2), which provides the current temporary exemption, would need to be amended to put into effect an indefinite exemption.

Option 3: Status quo

4.49 The current exemption for financial advisers will lapse on 30 June 2013. If the Government decides to take no action and maintain the status quo, then the TASA 2009 will apply to financial advisers in full from 1 July 2013. This will mean that financial advisers will need to comply with all the requirements of the TASA 2009, including the Code of Professional Conduct, education, experience and other requirements from 1 July 2013 (as opposed to the three phases outlined above with the co-regulatory framework option).

4.50 This option has the benefit of bringing all providers of tax agent services into the TASA 2009 regime, thereby regulating tax advice provided by financial advisers, plus 'levelling the playing field' between financial advisers and tax agents. However, allowing the exemption to end without any transitional safety-net arrangements may be detrimental to the regulators (ASIC and the TPB) and to affected financial advisers.

Impact analysis

4.51 There are approximately 18,000 financial advisers in Australia, however, not all financial advisers will be providing tax advice for a fee or other reward in addition to the financial advice that they would be providing. Anecdotal evidence suggests that there may be anywhere between 8,000 and 17,000 financial advisers who could be providing tax advice for a fee or other reward. Some may already be registered with the TPB as tax agents.

4.52 The Government is likely to incur implementation costs under both Options 1 and 3. There may also be costs in the setting up of additional registration mechanisms or adding financial advisers who provide tax advice to the TASA 2009 register, however, these are likely to be minimised with requirements to use existing systems.

4.53 Over the long-term, the requirements of Options 1 and 3 will not be different, as the level of regulatory oversight will be the same.

4.54 A quantitative estimate of these possible costs was not available at the time of writing.

Impact of option 1

4.55 The consumer protection provided by the TASA 2009 would be in place and implemented under this option. The protections that would come into effect from the commencement of the co-regulatory framework (1 July 2013) include: registration, compliance with the fitness and propriety requirements, and with the Code of Professional Conduct. Financial advisers will need to comply with these key protections from the start of their registration. Subsequently, those financial advisers may need to meet further education and experience requirements.

4.56 Streamlining the regulation of tax advice through a co-regulatory framework, jointly administered by ASIC and the TPB, will mean that financial advisers will not generally have to provide the same details to two separate regulators in order to secure licencing, registration or renewal.

4.57 Certainty and consumer protection would be enhanced under this model, as there is a proposed requirement that financial advisers ensure that their professional indemnity insurance (PI insurance) will cover them not only for the financial advice that they provide, but also for their tax advice.

4.58 A co-regulatory framework should raise the standard of advice provided by financial advisers who provide tax advice, as professional standards would be increased because financial advisers will be subject, for the first time, to explicit tax-related obligations and education standards, Code of Professional Conduct requirements, and disciplinary standards.

Impacts on financial advisers and financial advice businesses

4.59 Financial advisers will continue to face the costs associated with obtaining or maintaining an appropriate AFSL licences (that is, the proposed co-regulatory framework will not impact on those). However, financial advisers who provide tax advice would also need to ensure that their licences, registrations or renewals cover them for the provision of tax advice services. The co-regulatory model should minimise the time financial advisers spend applying to regulators for licencing, registration or renewal. In addition, for the first time financial advisers could be subject to explicit requirements that tax agents are currently subject to under the TASA 2009, such as the specific tax-related conduct obligations and education standards.

4.60 Financial advisers may face costs such as registration and renewal fees, as well as education costs (additional taxation training and CPE developed by the TPB, and PI insurance costs if the financial

adviser's existing PI insurance does not cover them for the tax advice). However, financial advice businesses may choose to bear the costs associated with obtaining and maintain registration on behalf of financial advisers that they employ. Financial advice businesses may therefore incur costs such as registration and renewal fees, as well as education costs and PI insurance costs.

4.61 Financial advisers who wish to provide tax advice will need to ensure that their PI insurance extends to covering them for the tax advice that they may provide. This may or may not require them to pay an addition premium on their existing PI insurance.

4.62 Registration fees collected by the TPB could initially be waived for financial advisers who are being regulated for the first time. To assist with this transition, fees could be delayed until the commencement of a transitional phase on 1 July 2015. After this point though, a proposed fee structure could be:

- $400 — for three-year registration as a financial adviser who carries on a business as a financial adviser; and
- $200 — for three-year registration as a financial adviser who does not carry on a business as a financial adviser.

4.63 During the initial notification phase, financial advisers could benefit from a delay in the requirement to pay registration fees from 1 July 2013 to 1 July 2015. As such, they will be able to register and be able to provide advice without needing to immediately pay the registration fee.

4.64 Financial advisers intending to provide tax advice would become subject to the qualification and experience requirements which apply to registration and renewal of tax agents (in line with items 201 to 206 in Schedule 2, Part 2 of the TASR 2009). If they do not qualify for an exemption or do not meet the education requirements, under the co-regulatory framework the financial advisers who wish to provide tax advice may need to complete the education requirements from 1 July 2016 (the start of the long term period).

4.65 Apart from needing to invest time to complete the required courses, financial advisers or their employers are likely to incur educational expenses such as course fees and course material costs to assist them meet the educational requirements.

4.66 This is the preferred Option, as it meets the objectives of the Government.

Possible costs of meeting the education requirement

4.67 The TPB is proposing that an Australian taxation law course that some financial advisers may need to undertake should be at the Diploma level, and their preliminary view is such a course would be of 100 to 130 hours duration and could cost between $680 and $1,060. This would equate to one quarter of a semester's full-time workload.

4.68 Some financial advisers may have already undertaken a course of study that covers the course content. Further, some financial advisers should be entitled to sit an exam that tests their prior knowledge and experience. In those cases, there may not be an additional cost impost (in the course of prior study) or a reduced cost impost (by undertaking a test).

4.69 Financial advisers who provide tax advice will also be expected to maintain and update their skills through CPE. This would also require an investment of time, possible additional costs to attend short courses, and the need to maintain a record as evidence of the CPE. Membership with accredited associations which impose CPE requirements upon members may also count toward meeting the TASA 2009 CPE requirements.

Impacts on recipients of tax advice from financial advisers

4.70 Recipients of tax advice from financial advisers would benefit from the enhanced certainty that comes with these advisers being registered in a similar manner to tax agents under the TASA 2009. Consumer protection will be strengthened as a result of a requirement that relevant financial advisers will have PI insurance policies that cover them for the tax advice that they may provide. This will provide consumers with a further safety-net.

4.71 The competency of financial advisers who provide tax advice will be enhanced, and recipients of tax advice can be assured that the standard of advice that is received would be of a similar professional standard to that provided by tax agents that are currently regulated under the TASA 2009.

4.72 Some benefits to consumers could be deferred for three years, as under Option 1, CPE and education requirements will apply from 1 July 2016, rather than 1 July 2013 (the date after the exemption expires).

4.73 As financial advisers would face new costs and outlays for registration and education, they may pass some of the additional costs to the receipts of the tax advice that they provide.

Impact of option 2

4.74 Financial advisers will not face financial costs or additional compliance burdens under this option. However, the underlying risks associated with the absence of regulating financial advisers who provide tax advice, and the concerns associated with those, would remain unresolved.

4.75 Financial advisers who provide tax advice would remain unaccountable for the tax advice that they provide, and would not face disciplinary action or be subject to penalties under the TASA 2009. Consumer protection afforded by the TASA 2009 would not be available to the recipients of tax advice from such financial advisers.

4.76 Recipients of tax advice from financial advisers could potentially face uncertainty as they would not be able to rely on sanctions under the TASA 2009 or the Code of Professional Conduct that they could rely on if similar advice was obtained from a registered tax agent.

4.77 This is not a preferred option, as it does not meet the objectives of the Government.

Impact of option 3

4.78 Under this option, financial advisers would be subject to all obligations under the TASA 2009 regime from 1 July 2013.

4.79 Consumers of tax advice could benefit from the protection that the TASA 2009 provides, and would be assured that the same scrutiny would be applied to a financial adviser who provides tax advice, as would be applied against a tax agent. Financial advisers, who wish to provide tax advice as part of their services would need to register under the TASA 2009, meet the propriety test, agree to be bound by the Code of Professional Conduct, as well as show that they meet the education and experience requirements upon registration.

4.80 Financial advisers who provide (or advertise that they can provide) tax advice for a fee or other reward, and who do not register under the TASA 2009, would face civil penalties for not complying with the TASA 2009 regime. Offending individual advisers could face civil penalties of up to 250 penalty units (or currently $27,500) while body corporates committing similar offences could face civil penalties of up to 1,250 penalty units (or currently $137,500).

4.81 In addition, financial advisers who wish to provide tax advice will be required to meet the education and experience criteria, and they may or may not have met those criteria at the time that the TASA 2009

exemption expires. Those who have not met the criteria will not be permitted to register and provide tax advice, and will be subject to civil penalties if they do provide such advice.

4.82 This is not the preferred option, as it does not meet the objectives of the Government.

Consultation

4.83 Consultation on this matter commenced in November 2010 with the release of the options paper, 'Regulation of tax agent services provided by financial planners'.

4.84 The options paper presented two options: to either regulate financial advisers within the tax agent services regime or through regulatory supervision by ASIC. Twenty-two submissions were received with two suggesting that financial advisers providing tax advice be given a permanent exemption from additional regulation, while a handful supported the option for the regulation to be within the tax agent services regime. However, the majority supported the option for the regulation to be undertaken by ASIC under the existing AFSL regime to avoid unnecessary complexity and confusion for the public and financial advisers, but also accepted that significant background support from the TPB would be appropriate to avoid unnecessary duplication and costs.

4.85 Between December 2010 and April 2011, the then Assistant Treasurer met several times with representatives of the financial planning, tax and accounting bodies, the Treasury, the TPB and ASIC to discuss how financial planners who provide tax agent services should be regulated.

4.86 The outcome of the then Assistant Treasurer's meeting with representatives on 15 December 2010 was that Treasury, ASIC and the TPB would work through options using ASIC as the 'one-stop shop' to regulate financial advisers.

4.87 Subsequent meetings developed a broad set of principles, which the then Assistant Treasurer announced on 10 February 2011. Also, key aspects of a possible model to regulate financial planners who provide tax advice within the context of providing financial advice were announced by the then Assistant Treasurer on 7 April 2011.

4.88 Broadly the agreement centred on a model of regulation, where collaborative approaches streamline arrangements to be implemented as far as practicable. The aim of the new arrangement is to avoid duplication

of regulation and red tape, reduce unnecessary burden and costs for financial planners, as well as raise competencies and strengthen consumer protection.

4.89 On 27 February 2012 Treasury conducted a further confidential consultation meeting with stakeholders, including representatives of the financial planning, tax and accounting bodies, the TPB and ASIC to further develop the regulatory framework for financial advisers providing tax advice. Following this meeting, Treasury held further discussions with the various stakeholders to develop a paper to focus on matters to implement a proposed new regulatory framework for financial advisers providing tax advice.

4.90 Stakeholders' comments showed support and agreement with the proposed regulation of relevant financial planners (who are not otherwise registered tax agents or legal practitioners) by the TPB. The Self Managed Superannuation Funds Professionals' Association of Australia advised that it supports the co-regulatory framework for financial planners providing tax advice in conjunction with the provision of financial advice as outlined in the draft discussion paper. The Association of Financial Advisers confirmed that it does not have any major issues with information sharing between the TPB and ASIC which is one of the key matters to enable the proposed option to work effectively.

4.91 Following further consultation with representatives from the financial planning, tax and accounting bodies, the TPB and ASIC, the Assistant Treasurer announced on 30 April 2012 the decision to grant an extension to the exemption for financial advisers providing tax advice. This extension has been granted in order to allow for the details of the regulatory model to be settled and ensure resolution of implementation issues associated with bringing financial advice under the scope of the tax agent services regime.

4.92 The Government will undertake further consultation on proposed legislation and regulatory amendments and seek to ensure that the legislation and regulations are introduced before the changes will take effect on 1 July 2013.

Further consultations on exposure draft legislation and regulations

4.93 Subject to agreement with this framework, a further broad consultative process based on exposure draft legislation, regulation and supporting material will be held. Draft legislation and explanatory materials will be released for public comment to enable not only representatives of affected professionals, the TPB, and ASIC, to further comment but to provide the wider community with an opportunity to comment.

Conclusion and recommended option

4.94 The proposed co-regulatory framework (Option 1) most fully meets the Government's objectives, as it addresses not only the anomaly in relation to the current regulation of tax advisers, but also effectively addresses the underlying risks for consumers as it seeks to clarify the legal implications on financial advisers who provide tax advice. In addition, it reflects the discussions held with industry.

4.95 Under the co-regulatory framework, from 1 July 2013 the financial advisers who wish to provide tax advice in addition to the financial advice that they are providing would need to apply for registration under the TASA 2009, meet the fitness and propriety test and comply with the Code of Professional Conduct under the TASA 2009 and ensure that their PI insurance cover extends to the tax advice that they could be providing. This will maintain the integrity of the tax system and ensure that financial advisers who wish to provide tax advice as part of their service to their clients are accountable for the service that they provide their clients in similar manner that tax agents are under the TASA 2009. This option also provides financial advisers with transitional arrangements that do not compromise consumer protection.

4.96 The proposed phased introduction of the new co-regulatory arrangements should minimise the impact on financial advisers, as they would not need to pay registration fees until the commencement of the transitional period on 1 January 2015, and not need to show that they meet the education and experience requirements until 1 July 2016 when the long term phase commences, and if additional education requirements need to be proven these would not become mandatory until 1 July 2016 when the long term phase commences.

4.97 While the framework does not introduce the entire the TASA 2009 regime at once, the key requirements need to be met at the nomination and registration phase and this ensures consumer protection and the integrity of the TASA 2009 are upheld. The other requirements are met in the longer-term and these strengthen and fully apply the TASA 2009 requirements.

Option 1 is the preferred option

4.98 Option 1 is the preferred option. The co-regulatory framework would bring financial advisers who provide tax advice into the TASA 2009 regulatory framework, thereby maintaining the integrity of tax advice and protecting consumer interests. Ultimately, it will ensure that financial advisers providing tax advice are regulated in a similar manner to tax agents providing advice under the TASA 2009. Option 1 provides a phased-in approach to bringing financial advisers within the

ambit of the TASA 2009, thereby allowing the financial advice industry to adapt to the new regulatory environment and meet industry needs.

4.99 Option 2 would not meet the Government's objectives, as financial advisers would continue to be exempt from the TASA 2009 requirements under this option and it would not ensure consistent regulation of tax advice being provided.

4.100 Option 3 (maintaining the status quo) would meet some of the Government's objectives, but does not address financial advisers' concerns, as they would need to continue to register and comply with AFSL requirements for the financial advice that they provide, and in addition register and comply with all the TASA 2009 requirements as soon as the current exemption expires (from 1 July 2013). Financial advisers who wish to provide tax advice as part of their service to their clients would be required to become registered under the TASA 2009, meet all the TASA 2009 requirements, pay registration fees as soon as the exemption lapses (that is, from 1 July 2013).

Implementation and review

4.101 Option 1 would be implemented by amending legislation and regulations. These amendments would commence when the current exemption from the TASA 2009 expires on 1 July 2013. Given the number of advisers who may apply for registration, it is envisaged that transitional arrangements will be necessary to assist both industry, ASIC and the TPB in adapting to the new regime.

4.102 It is expected that further consultation will take place on the draft legislation and regulations that will give effect to the new arrangements. This would occur in the second half of 2012.

4.103 Also, the TPB and ASIC will need a period of time to introduce and fine-tune their administration mechanisms to ensure that the co-regulatory framework (including required information sharing mechanisms) is implemented so as to avoid providing the same information to different regulators.

4.104 A review could then be undertaken as directed by the Government.

Attachment A — Board launch of a new continuing professional education[4]

4.105 On 4 June 2012, the Board launched a new CPE policy for tax and BAS agents.

4.106 From 1 July 2012 all tax practitioners should begin their continuing professional education in accordance with the Board's policy to maintain their professional knowledge and skills. Agents should maintain a record as evidence of their CPE from 1 July 2012.

[4] The CPE policy is an important step in assuring the community that tax and BAS agents meet appropriate standards of ethical and professional conduct. The policy will assist tax practitioners to maintain up-to-date and relevant knowledge and skills to comply with their obligations under the Code of Professional Conduct.

Chapter 5
Improving the transparency of Australia's corporate tax system

Outline of chapter

5.1 Schedule 5 to this Bill amends the *Taxation Administration Act 1953* (TAA 1953) to:

- require the Commissioner of Taxation (Commissioner) to publish limited information about the tax affairs of large corporate taxpayers;
- allow for the publication of certain aggregate tax information irrespective of whether the publication, in conjunction with publicly available information, may be reasonably capable of being attributed to a particular taxpayer (other than a natural person); and
- allow for enhanced information sharing between Government agencies in relation to decisions under the *Foreign Acquisitions and Takeovers Act 1975* and Australia's Foreign Investment Policy.

5.2 Unless otherwise noted, all legislative references in this Chapter are to the TAA 1953.

Context of amendments

5.3 A fair, competitive and sustainable tax system is critical for the future prosperity of the nation. Australia's tax system raises the revenue that Government requires to provide the quality public goods and services needed by the community.

5.4 Tax systems that rely on voluntary compliance require strong public confidence. If the community feels that the tax system is not fair, there could be a reduction in voluntary compliance. Ultimately, this could cause a loss of confidence and undermine the tax system's sustainability.

5.5 The apparent ease with which some large corporate and multinational entities can shift taxable profits and erode a country's tax

base is a shared concern for the Group of Twenty (G20) and most Organisation for Economic Co-operation and Development countries.

5.6 The first objective of these amendments is to discourage large corporate tax entities from engaging in aggressive tax avoidance practices.

5.7 The second objective of these amendments is to provide more information to inform public debate about tax policy, particularly in relation to the corporate tax system.

5.8 The third objective is to enable better public disclosure of aggregate tax revenue collections, even when the identity of particular taxpayers (other than natural persons) could potentially be deduced. This may arise, for example, where the number of taxpayers paying tax under a particular published head of revenue is small, so one taxpayer may be able to deduce information about another from an aggregate figure.

5.9 The fourth objective is to allow improved sharing of relevant tax information between Government agencies. The amendments will ensure that the Department of the Treasury (Treasury) is better placed to consider the tax implications of applications under the *Foreign Acquisitions and Takeovers Act 1975* and Australia's Foreign Investment Policy.

5.10 The Government is committed to maintaining the confidentiality of taxpayer information of natural persons. The amendments contain express protections for natural persons.

The current taxpayer confidentiality framework

5.11 Subject to a limited range of exceptions, the TAA 1953 makes it an offence for any taxation officer (including the Commissioner) to disclose protected information (section 355-25 of Schedule 1). This offence carries a penalty of up to two years imprisonment.

5.12 Protected information is defined in subsection 355-30(1) of Schedule 1 to mean information that:

- was disclosed or obtained under or for the purposes of a law that was a taxation law (other than the *Tax Agent Services Act 2009*) when the information was disclosed or obtained; and
- relates to the affairs of an entity; and
- identifies, or is reasonably capable of being used to identify, the entity.

Summary of new law

5.13 Schedule 5 contains three measures designed to improve the transparency of Australia's business tax system.

5.14 The first of these measures imposes a duty on the Commissioner to publish certain information obtained from the tax returns of those corporate tax entities that return a total income of $100 million or more for an income year.

5.15 The Commissioner will also have a separate duty to publish the final annual amount of an entity's annual Minerals Resource Rent Tax (MRRT) or Petroleum Resource Rent Tax (PRRT) payable (if any) as reported by the entity, regardless of its total income. MRRT, however, does not become payable until the miner's 'group mining profit' exceeds $75 million for an MRRT year.

5.16 The second measure amends the taxpayer confidentiality provisions to ensure that the Commonwealth can publish aggregate tax collection information for the purposes of fulfilling its financial reporting obligations. An exception is included to maintain the confidentiality of protected information that could be reasonably capable of identifying an individual (natural person).

5.17 The third measure is to enhance information sharing between Government agencies. The amendments ensure that it is not an offence for a taxation officer to disclose confidential taxpayer information to the Treasury for the purposes of decision making by the Treasurer, or an authorised officer, in relation to a decision under the *Foreign Acquisitions and Takeovers Act 1975* or Australia's Foreign Investment Policy.

Comparison of key features of new law and current law

New law	***Current law***
The Commissioner will need to make publicly available specific information relating to the tax affairs of all corporate tax entities that have: • a reported total income of $100 million or more; or • a liability to pay an amount of MRRT or PRRT in a future MRRT year or year of tax.	No equivalent.

New law	*Current law*
Publication of aggregate tax information will be permitted irrespective of whether such disclosure is reasonably capable of being attributed to a particular entity, unless the entity is an individual (natural person).	Publication of aggregate tax information is prohibited where the publication is reasonably capable of being attributed to a particular entity.
A taxation officer may disclose protected information to the Secretary of the Treasury for the purposes of briefing the Treasurer, or an authorised officer within the Treasury, in relation to a decision that may be made under the *Foreign Acquisitions and Takeovers Act 1975* or Australia's Foreign Investment Policy.	A taxation officer may disclose protected information to the Secretary of the Treasury for the purposes of briefing the Treasurer in relation to a decision that the Treasurer may make under the *Foreign Acquisitions and Takeovers Act 1975*.

Detailed explanation of new law

Publication of tax information relating to large corporate taxpayers

5.18 Schedule 5 amends the TAA 1953 to create a duty on the Commissioner to publish limited tax return information of corporate tax entities with total incomes of $100 million or more in an income year.

5.19 'Corporate tax entity' is defined in section 950-115 of the *Income Tax Assessment Act 1997* (ITAA 1997) and includes all taxpayers treated as corporations for tax purposes. These taxpayers include companies, corporate unit trusts, public trading trusts and corporate limited partnerships.

5.20 The amendments will not apply to corporate tax entities that do not lodge company tax returns. In the case of consolidated groups and multiple entry consolidated groups, the information published will be that reported by the head company in its tax return.

5.21 Specifically, for a corporate tax entity with a reported total income for the year of $100 million or more, the Commissioner will be required to publish the entity's:

- name and ABN;
- total income;

- taxable income; and
- tax payable;

as reported in its company tax return.

[Schedule 5, item 1, section 3C]

5.22 For any entity with MRRT payable in an MRRT year, or PRRT payable in a year of tax, the Commissioner will be required to publish the entity's ABN and name, as well as the amount of MRRT and/or PRRT payable as reported in its returns. ***[Schedule 5, item 1, sections 3D and 3E].***

Source of information

5.23 In determining whether the Commissioner is required to publish information about a specific taxpayer, the Commissioner can only have regard to the information that the taxpayer has reported to the Commissioner in its relevant tax return. ***[Schedule 5, item 1, subsections 3C(1), 3D(1) and 3E(1)]***

5.24 Furthermore, the amendments require the Commissioner to publish only amounts that the taxpayer reports in its tax returns. ***[Schedule 5, item 1, subsections 3C(3), 3D(3) and 3E(3)]***

5.25 The Commissioner is not permitted to substitute his or her own assessment of a taxpayer's tax information for the purposes of applying the income or tax thresholds, or in determining the figures to be published.

Example 5.1

> A42 Pty Ltd lodges a company income tax return that includes a self-assessment of total income of $110 million and a taxable income of $50 million. Subsequently, the Commissioner issues an assessment notice to A42 Pty Ltd that denies a number of the company's deductions and results in an assessment of taxable income totalling $75 million. Notwithstanding this assessment, the Commissioner is required to publish A42 Pty Ltd's taxable income as $50 million as reported by the taxpayer.

5.26 The Commissioner, however, may verify a taxpayer's identity, including its name and ABN, before publication to ensure that the correct taxpayer is identified. ***[Schedule 5, item 1, paragraphs 3C(3)(a), 3D(3)(a) and 3E(3)(a)]***

5.27 Sourcing information from tax returns ensures that the amendments do not impose direct compliance costs on taxpayers, and that the potential for errors and disputed publications is minimised. The

administrative burden on the Australian Taxation Office (ATO) is also reduced.

Explanation of information published — company income tax

5.28 An entity's name and ABN are to be published to identify each entity with published information. ***[Schedule 5, item 1, paragraph 3C(3)(a)]***

5.29 'Total income' is not defined in the tax law; it is based on accounting concepts, and refers to gross income. 'Total income' is currently reported at item 6(S) in the company tax return. The Commissioner will only publish income tax information of those taxpayers that report total income of $100 million or more in an income year. ***[Schedule 5, item 1, paragraph 3C(3)(b)]***

5.30 'Taxable income' refers to the amount a taxpayer returns as its assessable income less deductions. Corporate tax entities currently report their taxable income or net income at item 7(T) in the company tax return. Corporate unit trusts and public trading trusts currently report their 'net income' at item 7(T). The Commissioner will publish the reported taxable income or net income (if any) of these entities if they report a total income of $100 million or more. ***[Schedule 5, item 1, paragraph 3C(3)(c)]***

5.31 For an entity with a tax loss, the Commissioner will not publish the quantum of the loss. ***[Schedule 5, item 1, paragraph 3C(3)(c)]***

5.32 'Income tax payable' refers to the amount a taxpayer returns as its income tax liability (if any) for the income year after applying the relevant tax rate to its taxable income and applying available tax offsets. Pay as You Go instalments do not affect the income tax payable amount but rather count as a prepayment against the tax payable liability. ***[Schedule 5, item 1, paragraph 3C(3)(d)]***

Example 5.2

There are three corporate tax entities (A1 Ltd, B1 Ltd and C1 Ltd) that each have a total income of $100 million or more in the 2013-14 income year, and a fourth company (Z Ltd) that has a total income of $80 million in the same income year.

The Commissioner will make the following information publicly available in relation to that income year.

Name	*ABN*	*Total income*	*Taxable income*	*Income tax*
A1 Ltd	10 234 567 890	$500,000,000	$200,000,000	$60,000,000
B1 Ltd	97 876 543 210	$300,000,000	$150,000,000	$40,000,000
C1 Ltd	10 293 847 756	$120,000,000	–	–

Note that C1 Ltd is reported as not having a taxable income. This could be because it has either a nil taxable income or is in a tax loss position. Note also that Z Ltd is not reported as it does not have total income of $100 million or more.

Explanation of information published — MRRT and PRRT

5.33 The Commissioner will be required to publish tax information about entities with an amount of MRRT or PRRT payable in a given MRRT year or year of tax (respectively). The Commissioner is required to publish this information regardless of the total income of the entity. ***[Schedule 5, item 1, sections 3D and 3E]***

5.34 MRRT does not become payable until the miner's 'group mining profit' exceeds $75 million for an MRRT year. MRRT years are the same as financial years unless an entity has a substituted accounting period for income tax purposes. The PRRT, however, has a fixed 'year of tax' that aligns to the financial year.

5.35 An amount of MRRT or PRRT payable is the amount an entity reports in its MRRT or PRRT returns.

Example 5.3

There are two entities (A2 Ltd and B2 Ltd) that each have an amount of MRRT payable for the 2013-14 MRRT year.

The Commissioner will make the following information publicly available in relation to that MRRT year.

Name	*ABN*	*MRRT Payable*
A2 Ltd	84 545 109 742	$20,000,000
B2 Ltd	65 743 079 112	$5,000,000

Timing and form of publication

5.36 The Commissioner must publish this information as soon as practicable after the end of the income year, MRRT year, or year of tax (as appropriate). The amendments do not prescribe a period within which the Commissioner must publish the information, allowing a flexible approach that accommodates organisational capabilities and priorities. ***[Schedule 5, item 1, subsections 3C(2), 3D(2) and 3E(2)]***

5.37 It is envisaged that the Commissioner will publish one annual report encompassing all relevant taxpayers, and including all the information affecting income tax, MRRT and PRRT. This would likely be released several months after the date for the lodgement of the final company income tax returns for an income year. The Commissioner may

give advance public notice of his or her intention to make the publication at a particular time.

5.38 Many companies operate under substituted accounting periods for tax purposes. This means that some companies' income years do not align with the standard 1 July to 30 June financial year.

5.39 Some taxpayers may not be required to lodge returns for the 2013-14 income year until July 2015. The first publication, therefore, could occur in late 2015 and would cover all company income tax returns for the 2013-14 income year, and the equivalent MRRT year and PRRT year of tax.

5.40 However, the exact form of these publications will be left to the Commissioner. It could, for example, be published on the ATO's website. The Commissioner may include a range of general explanatory details to provide context for the published data.

Correction of errors

5.41 Provision for the correction of errors is an important safeguard in these amendments.

5.42 The amendments allow the Commissioner to correct errors that are made in a publication in two circumstances: where the Commissioner has made an error, and on the initiative of the relevant taxpayer.

5.43 Where the Commissioner has made an error, he or she has power to publish a correction. The correction must be made from the information the taxpayer has returned. ***[Schedule 5, item 1, subsections 3C(6), 3D(6) and 3E(6)]***

5.44 The Commissioner may also make information publicly available that corrects an error that the taxpayer has brought to the Commissioner's attention. This may cover a range of circumstances where a taxpayer makes a further, special or amended tax return. ***[Schedule 5, item 1, subsections 3C(4)-(5), 3D(4)-(5) and 3E(4)-(5)]***

5.45 The Commissioner may not substitute, for the purposes of these amendments, his or her own assessment about an entity's tax affairs for the information the entity has returned.

5.46 The Commissioner has a discretion in deciding whether to publish a correction, including a discretion as to the time and form of the publication.

Interaction with taxpayer confidentiality provisions

5.47 Imposing a statutory duty on the Commissioner to publish this information will ensure that the publications do not contravene the existing taxpayer confidentiality provisions. This is because the publications will fall within an existing exception (in subsection 355-50(1) of Schedule 1) for disclosures in the performance of a taxation officer's duties. ***[Schedule 5, items 3 and 4, note to section 355-50 of Schedule 1]***

Publishing aggregate collections for each Commonwealth tax.

5.48 Schedule 5 amends Schedule 1 to the TAA 1953 to create exceptions to the taxpayer confidentiality offence provisions for disclosure or on-disclosure of periodic aggregate tax information.

5.49 The objective of this proposal is to enable better public disclosure of aggregate tax revenue collections, even when the identity of particular entities is apparent or could potentially be deduced. This may arise, for example, where the number of taxpayers paying tax under a particular published head of revenue is small, so one taxpayer may be able to deduce information about another from an aggregate figure.

5.50 The amendments ensure that the offence provisions do not apply if the information is ***periodic aggregate tax information***, which is defined to include actual or estimated collections and assessments of a specific tax, excise duty or customs duty over a period. Collections and assessments include amounts such as interest and penalties imposed in relation to a tax or duty. ***[Schedule 5, item 2, paragraph 355-47(2)(a) of Schedule 1]***

5.51 The first exception ensures that the offence provision in section 355-25 of Schedule 1 to the TAA 1953, which makes it an offence for a taxation officer to make a record of or otherwise disclose protected information, does not apply if the information recorded or disclosed is 'periodic aggregate tax information'. ***[Schedule 5, item 2, subsection 355-47(1) of Schedule 1]***

5.52 The second exception ensures that the offence provision in section 355-155 to Schedule 1, which makes it an offence for an entity to on-disclose information which was only received through another exception to the tax confidentiality provisions, does not apply if the information recorded or disclosed is 'periodic aggregate tax information'. ***[Schedule 5, item 6, section 355-172 of Schedule 1]***

5.53 The definition of 'periodic aggregate tax information' refers to a tax imposed under a particular Act, to reflect the constitutional

requirement that laws imposing taxes may only impose one tax. This is a convenient way to distinguish taxes.

5.54 The definition of 'periodic aggregate tax information' recognises that excise and customs duties are under no such constitutional requirement and a law may impose multiple excise or customs duties. For this reason, the meanings of 'duties of excise' and 'duties of customs' are intended to share their constitutional meaning.

5.55 The meaning of a 'type' of duty is intended to be broad enough to allow publications to distinguish between duties imposed on different goods and duties imposed at differing rates, such as those listed in the Schedule to the *Excise Tariff Act 1921*.

5.56 These amendments ensure that aggregate information about the amounts collected or assessed by the Commissioner under a particular Act, or in respect of a type of duty, can be published. They also ensure the offence provisions do not preclude the publication of forecasts of the amount of a tax or duty to be collected or assessed, or of policy costings in respect of a tax or type of duty.

5.57 These amendments will ensure, for example, that the Government is not restricted from publishing aggregate tax figures for its financial reporting purposes.

Ensuring that no individual's tax affairs are made public

5.58 Aggregate information that is capable of identifying an individual (natural person) taxpayer will continue to be protected information and will not be able to be published under the amendments. This ensures that individuals' privacy is not infringed. ***[Schedule 5, item 2, paragraph 355-47(2)(b) of Schedule 1]***

Example 5.4

Lower Ltd and Larger Ltd are listed companies and the only entities subject to paying an excise on beer in April 2014. This is public knowledge. Disclosing the aggregate amount of beer excise collected in April 2014 is reasonably capable of identifying the amount of excise paid by each company, at least to the other company and potentially more broadly based on public data on market shares. Nevertheless, the information may be disclosed, for example, for publication in the Government's financial reports.

If Larger Ltd exits the beer industry in December 2014, leaving Lower Ltd as the sole entity subject to the beer excise, it would still be possible to publish the total amount of excise collected or assessed in April 2015.

Example 5.5

Further to Example 5.4, Aaron purchases Lower Ltd's beer business as a going concern in April 2015, operating it as a sole trader. If the Government published the amount of beer excise collected in July 2015, the information is reasonably capable of being attributed to Aaron. The amendments do not permit the disclosure of the aggregate amount of beer excise collected in this period. The amount of beer excise collected, however, may be aggregated into a broader revenue head, such as alcohol excise, that could be disclosed.

Enhanced information sharing between Government agencies

5.59 These amendments extend the existing information sharing arrangements between the ATO and the Treasury with respect to foreign acquisition and investment decisions affecting Australia.

5.60 This is achieved by amending the current exception to the taxpayer confidentiality provisions for disclosures to the Treasury for the purpose of briefing the Treasurer in relation to a decision under the *Foreign Acquisitions and Takeovers Act 1975* — this is provided at item 7 in table 3 to subsection 355-65(4).

5.61 The amendment ensures that taxation officers can disclose confidential taxpayer information for the purpose of briefing the Treasurer or an authorised Treasury officer, in relation to a decision that may be made under the *Foreign Acquisitions and Takeovers Act 1975* or in accordance with Australia's Foreign Investment Policy. ***[Schedule 5, item 5, subsection 355-65(4)]***

5.62 Before this amendment, such information could only be disclosed for the purposes of briefing the Treasurer (but not an authorised Treasury officer) in relation to decisions made under the *Foreign Acquisitions and Takeovers Act 1975* only, and not Australia's Foreign Investment Policy.

5.63 The amendment enhances the ability of the Government to assess the national interest implications of foreign investment proposals by allowing more detailed information on the impact a proposal may have on Australia's revenue base, to be disclosed.

5.64 However, such information can only be used to assess the national interest implications of a foreign investment proposal. The information must not be used or disclosed for other purposes, or otherwise provided to the public.

Application and transitional provisions

5.65 All of the amendments in Schedule 5 commence on Royal Assent.

5.66 However, the amendments concerning the publication of tax information relating to large corporate taxpayers and entities with resource rent tax liabilities apply from either (as appropriate): the 2013-14 income year, the 2013-14 MRRT year, or the year of tax starting on 1 July 2013. ***[Schedule 5, subitem 8(1)]***

5.67 The amendments will apply to entities with substituted accounting periods for income tax and MRRT purposes as if the entities operated on an accounting period aligned to the financial year. Information returned with respect to a substituted accounting period in lieu of a financial year will be treated as a return for that financial year.

5.68 The amendments concerning the enhanced information sharing between Government agencies apply to records and disclosures made on or after Royal Assent, irrespective of when the information was obtained. ***[Schedule 5, subitem 8(2)]***

Consequential amendments

5.69 Consequential amendments amend the notes to subsection 355-50(1) of Schedule 1 to the TAA 1953. ***[Schedule 5, items 3 and 4, note to section 355-50 of Schedule 1]***

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Tax secrecy and transparency

5.70 Schedule 5 to this Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Publication of tax information relating to large corporate taxpayers

5.71 Item 1 of Schedule 5 amends the *Taxation Administration Act 1953* (TAA 1953) to require the Commissioner to make limited information about the tax affairs of large corporate taxpayers public.

5.72 As these amendments apply only to companies and other non-individual entities, they do not engage any human rights.

Publishing aggregate collections for each Commonwealth tax

5.73 Items 2 and 6 of Schedule 5 amend the TAA 1953 to ensure that aggregate information about the amounts collected or assessed by the Commissioner under a particular Act, or in respect of a type of duty of excise, is not protected information.

5.74 However, this does not apply if the information is capable of being used to identify an individual (natural person). By ensuring that personal information about individuals cannot be discerned from this information, these amendments recognise the importance of affording privacy to individuals' personal affairs. As such, these amendments promote the prohibition on interference with privacy under article 17 of the *International Covenant on Civil and Political Rights*.

Enhanced information sharing between Government agencies

5.75 Item 5 of Schedule 5 extends an exception to the taxpayer confidentiality provisions to enhance information sharing between Government agencies.

5.76 The extended exception will ensure that a taxation officer does not commit an offence in providing the Secretary of the Treasury with taxpayer information in relation to a decision the Treasurer may make in accordance with Australia's Foreign Investment Policy, or by an authorised Treasury officer making a decision under either the *Foreign Acquisitions and Takeovers Act 1975* or in accordance with Australia's Foreign Investment Policy.

5.77 Taxpayers affected by disclosures made under the current foreign investment exception are generally not individuals. Nevertheless, there may be some individual taxpayers whose information may be disclosed to the Secretary under the amendments. Therefore, the amendment may engage the prohibition on interference with privacy under article 17 of the *International Covenant on Civil and Political Rights*.

5.78 The effect of the amendment is to increase the situations in which a taxation officer can disclose information to the Secretary. However, such information can only be used by the Secretary to assess the national interest implications of a foreign investment proposal. The information must not be used or disclosed for other purposes, or provided to the public.

5.79 The amendment enhances the ability of the Government to assess the national interest implications of foreign investment proposals by allowing more detailed information on the impact a proposal may have on Australia's revenue base to be disclosed.

5.80 Accordingly, any interference with a person's right not to be subject to arbitrary or unlawful interference with their private life is reasonable, necessary and proportionate when considered against the very important national interest objective.

Conclusion

5.81 Schedule 5 engages the prohibition on interference with privacy, but does so in a reasonable, necessary and proportionate way. This Schedule also (separately) promotes the prohibition on interference with privacy, but does not engage any other rights or freedoms. As such, this Schedule is compatible with human rights.

Assistant Treasurer, the Hon David Bradbury

Chapter 6
Petroleum Resource Rent Tax

Outline of chapter

6.1 Schedule 6 to the Bill amends the *Petroleum Resource Rent Tax Assessment Act 1987* (PRRTAA) to address the unintended impacts arising from the decision of the Full Federal Court in *Esso Australia Resources Pty Ltd v Commissioner of Taxation* [2012] FCAFC 5 (*Esso*).

6.2 The amendments ensure that taxpayers can apportion payments for the purposes of determining deductible expenditure under the petroleum resource rent tax (PRRT) law. The amendments ensure that, where a taxpayer:

- incurs expenditure which was not solely incurred in relation to a petroleum project, the expenditure can be apportioned with that portion of expenditure incurred in relation to the project being deductible; or

- makes a payment to procure the carrying out of activities by a third party where that payment is not solely related to a petroleum project, the payment is able to be apportioned to determine the portion which is deductible.

6.3 The amendments also ensure that, where a PRRT taxpayer makes a payment to procure an unrelated third party to undertake project operations, activities or things on their behalf, they are not required to 'look-through' to the character and nature of the expenditure incurred by the third party to determine the extent to which the payment is deductible.

6.4 However, where the third party is related to the PRRT taxpayer, the amendments require that a look-through approach generally be applied, consistent with the decision of the Full Federal Court.

Context of amendments

Overview of the Petroleum Resource Rent Tax

6.5 The PRRT is a project-based resource profits tax of 40 per cent of certain taxable profits derived from the extraction and processing of

petroleum recovered in Commonwealth waters. The PRRT was extended to apply to the North West Shelf project and onshore petroleum projects from 1 July 2012. The PRRT is imposed under the *Petroleum Resource Rent Tax Assessment Act 1987* (PRRTAA). All legislative references in this Chapter are to the PRRTAA unless otherwise specified.

6.6 The PRRT is assessed on a petroleum project basis and is levied on the 'taxable profit' derived by a taxpayer in a financial year from a petroleum project. Taxable profit is calculated by deducting from project assessable receipts the person's eligible real expenditure, together with any expenditure transferred to the project from other projects.

6.7 Deductible expenditure broadly includes those expenditures, whether capital or revenue in nature, which are incurred in carrying on or providing the operations, facilities or other things related to the project ('project activities'). The deductible expenditure provisions of the PRRTAA cover three main expenditure types:

- exploration expenditure (section 37);
- general project expenditure (section 38); and
- closing down expenditure (section 39).

6.8 However, section 44 provides that certain types of expenditure, such as administrative costs or other work costs indirectly incurred, are not deductible, notwithstanding that they were incurred in relation to a petroleum project. Such costs are referred to as 'excluded expenditure'.

6.9 A taxpayer may carry on or provide operations, facilities or other things ('project activities related to their project themselves (including through their employees or agents), or alternatively pay a third party to carry on or provide those project activities on their behalf.

6.10 Where a PRRT taxpayer incurs a liability to make a payment to a third party to carry on or provide project activities, section 41 currently operates to treat:

- the PRRT taxpayer as having carried on those activities; and
- the liability to have been incurred by the PRRT taxpayer in undertaking those activities.

Application of the PRRT law prior to the *Esso* decision

Deductible expenditure provisions treated as self-apportioning

6.11 Prior to the decision in *Esso*, the Commissioner of Taxation (the Commissioner) applied the PRRT law on the basis that the deductible expenditure provisions of the PRRT were self-apportioning. That is, if a PRRT taxpayer incurred expenditure not solely related to a petroleum project ('mixed expenditure'), the mixed expenditure could be apportioned, with that portion incurred in relation to the project being deductible (provided it was not excluded expenditure).

6.12 Similarly, payments made to a third party to procure project activities in addition to non-project related activities could also be apportioned, with that portion related to the provision of project activities treated as having been incurred by the taxpayer under section 41 and deductible by the taxpayer, subject to the deductible expenditure provisions.

Deductibility of third party payments for project activities

6.13 Where a taxpayer had made a payment to procure project activities to be carried out by a third party, the taxpayer was generally not required to look-through to the nature of the expenditure incurred by a third party in undertaking the activities to determine the extent to which the payment was deductible. Rather, the deductibility of the payment was dependent on the nature and character of the activities procured and how they related to the project.

6.14 If the third party only carried out or provided project activities, then that expenditure (which would have been deductible had the activities procured been undertaken by the PRRT taxpayer) was taken to be of the same character and nature as the activities procured and the taxpayer's payment was treated as deductible in full. This was notwithstanding that the payment may have taken into account expenditure by the third party that would have been excluded expenditure had it been directly incurred by the PRRT taxpayer.

6.15 However, if the third party was contracted by the taxpayer to provide services which would constitute excluded expenditure under section 44 if incurred directly by the taxpayer (such as indirect administrative activities, for instance), then the payment for those services was excluded expenditure and was not therefore deductible under section 37, 38 or 39.

Impact of the decision in *Esso*

Deductibility of third party payments for project activities

6.16 The deductibility of third party payments under section 41 was considered by the Full Federal Court in *Esso*.

6.17 In its decision, the Court held that, under section 41, payments made by a PRRT taxpayer to a third party for project activities are taken to have the same characteristics as the actual expenditure incurred by the third party in undertaking or providing the activity. The Court noted that:

> '…s 41 achieves the unsurprising result that the eligible person is in the same position to claim deductions from assessable receipts…as it would have been if it had carried on the activities comprising the project itself. Where an eligible person incurs a liability to make a payment to procure the carrying on or providing of operations, facilities or things of a kind referred to in s 37, 38 or 39 by another person, the deeming worked by paras (a) and (b) of s 41 makes the liability of the eligible person a liability to pay for those operations, facilities and things, including…things which are "excluded expenditure" as designated by s 44.'

6.18 The practical effect of applying this look-through interpretation is that, if part of the third party's expenditure is excluded expenditure under section 44, then it will also be excluded expenditure for the PRRT taxpayer and consequently not deductible.

6.19 Requiring PRRT taxpayers to apply a look-through approach to third party payments would require the third party to provide details of all the expenditure incurred in providing the service, including commercial-in-confidence information, in order for the taxpayer to determine the extent to which the payment was deductible.

6.20 A third party who is unrelated to the taxpayer is likely to be unwilling to provide the required information and, in its absence, the Commissioner will be unable to determine what proportion of the payment for services was deductible, potentially resulting in the entire payment being non-deductible.

6.21 In contrast, where parties are related there are not the same issues concerning providing information between the parties. Accordingly, requiring PRRT taxpayers to apply a look-through approach for payments made to related contractors protects the integrity of the PRRT. In these circumstances, the look-through requirement ensures that excluded costs and related party profit margins are not taken into account in working out the deduction available to the PRRT taxpayer.

Scope to apportion expenditure under the deductible expenditure provisions

6.22 In its decision, the Court also made the observation that the deductible expenditure provisions of the PRRTAA relating to exploration expenditure, general expenditure, and closing down expenditure (sections 37, 38 and 39 respectively) do not allow for payments to be apportioned.

6.23 The effect of this is that, where a taxpayer incurs mixed expenditure, none of the expenditure will be deductible. This is notwithstanding that a portion of it was legitimately incurred in relation to a petroleum project. The same outcome will also occur under section 41 where a payment was made to a third party which was not made solely to procure the carrying on or provision of project activities.

6.24 The Commissioner's longstanding administrative practice in relation to the PRRT has been to treat the relevant sections as self-apportioning.

Summary of new law

Scope to apportion expenditure

6.25 The amendments ensure that PRRT taxpayers can apportion 'mixed' expenditure that is only partly incurred in relation to a particular petroleum project for the purposes of determining deductible expenditure under sections 37, 38 and 39. To the extent a payment or part of a payment is made in relation to a project, it is able to be deducted provided it is not excluded expenditure.

6.26 Similarly, the amendments ensure that payments made to procure the carrying on of project activities, as well as other things, by a third party can be apportioned for the purposes of the PRRT law.

Look-through requirement limited to payments to related parties

6.27 Where a PRRT taxpayer makes a payment to an unrelated third party to procure project activities, the amendments ensure that the Commissioner's longstanding application of section 41 applies. That is, to the extent the payment is made to procure the carrying on or provision of project activities, it is treated as having been incurred by the taxpayer in carrying on or providing those things in determining its deductibility.

6.28 However, consistent with the decision of the Full Federal Court, where a PRRT taxpayer pays a related contractor to carry on or provide project activities (excluding those related to capital), the requirement that the taxpayer look-through the payment is preserved. That is, the character, nature and amount of the payment reflects that of the actual expenditure incurred by the related contractor in carrying on the project activities procured for the purposes of determining the extent to which it is deductible under sections 37, 38, 39 and 44.

6.29 Where a payment or part of a payment to a related contractor is made for the use of property (on which capital expenditure was incurred), the payment or part of the payment is not looked-through, but instead is deemed to have the same character and nature as the project activity procured.

Comparison of key features of new law and current law

New law	***Current law***
Apportionment of expenditure	
PRRT taxpayers can apportion mixed expenditure to determine the portion which constitutes exploration, general project or closing down expenditure and which is deductible.	No apportionment of mixed expenditure is possible. Consequently, where expenditure is only partly incurred in relation to a petroleum project, none of the expenditure may be deductible.
Application of the 'look-through' approach	
Look-through is not required in relation to payments to unrelated third parties for project activities. Whether the payment is deductible depends on the character and nature of the activity procured. Where a PRRT taxpayer makes a payment to a *related contractor* for the provision of project activities, 'look-through' is required, except in relation to payments related to the use of property. The extent to which the payment is deductible is limited to the expenditure incurred by the related contractor in providing the service, and the character and nature of that expenditure.	A PRRT taxpayer must 'look-through' a payment made to a third party for project services to determine the extent to which the payment is deductible. That is, the character and nature of the contractor's expenditure, rather than that of the service or activity procured, is used to determine the extent to which the payment is deductible. The proportion of the payment that relates to excluded expenditure incurred by the contractor is not deductible by the taxpayer.

Detailed explanation of new law

Scope to apportion expenditure

6.30 These amendments ensure that 'mixed' expenditure incurred by a taxpayer only partly in relation to a petroleum project can be apportioned to determine deductibility.

6.31 Where a PRRT taxpayer incurs expenditure in relation to both project activities (section 37, 38 or 39), as well as in relation to other things, the amendments confirm that expenditure can be apportioned to determine the amount and type of deductible expenditure under the PRRT law.

6.32 This is achieved by replacing the reference to payments 'liable to be made' and 'liable to be paid' in the deductible expenditure provisions relating to exploration, general project and closing-down expenditure, with the terms, 'to the extent that they are made', and 'paid by the person, to the extent that the payment relates to'. The words, 'to the extent' which are commonly used in the income tax law, support the apportionment of expenditure.

6.33 Only the part of the payment that was incurred in relation to project activities, and which does not constitute excluded expenditure is able to be deducted. ***[Schedule 6, items 1 and 2, subsection 37(1) of the PRRTAA, items 4 and 5, subsection 38(1) of the PRRTAA and Schedule 6, item 7, subsection 39(1) of the PRRTAA]***

Example 6.1: Apportionment between types of deductible expenditure

Chan Resources holds an interest in a petroleum project and, on 1 July 2015, purchases a drill for $5 million to recover petroleum from the licence area as well as to carry on exploration for new petroleum pools in the licence area.

Drilling records confirm the drill was used in carrying on the recovery of petroleum and in carrying on the exploration for other petroleum pools in the production licence area.

Chan Resources incurs exploration expenditure to the extent the payment is made in carrying on the operations, facilities and other things required in section 37. Chan Resources also incurs an amount of general project expenditure to the extent the payment is made in carrying on the operations, facilities and other things in section 38.

The method of apportionment adopted by Chan Resources is a question of fact to be determined in the circumstances, and should be supported

by business records sufficient to satisfy the substantiation requirements in section 112.

Example 6.2: Apportionment of project related expenditure between multiple petroleum projects

Colour Enterprises holds an interest in both the Green petroleum project and the White petroleum project. Brian is employed by Colour Enterprises and is the site supervisor of both projects.

To determine the amount of general project expenditure incurred by Colour Enterprises in relation to each project, the salary paid to Brian in 2013-14 is apportioned to the extent that Brian is involved in carrying on the project activities for both the Green and White projects.

Colour Enterprises chooses to apportion the payment according to the time directly spent by Brian on the activities of each project. This method of apportionment is appropriate provided it is substantiated by the business records kept by Colour Enterprises.

Example 6.3: Apportionment between deductible expenditure and excluded expenditure

JillCo holds an interest in an exploration permit and enters a hire purchase agreement on 1 July 2014 with LukeCo to acquire a drill in order to carry on exploration activities in the permit area.

Under the terms of the agreement, which separately discloses the interest charge, JillCo makes 12 monthly payments of $110,000. The total payment is $1.32 million ($1.20 million plus $0.12 million interest).

JillCo incurs exploration expenditure of $1.20 million for the payments made in carrying on the project activities. The $0.12 million interest charge is not deductible as exploration expenditure, as it constitutes excluded expenditure under paragraph 44(1)(b).

Example 6.4: Apportionment between eligible real expenditure and non-project expenditure

Wetgasco holds an interest in an offshore petroleum project from which natural gas is recovered for use as feedstock for an integrated LNG plant. Wetgasco owns and operates the onshore processing and liquefaction plant.

The natural gas recovered from the project's offshore recovery platform is transported via pipeline to an onshore processing facility that removes impurities to produce the marketable petroleum commodity sales gas, before it then enters the downstream liquefaction plant to be further processed into LNG.

Grant is the operations manager for Wetgasco with responsibility for supervising the overall integrated gas to liquid (GTL) operation up until the point the LNG is produced and ready for sale.

In order to determine the amount of general project expenditure for the petroleum project, the salary paid to Grant by Wetgasco must be apportioned to reflect the extent to which the payment was made in carrying on or providing project activities, noting that the project ring fence occurs at the point sales gas is produced and becomes an excluded commodity.

Westgasco chooses to apportion Grant's salary payment according to the time directly spent by Grant on the project activities. The portion of Grant's salary related to time spent managing the downstream liquefaction activities is non-project expenditure and is not deductible. This method of apportionment is appropriate provided it is substantiated by the business records kept by Westgasco.

Apportionment of payments to third parties

6.34 The amendments also confirm that a PRRT taxpayer can apportion payments that are subject to section 41 where only part of the payment is to procure another person to carry on project activities. ***[Schedule 6, item 9, subsection 41(1) of the PRRTAA]***

6.35 Apportionment under section 41 effectively excludes the part of the payment made to the third party that was not to procure the carrying on or provision of project activities, but does not otherwise alter the operation of section 41 as a deeming provision, as confirmed by the Full Federal Court.

6.36 The deductibility of the part of the payment made to procure project activities, and which is taken to have been incurred by the taxpayer under subsection 41(1), is determined under sections 37, 38 and 39 of the PRRTAA.

Example 6.5: Apportionment of a third party payment

Amartya Co holds an interest in an offshore petroleum project from which natural gas is recovered for use as feedstock for an integrated LNG plant. Amartya Co owns the onshore processing and liquefaction plant, but makes payments to Alpha Engineering to operate the processing and liquefaction plant on its behalf. As activities related to the liquefaction fall beyond the PRRT ring fence, Amartya Co apportions the payment made to Alpha Engineering to reflect that part of the payment relating to the provision of upstream project activities. Section 41 operates to deem that portion of the payment to have been incurred by Amartya Co in carrying on or providing project activities. Whether, and to what extent, the deemed payment is deductible is

determined under the deductible expenditure provisions of the PRRTAA.

Deductibility of payments to third parties and the operation of section 41

6.37 The amendments repeal the current section 41, and replace it with a new section 41 which clarifies how payments made by a taxpayer to procure a third party to carry out or provide project activities are treated, depending on whether the third party is 'related' or 'unrelated' to the taxpayer. ***[Schedule 6, item 9, subsections 41(1) and 41(1A) of the PRRTAA]***

6.38 Where the third party is commercially or operationally related to the PRRT taxpayer, the Full Federal Court's interpretation of the operation of section 41 is largely preserved. That is, where a PRRT taxpayer makes a payment to procure project activities from another participant such as the operator, or a related contractor, the taxpayer is required to 'look-through' to the character, nature and amount of the related contractor's expenditure when determining how much of the payment is deductible under the PRRT law. ***[Schedule 6, item 9, paragraph 41(1)(d) of the PRRTAA]***

6.39 The amendments ensure that section 41 applies to payments made to third parties to procure project services or activities so that there is no requirement to look through to the character, nature and amount of the expenditure of the third party where the third party is not related to the PRRT taxpayer. ***[Schedule 6, item 9, paragraph 41(1)(b) of the PRRTAA]***

6.40 Not requiring PRRT taxpayers to look-through payments to an unrelated contractor's underlying expenditure reflects both that the parties are acting at arm's length as well as the practical difficulty of administering the arrangements under such circumstances.

When is a third party related to a PRRT taxpayer?

6.41 The amendments define what constitutes a related person for the purposes of the broader operation of section 41. ***[Schedule 6, item 9, subsection 41(1A) of the PRRTAA]***

6.42 A third party (referred to as the 'other person') that provides services to the PRRT taxpayer (referred to as the 'eligible person') is related to the taxpayer for the purposes of section 41 where they:

- hold an interest in the same petroleum project for which they are providing the operations, facilities or other things to the taxpayer; or

- are connected with the taxpayer to whom they are providing the project operations, facilities or other things.

6.43 Broadly, entities are 'connected' within the meaning of section 328-125 of the ITAA 1997 to one another if either entity controls the other, or both are controlled by the same third entity.

6.44 In addition, where the other person engages another party that is connected to the other person (referred to as the third person) to carry on or provide the activities procured on behalf of the eligible person, then the third person will be related for the purposes of section 41. ***[Schedule 6, item 9, subsection 41(1C) of the PRRTAA]***

Example 6.6: Project service providers related to taxpayer

RexCo holds an interest in a petroleum project and makes a payment to ProcessCo, a wholly owned subsidiary, to carry out project activities. ProcessCo contracts with ThreeCo, another wholly owned subsidiary of RexCo, to provide some of the activities in relation to the project.

ProcessCo is connected to RexCo and so paragraph 41(1A)(b) applies in relation to that part of the payment relating to the project activities carried on by ProcessCo. Further, as ProcessCo and RexCo are connected and ProcessCo procured project activities from ThreeCo, which is a connected entity with ProcessCo, subsection 41(1C) will apply to that part of the payment relating to the project activities provided by ThreeCo.

Example 6.7: Third party related to taxpayer

BlackCo holds a 60 per cent interest in a petroleum project and is the joint venture operator responsible for project operations. The remaining project interest is held by RedCo. RedCo pays BlackCo for the project activities carried out in relation to its project interest.

BlackCo makes payments to WhiteCo, a wholly owned subsidiary, to carry on all the operations in relation to the project.

As BlackCo is procuring project operations from the connected entity WhiteCo on behalf of Redco; and as BlackCo holds an interest in the project, subsection 41(1C) applies in relation to the payment by RedCo to BlackCo.

Payments made to an unrelated contractor to procure project services

6.45 Where a PRRT taxpayer contracts with an unrelated contractor, to the extent the contract payments are to procure the carrying on or provision of project activities in relation to a project, the project activities procured are deemed to have been undertaken by the taxpayer and not the

third party. Subsequently, the payment is deemed to have been incurred by the taxpayer in carrying on or providing those project activities. ***[Schedule 6, item 9, subsection 41(1) of the PRRTAA]***

6.46 For the purposes of determining the extent to which the payment constitutes deductible expenditure, the character and nature of the project activities procured is taken to be impressed upon the payment for the purposes of sections 37, 38, 39 and 44. That is, where a payment or part of a payment is solely for project activities which do not constitute excluded expenditure, that payment is taken to have been incurred in carrying on or providing those activities and is deductible in full. The taxpayer is not required to look-through the payment to what the contractor incurred expenditure on in providing the service. ***[Schedule 6, item 9, paragraph 41(1)(b) of the PRRTAA]***

Example 6.8: Application of section 41 to an unrelated party — single operating expense

PetroSarah holds an interest in an onshore petroleum project. PetroSarah enters into a service agreement with Lee Co to provide staff to operate a drill rig for the recovery of petroleum from the production licence area. The agreement is for a 12 month period for the fixed payment of $2 million. Lee Co incurs $1.9 million of expenditure in operating the drill rig.

Lee Co does not hold an interest in the project and is not connected with PetroSarah and so subsection 41(1A) does not apply.

Since subsection 41(1A) does not apply to Lee Co, the $2 million payment by PetroSarah is taken for the purposes of sections 37, 38, 39 and 44 to have the same character and nature as the operations, facilities or other things procured.

The payment to Lee Co was incurred to procure a 'project activity' which is not itself an excluded expenditure type under section 44. Consequently, PetroSarah can deduct the full $2 million as general project expenditure (despite Lee Co only incurring $1.9 million of expenditure).

Example 6.9: Application of section 41 to an unrelated party — project activity procured is excluded expenditure

A PRRT taxpayer, Bayside Oil, incurs a liability to pay $100,000 to obtain office space for its administrative employees from an unrelated third party that does not hold an interest in the project. The office building is located at a site some distance from the project site which is not adjacent to the project operations.

Subsection 41(1A) does not apply as the person providing the office facilities to Bayside Oil is not a related party.

Therefore, the payment is deemed to have been incurred by Bayside Oil and is taken to have the same character and nature as the project activity procured.

Payments in respect of land and buildings for use in connection with administration, which are not adjacent to the project operations, are excluded expenditure under paragraph 44(1)(k). Consequently, the payment is an item of excluded expenditure when section 37, 38 or 39 is applied and is not deductible to Bayside Oil.

Payments made to a related contractor to procure project services: look-through

6.47 Where a PRRT taxpayer makes a payment to a related contractor to procure the carrying on or provision of project activities, the activities procured are treated as having been undertaken by the taxpayer. To the extent the payment relates to procuring those activities, it is deemed to have been made by the taxpayer in carrying on or providing those activities.

6.48 The PRRT taxpayer is required to look-through to the expenditure incurred by the related contractor in providing the service to determine the extent to which the payment constitutes deductible expenditure.

6.49 The payment deemed to have been made by the PRRT taxpayer under subparagraph 41(1)(a)(ii) is, except where it relates to the use of property (on which capital expenditure was incurred), taken to be of the same character, nature and amount as the expenditure incurred by the third party in providing the project activity. Where the third party incurs expenditure in providing the project activity that would be excluded expenditure had it been directly incurred by the PRRT taxpayer, then that expenditure is excluded expenditure when deemed to have been made by the PRRT taxpayer. ***[Schedule 6, item 9, paragraph 41(1)(d) of the PRRTAA]***

6.50 As the amount of the payment deemed to have been made by the PRRT taxpayer is also limited to the amount of expenditure incurred by the related party in providing this service, any mark-up is also effectively precluded from deduction by the PRRT taxpayer. This ensures that a PRRT taxpayer cannot artificially increase its deductible expenditure by establishing a related service company rather than undertaking project activities directly. ***[Schedule 6, item 9, subparagraph 41(1)(d) of the PRRTAA]***

Example 6.10: Application of section 41 to related party — single expense

Nomis Co holds an interest in an offshore petroleum project. Nomis Co enters into a service agreement with Semaj Co, a wholly owned

subsidiary, to provide maintenance services for the project's oil platform. The agreement is for a 12 month period for a fixed payment of $3 million.

Semaj Co incurs $2.75 million of expenditure in maintaining the platform.

Subsection 41(1A) applies as Semaj Co is connected to Nomis Co. Therefore, the payment that is deemed to have been made by Nomis Co under subparagraph 41(1)(a)(ii) is taken to be of the same character, nature and amount as the expenditure incurred by Semaj Co for the purposes of determining deductible expenditure under sections 37, 38, 39 and 44.

In this example, Nomis Co is taken to have incurred $2.75 million in expenditure, which is deductible as general project expenditure under section 38 of the PRRTAA.

Example 6.11: Application of section 41 to related party — expenditure includes excluded expenditure

Assume the same facts as Example 6.10, except in this case, as well as incurring $2.75 million expenditure on maintaining the oil platform, Semaj Co also incurs an additional $10,000 in indirect head office administration expenses.

As subsection 41(1A) applies to Semaj Co, the payment deemed to have been incurred by Nomis Co is taken to be $2.76 million, being the same amount as the expenditure Semaj Co incurred in carrying on or providing the project service procured.

The payment is also taken to have the same character and nature as the $2.76 million expenditure incurred by Semaj Co for the purposes of determining its deductibility under sections 37, 38, 39 and 44. As indirect administrative or accounting costs are excluded expenditure under paragraph 44(1)(j) of the PRRTAA, Nomis Co is only able to deduct $2.75 million as general project expenditure under section 38.

Payments made to a related party concerning property

6.51 There is an exception to the look-through requirement where the payment or part of the payment relates to the use of property (on which the related party incurred capital expenditure) by the related party to provide the project activities procured by the PRRT taxpayer. To the extent the payment relates to the use of property on which the related party has incurred capital expenditure, that payment is treated like payments made to unrelated contractors for the purposes of determining the deductibility of the payment or part of the payment. ***[Schedule 6, item 9, paragraph 41(1)(c) of the PRRTAA]***

Example 6.12: Payments to a related party in relation to property

LuckyLuke holds an interest in an onshore petroleum project and enters into an agreement with a wholly owned subsidiary, AnnaBella Co to provide and operate a drilling rig for the project. The agreement is for a 12 month period for a fixed payment of $10.15 million. The amount charged by AnnaBella Co includes an amount of $7 million which, consistent with normal commercial practice, takes into account a return of, and a return on, the capital cost of the drilling rig. The payment also includes $3 million to cover the operating expenses and labour costs incurred by AnnaBella Co to operate the rig, and a five per cent mark-up on the operating expenses to cover indirect costs, totalling $150,000.

As AnnaBella Co is wholly owned by LuckyLuke, they are connected and subsection 41(1A) applies. Paragraph 41(1)(c) applies to the part of the payment relating to the use of the drill rig (that is, $7 million) which is taken to have the same character and nature as the project activity procured for the purposes of sections 37, 38, 39 and 44. Paragraph 41(1)(d) applies to the extent the payment by LuckyLuke does not relate to the use of property, namely the operating costs and the mark-up. As this portion of the payment is taken to be of the same amount, character and nature as the expenditure incurred by AnnaBella Co, LuckyLuke is taken to have only made a payment of $3 million (subsection 41(1)). The $150,000 mark-up is not taken to have been made by LuckyLuke as it was not expenditure AnnaBella Co incurred in relation to the project.

Determining that part of the payment that relates to the use of property is a question of fact to be determined based on the circumstances. The method LuckyLuke uses to determine the extent the payment relates to the use of property is supported by the business records provided by AnnaBella Co.

A payment deemed under section 41 cannot exceed actual payment

6.52 As noted, where a PRRT taxpayer makes a payment to procure the carrying on or provision of project activities by a related contractor, the amount of the payment deemed under subparagraph 41(1)(a)(ii) to have been made by the taxpayer for the purposes of sections 37, 38, 39 and 44 is taken to be of the same character, nature and amount as the expenditure incurred by the related contractor in providing the activities procured.

6.53 Where the expenditure incurred by the related contractor in carrying on the project activities exceeds the payment made by the PRRT taxpayer, the related contractor's expenditure is taken to be proportionately reduced so as to ensure the taxpayer cannot deduct expenditure it did not incur. ***[Schedule 6, item 9, subsections 41(1B) and 41(1D) of the PRRTAA]***

Example 6.13: Related party expenditure exceeds payment for project services

A related service provider, Company C, charges the eligible PRRT taxpayer $100,000 for the provision of project activities. However, the expenditure the related third party incurred in carrying on or providing the activities procured is $150,000 of which $50,000 is excluded expenditure. Under subsection 41(1B) the amount of the payment taken to be made by the eligible PRRT taxpayer is $100,000. Under subsection 41(1D), the character and nature of the payment reflects the proportionate reduction in the payment — that is, of the $100,000 one third (50,000/150,000) is excluded expenditure for the purposes of sections 37, 38, 39 and 44.

When deductible expenditure is taken to be incurred

6.54 The PRRT is intended to recognise expenditure at the time the liability for such expenditure arises, rather than when the amount is actually paid. This is consistent with the approach taken under the income tax law.

6.55 Amendments are made to exploration expenditure, general project expenditure and closing-down expenditure provisions to clarify the time at which the payment is taken to be incurred. This is when the taxpayer is liable to make the payment. ***[Schedule 6, items 3, 6, and 8, subsections 37(3), 38(3) and 39(5) of the PRRTAA]***

6.56 A similar amendment is made to section 41 in relation to payments made to a third party, which also provides that the payment is taken to have been incurred at the time it is liable to be paid. ***[Schedule 6, item 10, subsection 41(3) of the PRRTAA]***

6.57 When a person becomes liable to make a payment is determined by taking into consideration all the relevant facts surrounding the payment, including any contractual terms between the parties.

6.58 A contract that provides that payment is to be made on the issue of an invoice after delivery of the contract services, could give rise to a liability to make a payment when the invoice is issued. However, this depends on the terms of the arrangement.

Application of the PRRTAA anti-avoidance provisions

6.59 The anti-avoidance provisions in Part V of Division 6 continue to apply to arrangements, including those to which section 41 applies.

6.60 If a taxpayer enters into an arrangement, including transferring assets or restructures creating a tax benefit, the general anti-avoidance provisions contained in Division 6 of Part V may apply, if the requirements of the Division are satisfied.

6.61 If a payment made by a person is one to which deeming under section 41 applies, section 58 may apply so that the amount of the deemed expenditure may be reduced to what it would have been had the parties been dealing at arm's length in relation to the transaction.

6.62 Section 58 may also apply when apportioning the payment made by the eligible person between the part that relates to the use of property (on which the other person has incurred capital expenditure) and the other components.

Application provisions

6.63 The amendments generally apply from the applicable commencement date of the petroleum project. For projects located in Commonwealth waters (except the North West Shelf, and Bass Strait), the applicable commencement date is 1 July 1986. The applicable commencement date for the Bass Strait project is 1 July 1990. ***[Schedule 6, paragraph 11(1)(a)]***

6.64 However, in relation to interests in onshore projects and the North West Shelf project, to which the PRRT was extended from 1 July 2012, the amendments apply from the relevant starting base date of the project interest, as outlined in section 45. For those petroleum project interests where the PRRT taxpayer has chosen the look-back approach to value its starting base, the relevant starting base date is 1 July 2002. Similarly, for project interests where the PRRT taxpayer has chosen the market or book value approach to value its starting base, these amendments will commence from the time the interim expenditure period relating to the interest commences. ***[Schedule 6, paragraphs 11(1)(b) and 11(1)(c)]***

6.65 The retrospective application of the amendments benefits PRRT taxpayers. Without retrospective application, taxpayers would be denied deductions for past project expenditures where they were incurred as 'mixed expenditure' or alternatively where the taxpayer is unable to sufficiently substantiate the character and nature of expenditure incurred by contractors paid for undertaking past project activities.

6.66 The ability to apportion expenditure is consistent with the intended profits-based operation of the PRRT and with its administration since commencement. By providing that apportionment applies from the

commencement date of projects, the amendments ensure that PRRT taxpayers holding interests in offshore petroleum projects, particularly those who are yet to submit a PRRT return, are able to deduct past expenditures legitimately incurred in relation to a project.

6.67 Similarly, in relation to onshore projects and the North West Shelf project, the application of these amendments from the relevant starting base date ensures that taxpayers are not denied the ability to take into account legitimate past project expenditure in determining the starting base amount for those project interests existing as at 2 May 2010, under the 'look-back', market value or book value approaches.

6.68 The amendments relating to the deductibility of contractor payments under section 41 apply to contractor payments made by PRRT taxpayers who have not been required to furnish an annual PRRT return in relation to their project interest prior to 14 December 2012 (the date the amendments were announced) as if the contractor was unrelated to the taxpayer for payments incurred prior to 1 July 2013. This ensures that past payments made by these PRRT taxpayers to contractors, and for which the taxpayer is unlikely to have sufficient records to apply a look-through approach, are treated consistently with the application of the PRRT law prior to the decision in *Esso*. ***[Schedule 6, subitem 11(3)]***

6.69 The section 41 amendments will, however, apply from 1 July 2012 for those PRRT taxpayers who have been required to furnish an annual PRRT return prior to 14 December 2012. ***[Schedule 6, subitem 11(2)]***

6.70 This recognises that, following the *Esso* decision, the Commissioner released a Decision Impact Statement acknowledging that the past administration of the PRRTAA differed from the Court's interpretation. The Statement advised that the ATO would not seek to disturb assessments for the 2011-12 and earlier years, provided the taxpayer self-assessed consistent with the ATO's general administrative practice in this area or where taxpayers choose to amend past assessments consistent with the ATO's general administrative practice.

6.71 Some taxpayers may not have the necessary records to substantiate their claims for payments made prior to the introduction of these amendments, particularly given the considered views expressed by the Full Federal Court in the *Esso* case on the application of section 41. It is expected that the Commissioner, in consultation with industry, will adopt a reasonable approach to substantiation and apportionment where a past assessment is amended, or found not to have complied with the past general administrative practice, in these circumstances.

6.72 The amendments also clarify for the purposes of the application provisions that a reference to payment takes the same meaning as that used in sections 37, 38, 39 and 41. This ensures consistency between the application provisions and the deductible expenditure provisions in the PRRTAA. ***[Schedule 6, subitem 11(4)]***

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Petroleum Resource Rent Tax (PRRT) — Esso

6.73 Schedule 6 to this Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

6.74 Schedule 6 to this Bill amends the *Petroleum Resource Rent Tax 1987* to address issues arising out of the Full Federal Court decision in *Esso Australia Resources Pty Ltd v Commissioner of Taxation [2012]* FCAFC 5.

Human rights implications

6.75 This Schedule does not engage any of the applicable rights or freedoms.

Conclusion

6.76 This Schedule is compatible with human rights as it does not raise any human rights issues.

Assistant Treasurer, the Hon David Bradbury

Chapter 7
Removing the Capital Gains Tax Discount for Foreign Individuals

Outline of chapter

7.1 Schedule 7 to this Bill amends the *Income Tax Assessment Act 1997* (ITAA 1997) to remove the capital gains tax (CGT) discount on discount capital gains accrued after 8 May 2012 for foreign resident and temporary resident individuals.

7.2 All legislative references are to the ITAA 1997 unless otherwise stated.

Context of amendments

7.3 Currently, discount capital gains that are made by individuals may be reduced by a discount percentage before being included in assessable income. A CGT discount of 50 per cent is available to individuals regardless of tax residency status.

7.4 Generally, foreign and temporary resident individuals are only subject to CGT on taxable Australian property, which includes residential and commercial real estate and mining assets.

7.5 These assets are immobile and produce location specific returns. A reduction in the effective tax rate (by way of the CGT discount) is not necessary to attract foreign investment in these assets. Removing the CGT discount for foreign and temporary residents increases the return to Australia from gains made through foreign investment in Australian land.

7.6 As part of the 2012-13 Budget, the Government announced that the CGT discount would not apply to discount capital gains made by a foreign resident. However, the CGT discount will still apply to the portion of the discount capital gain of a foreign resident individual that accrued up until the date of announcement (8 May 2012).

7.7 As temporary residents are subject to CGT on the same basis as foreign residents, they will also be ineligible for the CGT discount.

7.8 These amendments will apportion the discount percentage applied to reduce discount capital gains to ensure that the full 50 per cent CGT discount is only available for periods in which an CGT asset was held:

- prior to 9 May 2012; and
- after 8 May 2012 during which the individual was an Australian resident.

Summary of new law

7.9 These amendments apply where:

- an individual was a foreign resident or a temporary resident at any time on or after 8 May 2012; and
- that individual makes a discount capital gain directly or indirectly as a beneficiary of a trust, from a CGT event that occurred after 8 May 2012; or
- a trustee who is taxed under section 98 of the *Income Tax Assessment Act 1936* (ITAA 1936) in respect of an individual beneficiary, makes a discount capital gain from a CGT event that occurred after 8 May 2012.

7.10 The effect of the measure is to:

- retain access to the full CGT discount for discount capital gains of foreign and temporary resident individuals in respect of the increase in value of a CGT asset that occurred prior to 9 May 2012;
- remove the CGT discount for discount capital gains of foreign and temporary resident individuals that arise after 8 May 2012; and
- apportion the CGT discount for discount capital gains where an individual has been both an Australian resident and a foreign or temporary resident during the period after 8 May 2012.
  - The discount percentage is apportioned to ensure the full discount (50 per cent) applies to periods when the individual was an Australian resident.

7.11 Where an Australian individual changes tax residency, the amendments will only apply to CGT assets that are taxable Australian property. This includes property characterised as taxable Australian property because an individual has chosen to disregard the CGT event triggered by their change in residency status (CGT event I1 may be disregarded under section 104-165).

7.12 Capital losses will continue to be offset against capital gains and net capital losses may still be carried forward.

7.13 These amendments are only intended to affect the discount percentage applied to a discount capital gain. These amendments do not affect other rules in the CGT regime, such as the application of the main residence exemption.

Comparison of key features of new law and current law

New law	*Current law*
The discount percentage of 50 per cent applicable to a discount capital gain of an individual is reduced: • if the CGT event from which the capital gain arises occurs after 8 May 2012; and • the individual was a foreign resident or a temporary resident at any time in the period between 8 May 2012 and the time of the CGT event. The discount percentage of 50 per cent applicable to discount capital gains assessed to a trustee that is taxed under section 98 of the ITAA 1936 in respect of an individual beneficiary is reduced: • if the CGT event from which the capital gain arises occurs after 8 May 2012; and • the beneficiary was a foreign resident or a temporary resident at any time in the period between 8 May 2012 and the time of the CGT event.	The 50 per cent discount percentage applicable to a discount capital gain of individual is available irrespective of the residency of the individual.

Detailed explanation of new law

7.14 These amendments reduce the discount percentage applicable to a discount capital gain of an individual where the individual was a foreign resident or temporary resident for some or all of the period that the CGT asset was held after 8 May 2012. ***[Schedule 7, item 6, subsection 115-105(1)]***

7.15 The amendments also reduce the discount percentage applicable to a discount capital gain made by a trustee that is taxed under section 98 of the ITAA 1936 in respect of an individual beneficiary who was a foreign resident or temporary resident for some or all of the period that the CGT asset was held after 8 May 2012. This ensures comparable treatment for beneficiaries, regardless of whether they are taxed directly or the trustee is taxed on their behalf. ***[Schedule 7, item 6, subsection 115-120)]***

7.16 The amendments apply to discount capital gains included in the assessable income of an individual irrespective of whether the CGT asset producing the gain was owned directly by the individual or held indirectly by a trust.

7.17 The amendments do not apply to reduce the discount percentage:

- where the CGT event occurred on or before 8 May 2012; or
- where an individual is an Australian resident at all times on or after 8 May 2012.

7.18 For CGT events occurring after 8 May 2012, the discount percentage applying to a discount capital gain from that event will depend on:

- whether the CGT asset was held on, or was acquired after, 8 May 2012;
- if the CGT asset was held on 8 May 2012, whether or not the individual was a resident on that date;
- whether a choice is made by an individual who was a foreign or temporary resident on 8 May 2012 to use the market value method to determine the part of the discount capital gain that accrued on and prior to that date; and
- the residency of the individual during so much of the period the CGT asset was held after 8 May 2012.

7.19 For CGT assets acquired after 8 May 2012 by an individual who was a foreign or temporary resident for the entire period the CGT asset

was held, the discount percentage will be zero. This is because such individuals are no longer eligible for the CGT discount.

7.20 For CGT assets acquired prior to 9 May 2012, and CGT assets acquired after 8 May 2012 where the residency status of the individual owner changes during the time the CGT asset was held, the discount percentage is reduced to reflect the periods the individual was eligible for the CGT discount. This is achieved through several mechanisms outlined below (generally by pro-rating the discount percentage). ***[Schedule 7, item 6, section 115-115]***

7.21 Individuals who were foreign or temporary residents on 8 May 2012 can receive the CGT discount for the gains from a CGT asset that accrued prior to the announcement of the measure. The market value of the CGT asset at 8 May 2012 is required to quantify the gain attributable to that earlier period. Individuals who do not have a market valuation will be ineligible for the CGT discount on pre-announcement gains. This is regardless of whether the individual made the discount capital gain directly or as a result of being a beneficiary of a trust. ***[Schedule 7, item 6, subsections 115-115(3) to (6)]***

7.22 In circumstances where a trustee is taxed under section 98 of the ITAA 1997 in respect of an individual beneficiary, the discount percentage will be worked out on the basis the individual made the gain.

7.23 In order for an individual (or a trustee taxed under section 98 of the ITAA 1936) to determine their reduced discount percentage, they will need to determine the following:

- the 'discount testing period' applicable to the discount capital gain; and
- which discount percentage formula from section 115-115 applies to that discount capital gain.

Determining the discount testing period

7.24 The discount testing period is the period over which the CGT discount is apportioned in order to take account of a relevant individual's tax residency status.

7.25 The start and end of the discount testing period depends on whether the individual made the discount capital gain directly or indirectly, and if the latter, on the type of trust and who is taxed.

Individuals with direct gains

7.26 For CGT assets that are directly disposed of by an individual, the discount testing period commences on the day the individual acquired the CGT asset and ends on the day the CGT event happens. ***[Schedule 7, item 6, paragraph 115-105(2)(d)]***

7.27 CGT assets to which these amendments apply may be subject to CGT roll-overs or acquired as a result of the death of an individual. Special rules about the time of acquisition are prescribed in the current law (in section 115-30). The discount testing period commences in accordance with the date of acquisition as prescribed in those rules.

7.28 In general, an individual is treated as having acquired the CGT asset when the earlier owner of the CGT asset acquired it. The individual is also treated as having the same residency status as that of the first individual during the relevant period. ***[Schedule 7 item 6, subsection 115-105(3)]***

Example 7.1

Dominic is a resident of France. On 1 January 2011 he entered into a contract to purchase a new property in Sydney. On 1 July 2012 Dominic entered into a contract to sell the property.

Dominic's discount testing period commences on 1 January 2011 and ends on 1 July 2012.

Example 7.2

Samantha is an Australian resident. On 1 July 2012, Samantha's grandmother died and Samantha inherited land in Victoria's Yarra Valley that was purchased by her grandmother under a contract entered into on 1 January 2011. Samantha's grandmother was a tax resident of the United Kingdom. On 1 January 2013 Samantha sold the land.

Samantha's discount testing period commences on 1 January 2011 and ends of 1 January 2013.

Example 7.3

Renee is a resident of South Africa and is a partner of Partnership ABC. On 1 January 2011, Partnership ABC entered a contract to purchase a new property in Sydney. On 1 July 2012 Partnership ABC entered a contract to sell the property.

Section 106-5 deems that any capital gain arising from a partnership asset is made by the partners. Renee's discount testing period commences on 1 January 2011 and ends on 1 July 2012.

Individuals with gains as a result of an interest in a fixed trust

7.29 Where an individual has a discount capital gain as a result of an interest it held in a fixed trust, the discount testing period commences on the most recent day the individual became a beneficiary of the trust and ends on the day the individual made the gain. ***[Schedule 7, item 6, table item 1 in subsection 115-110(2)]***

7.30 This discount testing period applies regardless of whether the trustee of the fixed trust held the CGT asset directly or received the capital gains indirectly as a result of an interest in another trust.

7.31 This approach overcomes difficulties that individuals may face in identifying the date of acquisition and disposal of a CGT asset where the CGT asset is held through a trust or a chain of trusts. It also reflects the decision of the individual to participate in the investment providing the capital gain.

7.32 The discount testing period commences on the 'most recent day you became a beneficiary'. Where an individual ceases to be a beneficiary of a fixed trust for a period of time, and later reacquires an interest in the same trust, the later date is the relevant start date for the discount testing period.

7.33 However, where an individual has an interest in the fixed trust and acquires a further interest at a later day, the discount testing period commences from the earlier acquisition date. This outcome is appropriate because the entity did not cease to be a beneficiary during the period, regardless of the fact its interest in the fixed trust increased.

Example 7.4

Dominic is a resident of France. On 19 May 2010, Dominic acquired an interest in a fixed trust. He acquired further units on 30 July 2012.

The trust owns various properties that it acquired between 1987 and 2009. On 1 July 2012, the fixed trust disposed of a property that it acquired in 2011. The trustee makes a capital gain from the property, which is included in the net income of the trust.

Dominic is presently entitled to income of the fixed trust for the 2012-13 income year and is assessable on a share of the net income of the trust that includes a discount capital gain relating to the sold property.

Dominic's discount testing period commences on 19 May 2010 and ends on 30 June 2013.

Example 7.5

Peter is a resident of Turkey. On 1 January 2011, he purchased an interest in a property trust in Australia that is not a managed investment trust (an indirect Australian real property interest).

On 30 June 2012, Peter is presently entitled to the income of the trust for the 2011-12 income year and is assessable on a share of the net income of the trust that includes a discount capital gain.

Peter's discount testing period for that discount capital gain commences on 1 January 2011 and ends on 30 June 2012.

On 30 June 2013, Peter is presently entitled to income of the trust for the 2012-13 income year and is assessable on a share of the net income of the trust that includes a discount capital gain. His discount testing period for that discount capital gain commences on 1 January 2011 and ends on 30 June 2013.

7.34 Where an interest in a fixed trust is acquired as a result of a CGT roll-over or the death of an individual, the rules in section 115-30 apply. These rules prescribe the time the interest was deemed to have been acquired as the time the earlier owner of the interest acquired it. The beneficiary is treated as having the same residency status as that of the first individual during the relevant period.

7.35 However, in the case where an individual held an interest in a fixed trust and then received another interest in that fixed trust as a result of the death of an individual, the earliest acquisition date is the relevant date for the discount testing period.

Example 7.6

Renee is a resident of Spain. On 19 May 2010, Renee acquired an interest in a fixed trust. On 1 August 2012, Renee inherits, as part of a deceased estate, another interest in the fixed trust. Renee's mother-in-law (deceased) acquired the interest in the fixed trust (first became a beneficiary) on 1 April 2005,

On 1 July 2012, fixed trust X disposed of a property that it acquired in 2011. The trustee makes a capital gain from the property, which is included in the net income of the trust. Renee is presently entitled to income of fixed trust X for the 2012-13 income year and is assessable on a share of the net income of the trust that includes a discount capital gain relating to the sold property.

Renee's discount testing period for that discount capital gain commences on 1 April 2005 and ends on 30 June 2013. Renee is also deemed to have the same residency status as her mother-in-law, for the

purposes of section 115-115, for the period of 1 April 2005 until 1 August 2012.

Example 7.7

Using the example above, except Renee's mother-in-law acquired the interest in the fixed trust (first became a beneficiary) on 1 April 2011. On 19 May 2010, Renee acquired an interest in the fixed trust.

Renee's discount testing period commences on 19 May 2010 and ends on 30 June 2013. This is because Renee first became of beneficiary of the fixed trust on 19 May 2010. The deemed acquisition of her mother in law's interest (as a result of the deceased estate) increased the size of her interest in the fixed trust and does not extend the discount testing period. The residency status of Renee's mother in law during the discount testing period is also irrelevant.

Individuals with gains as a result of an interest in a non-fixed trust

7.36 Generally, an individual beneficiary of a non-fixed trust (for example a discretionary trust) does not hold a quantifiable interest in the trust. Consequently, special discount testing period rules apply to identify when the discount testing period commences for these beneficiaries. These rules effectively disregard the non-fixed trust and treat the individual beneficiary as though it held the CGT asset or interest in a fixed trust (held by the trustee of the non-fixed trust) directly.

7.37 Where the trustee of a non-fixed trust directly held the CGT asset, the discount testing period for the beneficiary commences on the day the trustee of the non-fixed trust acquired that CGT asset. The same applies for an interest in a fixed trust, with the discount testing period commencing on the day the non-fixed trust trustee acquired the interest in the fixed trust. ***[Schedule 7, item 6, table item 2 in subsection 115-110(2)]***

7.38 The discount testing period will always end on the day the individual beneficiary made the gain. Generally, this will be the end of the income year.

Example 7.8

Dominic is a resident of France. On 1 January 2011 non-fixed trust purchased a new property in Sydney. On 1 July 2012, the non-fixed trust sold the property. Dominic is presently entitled to income of the fixed trust for the 2012-13 income year and is assessable on a share of the net income of the trust that includes a discount capital gain relating to the sold property.

Dominic's discount testing period commences on 1 January 2011 and ends on 30 June 2013.

7.39 Where an individual is a beneficiary through a chain of non-fixed trusts, the discount testing period is determined by reference to the first trustee in the chain that holds either an interest in a fixed trust or a direct interest in the CGT asset itself.

7.40 The discount testing period commences at the time that the non-fixed trust trustee acquired the relevant fixed trust interest or relevant CGT asset. If the CGT asset is directly held by a fixed trust, it is the interest in that fixed trust that is relevant for the purposes of the discount testing period of the beneficiary of the non-fixed trust.

Example 7.9

Dominic is a resident of France. On 1 January 2011 non-fixed trust X purchased a new property in Sydney. On 1 July 2012, non-fixed trust X sold the property.

On 1 January 2013, non-fixed trust X makes non-fixed trust Y 'specifically entitled' to the capital gain relating to the sold property.

Dominic is presently entitled to the income of non-fixed trust Y for the 2012-13 income year and is assessable on a share of the net income of the trust that includes a discount capital gain relating to the sold property.

Dominic's discount testing period commences on 1 January 2011 and ends on 30 June 2013.

In instances where a trustee does not distribute the income the normal trust rules apply.

7.41 The discount testing period commences on the most recent day the non-fixed trust trustee became a beneficiary of the fixed trust. 'The most recent day' is discussed in detail at paragraphs 7.32 and 7.33. ***[Schedule 7, item 6, table item 3 in subsection 115 -110(2)]***

Example 7.10

Non-fixed trust X purchased an interest in fixed trust Y on 1 January 2011. On 1 August 2012, fixed trust Y sells an Australian real property asset acquired in 2008.

On 1 September 2012, non-fixed trust X is made 'specially entitled' to the capital gain made by fixed trust Y.

Dominic is presently entitled to the income of non-fixed trust X for the 2012-13 income year and is assessable on a share of the net income of the trust that includes a discount capital gain relating to the sold property.

Dominic's discount testing period commences on 1 January 2011 and ends on 30 June 2013.

Example 7.11

Non-fixed trust X purchased an interest in fixed trust Y on 1 January 2011. On 1 September 2012, non-fixed trust X was made 'specifically entitled' to the capital gain made by fixed trust Y.

On 1 January 2013, non-fixed trust X makes non-fixed trust Z 'specifically entitled' to the capital gain.

Dominic is presently entitled to the income of non-fixed trust Z for the 2012 income year and is assessable on a share of the net income of the trust that includes a discount capital gain relating to the sold property.

Dominic's discount testing period commences on 1 January 2011 and ends on 30 June 2013.

Individual beneficiary — Trustee taxed under section 98

7.42 Where a trustee is assessed on a discount capital gain under section 98 of the ITAA 1936 in respect of an individual beneficiary, the trustee will reduce the discount percentage to reflect only the period that the individual beneficiary was an Australian tax resident. ***[Schedule 7, item 6, section 115-120)]***

7.43 The discount testing period applied to the trustee is determined as if the beneficiary had made the discount capital gain.

Example 7.12

Dominic is a resident of France. On 1 January 2011, he purchased an interest in a fixed trust.

Dominic is presently entitled to income of the fixed trust for the 2012-13 income year and is assessable on a share of the net income of the trust that includes a discount capital gain relating to the sold property. Because Dominic is a foreign resident at the end of the income year, subsection 98(2A) of the ITAA 1936 applies and the trustee is assessed in accordance with section 115-220 of the ITAA 1997.

The trustee's discount testing period commences on 1 January 2011 and ends on 30 June 2013.

Example 7.13

Dominic is a resident of France. On 1 January 2011, a non-fixed trust purchased a property in Sydney. On 1 May 2014, the non-fixed trust sells the property.

Dominic is presently entitled to income of the non-fixed trust for the 2012-13 income year and is assessable on a share of the net income of the trust that includes a discount capital gain relating to the sold property. Because Dominic is a foreign resident at the end of the income year, subsection 98(2A) of the ITAA 1936 applies and the trustee is assessed in accordance with section 115-220 of the ITAA 1997.

The trustee's discount testing period commences on 1 January 2011 and ends on 1 May 2014.

Calculating the discount percentage

Assets acquired after 8 May 2012

7.44 Individuals that are an Australian resident and acquire CGT assets after 8 May 2012 and do not change their tax residency are not subject to these amendments. The full discount percentage of 50 per cent applies.

7.45 Where the discount testing period commences after 8 May 2012 and the individual is a foreign or temporary resident for some or all of that period, then they are subject to these amendments. The discount percentage will be adjusted to reflect only that proportion of the discount testing period that the individual was an Australian resident. ***[Schedule 7, item 6, subsection 115-115(2)]***

7.46 The discount percentage is calculated under the following formula:

$$\frac{\text{Number of days during discount testing period that you were an Australian resident (but not a }^{*}\text{temporary resident)}}{2 \times \text{Number of days in discount testing period}}$$

7.47 If the individual was a foreign resident or temporary resident for the entire discount testing period the discount percentage will be zero.

Example 7.14: Asset acquired after 8 May 2012 and the individual is a foreign resident during part of the discount testing period

XYZ fixed trust acquires a taxable Australian property asset on 1 January 2014 for $10,000. XYZ fixed trust then sells the asset on 1 January 2016 for $20,000. XYZ fixed trust makes a distribution including the discount capital gain to its beneficiaries on 30 June 2016 (assume this is when those beneficiaries become presently entitled for the 2015-16 income year).

There are two beneficiaries of XYZ trust, each holding a 50 per cent interest in the trust. The first is Lucas, who has been a beneficiary of the trust since 1 January 2013 and has been an Australian resident for the entire period.

The other beneficiary is Lachlan. Lachlan has also been a beneficiary of the trust since 1 January 2013. Lachlan was a foreign resident individual until 1 January 2015, when he became an Australian resident.

The capital gains of the XYZ trust is $10,000 against which it applies the full discount percentage (50 per cent). Lucas and Lachlan are both presently entitled to $2,500 each.

Applying the rules in Subdivision 115-C, both Lachlan's and Lucas's capital gains are grossed up so that they have a discount capital gain of $5,000 each.

Lucas' discount testing period commences 1 January 2013 and ended on 30 June 2016. As Lucas has not been a foreign or temporary resident during any of the discount testing period, the amendments do not apply to his share of the gain. Therefore, he is entitled to the full discount percentage of 50 per cent.

Lachlan's discount testing period also commences 1 January 2013 and ended on 30 June 2016. Lachlan has been a foreign resident during the discount testing period and therefore is subject to sections 115-110 and 115-115.

As Lachlan's interest in the fixed trust was acquired after 8 May 2012, Lachlan must calculate the discount percentage under the formula in subsection 115-115(2). Therefore, Lachlan's discount percentage is,

$$\frac{547}{2554} = 21.42\%$$

Assets acquired prior to 9 May 2012

7.48 Individuals that were Australian residents on 8 May 2012 and at all times after 8 May 2012 are not subject to these amendments. The full discount percentage of 50 per cent applies.

7.49 Individuals that were foreign or temporary residents on 8 May 2012 (being the date of announcement) retain access to the full CGT discount for gains accrued up to that date. Such individuals must choose to use the market value to quantify the gain (the market value method is explained in further detail below).

7.50 The discount percentage that applies to gains accrued after 8 May 2012 is calculated on an apportionment basis taking into account the relevant individual's residency during the discount testing period. The discount percentage will reflect the proportion of the period after 8 May 2012 until the gain was made that the individual was an Australian resident.

7.51 Similarly, where the individual makes a discount capital gain as a beneficiary of a fixed trust, the discount percentage will be adjusted to reflect the proportion of the period after 8 May 2012 until the gain was made that the individual was an Australian resident.

Foreign or temporary resident on 8 May 2012 and the individual has chosen market value

7.52 To ensure gains accrued on the CGT asset prior to 9 May 2012 remain eligible for the full CGT discount, an individual who was a foreign or temporary resident on 8 May 2012 may obtain a market valuation of that asset.

7.53 The balance of any gain on the CGT asset accrued after 8 May 2012 will be subject to a discount percentage that is apportioned to reflect the period after 8 May 2012 that the individual was an Australian resident.

7.54 The market value method can only be used in respect of a discount capital gain where the gain is:

- made by an individual that was a foreign or temporary resident on 8 May 2012; and
- from a CGT asset acquired prior to 9 May 2012.

7.55 In addition to those requirements:

- the discount testing period for the discount capital gain must have commenced prior to 9 May 2012;
- the CGT asset's market value at 8 May 2012 cannot be less than its cost base (it must have increased in value); and
- the individual must choose to use the market value method.

[Schedule 7, item 6, subsections 115-115(4) and (5)]

7.56 If an individual is eligible and chooses to use the market value method, the discount percentage for the discount capital gain is calculated as follows:

- Step 1 – Calculate the CGT asset's 'excess'.
  - The ***excess*** is the increase in value of the asset that has accrued prior to 9 May 2012. It is calculated as the amount by which the CGT asset's market value at 8 May 2012 exceeds its cost base at 8 May 2012. ***[Schedule 7, item 5, paragraph 115-115(4)(d)]***
  - If the ***excess*** is equal to or greater than the total discount capital gain from the CGT asset, the full discount percentage of 50 per cent applies as the total gain accrued prior to 8 May 2012. This ensures that there is no reduction in the discount percentage where the value of the CGT asset has fallen between 8 May 2012 and the end of the discount testing period. ***[Schedule 7, item 6, subsection 115-115(4)]***
- Step 2 — If the ***excess*** is less than the discount capital gain from the CGT event, that is the value of the CGT asset increased after 9 May 2012, the discount percentage is worked out using the following formula:

$$\frac{\text{Excess} + \left(\dfrac{\text{Shortfall} \times \begin{array}{c}\text{Number of apportionable days that}\\ \text{you were an eligible resident}\end{array}}{\text{Number of apportionable days}} \right)}{2 \times \text{Amount of the }{}^{*}\text{discount capital gain}}$$

[Schedule 7, item 6, subsection 115-115(5)]

– The ***shortfall*** is the net increase in the value of the CGT asset accrued *after* 8 May 2012. This is calculated by subtracting the ***excess*** (amount of the capital gain accrued prior to 9 May 2012) from the amount of the total discount capital gain.

– The number of ***apportionable days*** means the number of days after 8 May 2012 during the discount testing period.

– ***The number of apportionable days that you were an eligible resident*** is the number of days after 8 May 2012 during the discount testing period that the individual was an Australian resident (but not a temporary resident).

7.57 In circumstances where the CGT asset or an interest in a fixed trust (that the capital gain was attributable to) was subject to section 115-30 (rules regarding acquisition when the asset has been subject to a roll-over), the apportionable days and residency status of the previous owner of the asset or interest in the fixed trust will be relevant.

7.58 Where an individual chooses to apply the market value method, the general CGT record keeping requirements (see section 121-20) must be satisfied. This means that a market valuation must be undertaken and the record of that valuation must be kept. The time at which the valuation must be performed is not prescribed.

Example 7.15: Asset acquired before 9 May 2012 and the market value method is used. However, the gain at 8 May 2012 exceeds the discount capital gain

Dominic is a resident of France. On 1 January 2011 he purchased a property in Sydney for $1,000,000. On 8 May 2012 the property was valued at $1,100,000. On 1 July 2012 Dominic sold the property for $1,050,000.

Dominic has a discount capital gain from the disposal of the property of $50,000.

As Dominic is a foreign resident, the discount percentage applicable to the gain may be adjusted by this measure.

For the purposes of determining the discount percentage, Dominic chooses to use the market value method. The discount percentage is worked out as follows:

- Calculate the CGT asset's ***excess***.

  $1,100,000 – $1,000,000 = $100,000

As the amount of the gain accrued before 9 May 2012 of $100,000 is greater than the total discount capital gain of $50,000 from the disposal of property the full discount percentage of 50 per cent applies. ***[Schedule 7, item 6, subsection 115-115(4)]***

Example 7.16: Asset acquired before 9 May 2012 and market value is used

Samantha is an Australian resident. On 1 July 2012, Samantha's grandmother died and Samantha inherited land in Victoria's Yarra Valley that was purchased on 1 January 2011 for $10,000,000. Samantha's grandmother was a tax resident of the United Kingdom.

On 8 May 2012, Samantha's land was valued at $11,000,000. On 1 January 2013 Samantha sold her land for $12,000,000.

Samantha has a total discount capital gain from the disposal of the land of $2,000,000.

As Samantha is a resident for part of the discount testing period, the discount percentage applicable to the gain is determined by reference to the amendments introduced in this bill.

Furthermore, because item 4 of section 115-30 applies to the CGT asset (as Samantha received the CGT asset as the beneficiary of a deceased estate), Samantha's grandmother's residency status and previous holding are relevant for determining the discount percentage. As Samantha's grandmother held the CGT asset on 8 May 2012, her residency status requires that Samantha calculate the discount percentage under subsection 115-115(4) or (6).

For the purposes of determining the discount percentage, Samantha chooses to use the market value method. The discount percentage is worked out as follows:

Step 1 Calculate the CGT asset's ***excess***.

$11,000,000 – $10,000,000 = $1,000,000

Step 2 As the ***excess*** is less than the discount capital gain ($2,000,000) from the CGT event, the discount percentage is worked out using the following figures:

- the ***shortfall*** amount is $1,000,000 ($2,000,000 less the ***excess***);
- the ***number of apportionable days*** Samantha was ***an eligible resident*** is 185 days (that is, days Samantha and her grandmother were an eligible resident);

- the ***number of apportionable days*** is 238 days (that is, the number of apportionable days taking into account Samantha and her grandmother's holding of the CGT asset); and
- twice the ***amount of discount capital gain*** is $4,000,000.

Therefore, Samantha's discount percentage is:

$$\frac{\$1{,}000{,}000 + \left(\frac{\$1{,}000{,}000 \text{ x } 185 \text{ days}}{238 \text{ days}}\right)}{\$4{,}000{,}000} = 44.43\%$$

Individual is a foreign or temporary resident on 8 May 2012 and has not chosen market value

7.59 Where an individual does not choose to use the market value method in respect of a CGT asset that is acquired prior to 9 May 2012 (and which has a discount period commencing prior to that date), the discount percentage is calculated using the following formula:

$$\frac{\text{Number of apportionable days that you were an Australian resident (but not a }^{*}\text{temporary resident)}}{2 \times \text{Number of days in discount testing period}}$$

[Schedule 7, item 6, subsection 115-115(6)]

7.60 The effect of not choosing the market value method is that the CGT discount is not available for gains accrued prior to 8 May 2012. The CGT discount remains available for periods after 8 May 2012 that the individual was an Australian resident. The formula achieves this affect by calculating the CGT discount as the time during the period after 8 May 2012 that the individual was an Australian resident as a proportion of the total time that the CGT asset or interest in the fixed trust was held.

Example 7.17: Asset acquired before 9 May 2012 and market value method is not used

Applying the facts described in Example 6.15, if Dominic did not choose to apply the market value, his discount percentage applicable to the discount capital gain of $50,000 would be:

$$\frac{0}{1096} = 0\%$$

Example 7.18

Applying the facts described in Example 6.16, if Samantha did not choose to apply the market value, her discount percentage applicable to the discount capital gain of $2,000,000 would be:

$$\frac{185}{1464} = 12.64\%$$

Resident individual on 8 May 2012

7.61 If an individual makes a discount capital gain from a CGT event occurring after 8 May 2012 and was:

- an Australian resident (but not a temporary resident) on 8 May 2012; and
- a foreign or temporary resident at any time during the period after 8 May 2012,

the discount percentage is apportioned to reflect all days in the period of ownership after 8 May 2012 that the individual was an Australian resident.

7.62 This is achieved by applying the following formula:

$$\frac{\text{Number of days in discount testing period} - \text{Number of apportionable days that you were a foreign resident or }^{*}\text{temporary resident}}{2 \times \text{Number of days in discount testing period}}$$

[Schedule 7, item 6, subsection 115-115(3)]

7.63 This approach results in the discount percentage being determined on the basis that the individual was eligible for the CGT discount for the entire period it owned the asset or interest in the fixed trust prior to 9 May 2012. The discount percentage is reduced for any part of the period after 8 May 2012 in which the individual was not eligible for the CGT discount (that is, any period in which the individual was a foreign or temporary resident).

Example 7.19: Resident individual on 8 May 2012

XYZ Trust buys an asset on 1 January 2010 for $10,000. XYZ trust then sells the asset on 1 January 2016 for $50,000.

There are two beneficiaries of the trust, each holding a 50 per cent interest in the trust. One of the beneficiaries is Lucas, who has been a beneficiary of the trust since 1 January 2011 and was an Australian

resident individual until and including 31 December 2014 (after which time he became a foreign resident).

The discount capital gain of the XYZ trust is $40,000, against which it applies the full discount percentage (50 per cent). Lucas is presently entitled to $10,000 at the end of the income year. Therefore, Lucas makes the gain on 30 June 2016.

Applying the rules in Subdivision 115-C, Lucas's capital gain is grossed up so that he has a discount capital gain of $20,000.

Lucas is subject to section 115-110 and subsection 115-115(3) as he is an individual, was a resident at 8 May 2012, has been a foreign resident individual during the discount testing period and received a discount capital gain as a beneficiary of a trust.

Lucas is subject to subsection 115-115(3) because he was an Australian resident on 8 May 2012.

The relevant dates for the discount testing period are 1 January 2011 (this is the date Lucas became a beneficiary of the fixed trust) and 30 June 2016. Therefore, the following numbers are relevant:

- ***the number of days in the discount testing period*** is 2008 days;
- ***the number of apportionable days Lucas was a foreign or temporary resident*** is 547 days; and
- ***two times the number of days in the discount testing period*** is 4016 days.

Therefore, applying subsection 115-115(3), Lucas' discount percentage is:

$$\frac{2008 - 547}{4016} = 36.38\%$$

Application and transitional provisions

7.64 The measure applies to CGT events that occur after 8 May 2012.

7.65 Gains accrued prior to 9 May 2012 remain eligible for the full CGT discount if the individual chooses to obtain market valuation of the asset as at 8 May 2012.

Consequential amendments

7.66 Consequential amendments are required to make references to the new sections 115-105, 115-110 and 115-115 in other areas of the tax law. ***[Schedule 7, items 1 to 4, subsection 115-30(1) and section 115-100]***

7.67 An amendment is also required to the main discount percentage provision to ensure the discount percentage resulting from section 115-115 applies. ***[Schedule 7, item 5, subsection 115-100]***

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Removing the Capital Gains Tax Discount for Foreign Individuals

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

Overview

7.69 This Schedule amends the *Income Tax Assessment Act 1997* to remove the CGT discount on discount capital gains accrued after 8 May 2012 for foreign resident and temporary resident individuals.

Human rights implications

7.70 In the context of this Schedule, and international taxation practice more generally, the differentiation of treatment between Australian residents and foreign residents is considered reasonable and justified.

7.71 There is a well-established body of international law and practice recognising that taxation laws of a State can differentiate between the tax treatment of residents of that State and the tax treatment of residents of other States. For example, treaties to prevent double taxation use residence status as a way to allocate taxing rights between States. At the same time, discrimination between residents of the same State on the basis of their nationality is prohibited. This Schedule does not

differentiate on the basis of nationality but on residency for the purposes of tax treatment.

7.72 The different treatment applied in this measure, of taxpayers according to their residence status (as opposed to their nationality), is consistent with that body of international law and practice.

7.73 The differentiation between foreign residents and Australian residents is a feature of the existing law relating to the taxation treatment of capital gains. Foreign residents are only subject to CGT if the CGT event happens in relation to a CGT asset that is taxable Australian real property. For Australian residents, CGT applies to all CGT assets (including non-real property) held anywhere in the world.

7.74 There is no basis to conclude that the treatment accorded foreign residents in this Schedule amounts to discrimination on the basis of 'other status' under the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Conclusion

7.75 This Schedule is compatible with human rights as it does not raise any human rights issues.

Assistant Treasurer, the Hon David Bradbury

Chapter 8 Tax exemption for payments under the Defence Abuse Reparation Scheme

Outline of chapter

8.1 Schedule 8 to this Bill amends the *Income Tax Assessment Act 1997* (ITAA 1997) to exempt from income tax, payments made under the Defence Abuse Reparation Scheme (the Scheme).

Context of amendments

Payments under the Scheme

8.2 The Defence Abuse Response Taskforce (the Taskforce) was set up in response to the DLA Piper *Report of the Review of allegations of sexual and other abuse in Defence*. One of the functions of the Taskforce is to assess allegations concerning abuse by Defence personnel which occurred prior to 11 April 2011.

8.3 As part of this process the Taskforce has established the Scheme, which establishes a mechanism for the Department of Defence to make a monetary payment to persons who in the opinion of the Reparation Payments Assessor may have, plausibly, suffered abuse whilst employed in Defence.

8.4 A person may receive only one payment under the Scheme and the amount of any payment under the Scheme is at the discretion of the Reparation Payments Assessor, in accordance with the Defence Abuse Reparation Scheme Guidelines.

Taxable status of the payments

8.5 Whether a payment is subject to tax is determined by its character in the hands of the recipient. A payment that has the character of income according to ordinary concepts is assessable income unless a statutory exemption applies. One-off payments will generally have the character of ordinary income if they are received as a product of employment, services rendered or the carrying on of a business.

8.6 As payments made under the Scheme arise out of an employment relationship with the Department of Defence or the Australian Defence Force, it is possible that they could also be characterised as statutory income under section 15-2 of the ITAA 1997.

Summary of new law

8.7 This measure amends the ITAA 1997 to exempt from income tax, payments made under the Scheme.

Comparison of key features of new law and current law

New law	*Current law*
Payments made to a recipient under the Scheme are exempt from income tax.	Payments made under the Scheme may be subject to income tax depending on the particular circumstances of the recipient.

Detailed explanation of new law

8.8 This measure inserts a specific exemption into the ITAA 1997 to ensure that all individuals who receive a payment under the Scheme do not have to pay income tax on that payment.

8.9 Section 51-5 of the ITAA 1997 contains a table detailing defence related payments that are exempt from income tax.

8.10 Schedule 8 amends section 51-5 of the ITAA 1997 to insert a new item 1.7 into the table, exempting from income tax, payments made under the Scheme. ***[Schedule 8, item 2, item 1.7 in table in section 51-5]***

8.11 Section 11-15 of the ITAA 1997 lists income which is exempt from income tax. Schedule 8 makes a consequential amendment to this list to include payments made under the Scheme as a category of exempt income. ***[Schedule 8, item 1]***

8.12 This ensures that the payments will not be assessable income so that those who receive this payment will receive the full benefit of the payment.

Application and transitional provisions

8.13 These amendments will apply to the 2012-13 income year and later income years. ***[Schedule 8, item 3]***

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Tax exemption for payments under the Defence Abuse Reparation Scheme

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

Overview

8.15 Schedule 8 to this Bill amends the ITAA 1997 to exempt from income tax payments made under the Defence Abuse Reparation Scheme in the 2012-13 income year and later income years.

Human rights implications

8.16 This Schedule does not engage any of the applicable rights or freedoms.

Conclusion

8.17 This Schedule is compatible with human rights as it does not raise any human rights issues.

Assistant Treasurer, the Hon David Bradbury

Chapter 9
GST-free treatment for National Disability Insurance Scheme funded supports

Outline of chapter

9.1 Schedule 9 to this Bill amends the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) to ensure that certain services and other things ('supports') supplied to a National Disability Insurance Scheme (NDIS) participant as part of an NDIS plan under the *National Disability Insurance Scheme Act 2013* (NDIS Act) are GST-free.

9.2 All legislative references in this chapter are to the GST Act unless otherwise stated.

Context of amendments

9.3 Supplies of various disability supports are GST-free under a number of provisions in Subdivision 38-B if the supplier receives government funding for the supplies. These provisions include but are not limited to the following:

- section 38-40 which provides that a supply of services is GST-free if the supplier receives funding under the *Disability Services Act 1986* or under a complementary State or Territory law in respect of the services;
- subsection 38-30(2) which provides that a supply of care is GST-free if the supplier receives funding under the *Home and Community Care Act 1985* in connection with that supply; and
- subsection 38-30(4) which provides that a supply of care is GST-free if the supplier receives funding from the Commonwealth, a State or a Territory in connection with the supply; and the supply is of a kind determined in writing by the Aged Care Minister.

9.4 However, the NDIS government funding for some of these disability support types is not provided to the suppliers. Instead, the NDIS funding (referred to as 'NDIS amount' in the NDIS Act) is provided to the

NDIS participant (that is, the person with a disability) or another person managing the funding for the participant.

9.5 The NDIS funding may be:

- managed by the participant (or a nominee of the participant) in accordance with the participant's plan for purchasing and paying for the supports;
- managed by a registered plan management provider in accordance with the participant's plan for purchasing and paying for the supports required by the participant; or
- managed by 'DisabilityCare Australia' (DCA) (the Agency managing the NDIS) in accordance with the participant's plan for purchasing and paying for the supports required by the participant.

9.6 A supply to an NDIS participant of a support they purchase is not GST-free under any of the current GST provisions which rely on the supplier receiving government funding for the supplies. This is because the supplier does not receive NDIS funding from the government for the supplies. However, some limited kinds of these supplies may be GST-free under other provisions in the GST Act, which do not require the supplier to be in receipt of government funding.

9.7 These amendments ensure that certain supplies to an NDIS participant of supports that are part of an NDIS plan are GST-free.

9.8 Suppliers may receive non-NDIS government funding for supplies of disability supports that are not part of an NDIS plan. These supplies will continue to be GST-free if a relevant provision in Subdivision 38-B is satisfied.

Summary of new law

9.9 Schedule 9 amends the GST Act to ensure that certain disability supports supplied to an NDIS participant as part of an NDIS plan under the NDIS Act are GST-free.

9.10 Specifically, Schedule 9 requires that for a supply to be GST-free it must be made under a written agreement between the supplier and the participant (or another person on behalf of the participant) and it must be of a kind which is included in a determination by the Disability Services Minister.

9.11 The amendments made by this Schedule apply in relation to supplies made on or after the commencement of provisions in the NDIS Act relating to participants' plans.

Comparison of key features of new law and current law

New law	*Current law*
Providing GST-free treatment for National Disability Insurance Scheme funded supports	
Certain disability supports supplied to an NDIS participant as part of an NDIS plan are GST-free. Supplies of various disability supports may still be GST-free under certain provisions of the GST Act, where the supplier receives government funding for the supplies. Some disability supports may be GST-free under one or more provisions of the GST Act even if the supplier is not in receipt of government funding. However, these provisions may not apply to some of the disability supports made to an NDIS participant.	Supplies of various disability supports may be GST-free under certain provisions of the GST Act, if the supplier receives government funding for the supplies. Some disability supports may be GST-free under one or more provisions of the GST Act even if the supplier is not in receipt of government funding. However, these provisions may not apply to some of the disability supports made to an NDIS participant.

Detailed explanation of new law

Overview

9.12 The amendments require that for a supply of a disability support to be GST-free it must be a reasonable and necessary support supplied to a participant as specified in the participant's plan.

9.13 A disability support could be any support provided, by a person or entity, intended to assist people with disability to realise their potential for physical, social, emotional and intellectual development, and participate in social and economic life.

9.14 The supply must also be made under a written agreement between the supplier and the participant or another person (including a person acting on behalf of the participant). The written agreement

provides supporting evidence that the appropriate GST treatment has been applied for the relevant supplies.

9.15 Also, for the supply to be GST-free, it must be of a kind determined in a legislative instrument by the Minister in charge of disability services.

Supply must be of one or more reasonable and necessary supports specified in the participant's plan

9.16 Section 33 of the NDIS Act specifies what information must be included in a participant's plan, including a statement of participant supports. This statement sets out any general supports that will be provided to, or in relation to, the participant, and any reasonable and necessary supports that will be funded under the NDIS.

9.17 In order to be GST-free, the supply of a disability support to a participant must be a supply of one or more 'reasonable and necessary supports' (as referred to in paragraph 33(2)(b) of the NDIS Act) that is specified in the statement of participant supports in the participant's plan. ***[Schedule 9, item 1, paragraphs 38-38(a) and (b)]***

Example 9.1: Supply must be a reasonable and necessary support specified in the participant's statement of participant supports

Jason is an NDIS participant who owns his own home. The statement of participant supports in Jason's NDIS plan specifies that he is to be provided with an NDIS amount of $20,000 for home modifications to his bathroom. However, Jason identifies this as a good time to renovate his kitchen and engages the same builder.

For the purposes of this example, it is assumed that home modifications is specified in a determination made by the Minister for Disability Services as a kind of support that will be GST-free if the other conditions in section 38-38 are met.

However, DCA has determined that the renovation to the kitchen did not qualify as a reasonable and necessary support in Jason's particular circumstances. It is therefore not listed as a reasonable and necessary support in Jason's statement of participant supports.

To determine whether the supply of the renovation to the kitchen is GST-free under section 38-38, the builder checks to see if it is listed as a reasonable and necessary support in Jason's NDIS plan. Because the kitchen renovation is not listed as a reasonable and necessary support in Jason's plan, the supply is not GST-free under section 38-38.

9.18 If required, DCA can work with a participant who is self-managing the funding for their supports to develop documentation that sets out relevant reasonable and necessary supports from their plan, for the participant to give to suppliers.

9.19 The plan must be in effect under section 37 of the NDIS Act. This requires the CEO of DCA to have approved the participant's statement of participant supports. The plan ceases to be effective when the plan is replaced by another plan, or the participant ceases to be an NDIS participant. ***[Schedule 9, item 1, paragraph 38-38(a)]***

Written agreement requirement

9.20 To ensure that only a supply to a participant that is specified as a 'reasonable and necessary support' in a participant's NDIS plan is GST-free, the supply must be made under a written agreement between the supplier and the participant (or another person on behalf of the participant) that:

- identifies the participant; and
- states that the supply is a supply of one or more of the 'reasonable and necessary supports' specified in the statement of participant supports in the participant's plan.

[Schedule 9, item 1, paragraph 38-38(c)]

9.21 For the purposes of these amendments, a 'written agreement' is not limited to legally executed contracts but may include documents (including those in electronic form) which provide written evidence of a legally binding obligation on the supplier to make the supply to the participant as specified in the participant's plan. If the relevant parties can demonstrate that they have a binding agreement in written form that identifies the participant and states that the supply is a supply of one or more reasonable and necessary supports as specified in the participant's plan, the requirement for a written agreement is satisfied.

9.22 The written agreement may be a single document. Alternatively, it may be evidenced from several documents. Accordingly, correspondence between the parties and receipts or invoices issued by the supplier that are consistent with the existence of a binding agreement may be sufficient evidence of the written agreement.

Example 9.2: Supply made under a written agreement in accordance with a self-managed participant's plan

Joe, an NDIS participant, requires five hours of support on a weekly basis which is specified as a reasonable and necessary support in his NDIS plan. He requests XYZ Co (XYZ) to supply him with the support for a period of three months based on the NDIS published price. Joe provides XYZ with a letter identifying that he is an NDIS participant, and also provides XYZ with the relevant part of his NDIS plan that specifies the type of support that he is to be provided with.

XYZ writes to Joe to confirm its agreement to provide the support, including the start date, and signs the letter. For the next three months, XYZ supplies Joe with the requested supports. These supplies are made under a 'written agreement' that identifies Joe and states that the supplies are a reasonable and necessary support specified in Joe's plan.

If all the other requirements of section 38-38 are satisfied, the supplies that XYZ makes to Joe as specified in Joe's plan are GST-free.

Example 9.3: Supply made under a written agreement in accordance with a participant's plan managed by a plan management provider registered with DCA

ABB Co (ABB) is registered with DCA as a plan management provider for NDIS participants. A number of NDIS participants have engaged ABB to manage their NDIS plans for them.

One participant identifies that they are interested in considering Elite, a provider of disability supports, to deliver one of the reasonable and necessary supports in their plan. With the participant's consent, ABB emails Elite with the relevant requirements of the participant, including the participant's name and the number of hours of support needed as specified in the participant's plan as a reasonable and necessary support. Elite meets with the participant and they discuss arrangements for the delivery of the supports. Elite writes to the participant and ABB setting out the details of the support to be provided and the price to be paid, but makes no reference to the participant's plan. ABB replies in writing to confirm the participant's agreement to receive the supports from Elite.

The 'written agreement' requirement under section 38-38 is satisfied by the written evidence provided by the combination of ABB's email setting out the supports required in accordance with the reasonable and necessary supports specified in the participant's plan, Elite's letter confirming support arrangements and ABB's letter of acceptance.

Neither Elite's letter nor ABB's letter of acceptance, nor both together would be sufficient evidence of the written agreement. This is because these documents do not state that the supply is of a reasonable and

necessary support as specified in the participant's plan. ABB's email on its own is also not sufficient evidence of the written agreement because it does not evidence a binding obligation on Elite to make the supplies to the participant.

If all the other requirements of section 38-38 are satisfied, the supplies Elite makes to the participants in accordance with their plans are GST-free.

Supply must be of a kind determined in a legislative instrument by the Minister in charge of disability services

9.23 These amendments enable the Disability Services Minister to make a determination by legislative instrument of the kinds of supports that are GST-free. ***[Schedule 9, items 1 and 2, paragraph 38-38(d) and subsection 177-10(5)]***

9.24 This approach ensures that GST-free treatment is provided only for those kinds of supports specified in the legislative instrument. This minimises the risk of extending GST-free status in unintended circumstances. It also provides flexibility for revising the determination, if required, as circumstances change.

9.25 A legislative instrument made under this power may apply retrospectively, to align with the application date for the measure. This retrospective power deals with the possibility that the legislative instrument might not be made until after the application date for the amendments in this Schedule. ***[Schedule 9, item 2, subsection 177-10(6)]***

9.26 This is generally to the benefit of taxpayers, as without the ability to apply the determination retrospectively, it is possible that no determination will apply at the time these amendments begin to apply. In that case, these amendments would have no effect as no supports would meet this condition for the GST-free treatment when these amendments begin to apply.

9.27 A defined term for Disability Services Minister is included in the dictionary in the GST Act. The Disability Services Minister is the Minister administering the NDIS Act. ***[Schedule 9, item 3, section 195-1]***

Application provision

9.28 The amendments made by this Schedule apply in relation to supplies made on or after the commencement of section 37 of the NDIS Act. Section 37 of the NDIS Act deals with when an NDIS plan comes into effect. The application provision ensures that GST-free

treatment can be provided once supplies start to be made under NDIS plans. ***[Schedule 9, item 4]***

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

GST-free treatment for National Disability Insurance Scheme funded supports

9.29 Schedule 9 to this Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

9.30 Schedule 9 to this Bill amends the *A New Tax System (Goods and Services Tax) Act 1999*.

9.31 The purpose of Schedule 9 is to ensure that certain services and other things supplied to an NDIS participant as part of an NDIS plan under the *National Disability Insurance Scheme Act 2013* are GST-free.

Human rights implications

9.32 Schedule 9 to this Bill engages the following human rights.

Right to social security

9.33 Article 9 of the International Covenant on Economic, Social and Cultural Rights recognises the right to social security for all persons while Article 28 of the Convention on the Rights of Persons with Disabilities requires countries to recognise the right of people with disabilities to social protection and to take appropriate steps to ensure access by people with disabilities to social protection and poverty reduction programs and to retirement benefits and programs.

9.34 The amendments to the GST Act make clear that a supply of a reasonable and necessary support to a participant in accordance with their NDIS plan is exempt from GST.

9.35 The amendments promote the right to social security by ensuring that reasonable and necessary supports that are supplied to an NDIS participant are not taxed.

Conclusion

9.36 Schedule 9 to this Bill is compatible with human rights as it promotes the right to social security.

The Assistant Treasurer, the Hon David Bradbury

Chapter 10
Deductible gift recipients

Outline of chapter

10.1 Schedule 10 to this Bill amends the *Income Tax Assessment Act 1997* (ITAA 1997) to update the list of specifically listed deductible gift recipients (DGRs).

Context of amendments

10.2 The income tax law allows income tax deductions for taxpayers who make gifts of $2 or more to DGRs. To be a DGR, an entity must fall within one of the general categories set out in Division 30 of the ITAA 1997 or be specifically listed by name in that Division.

10.3 DGR status helps eligible funds and entities attract public financial support for their activities.

Summary of new law

10.4 The amendments add United Way Australia, Australian Neighbourhood Houses & Centres Association (ANHCA) Inc., the Australia Foundation in support of Human Rights Watch Limited, Layne Beachley — Aim for the Stars Foundation Limited and Aurora Education Foundation Limited as specifically listed DGRs.

10.5 The amendments also extend the existing DGR specific listings of the Charlie Perkins Scholarship Trust and Roberta Sykes Indigenous Education Foundation.

Detailed explanation of new law

Aurora Education Foundation Limited (ABN 28 158 391 363)

10.6 Taxpayers may claim a tax deduction for gifts made to Aurora Education Foundation Limited after 30 June 2013. ***[Schedule 10, item 1, item 2.2.5 in the table in subsection 30-25(2) of the ITAA 1997]***

10.7 Aurora Education Foundation Limited works to promote and advance Indigenous education.

Roberta Sykes Indigenous Education Foundation (ABN 99 950 620 671)

10.8 Taxpayers may continue to claim a tax deduction for gifts made to the Roberta Sykes Indigenous Education Foundation after 1 August 2013. The current DGR specific listing for the Roberta Sykes Indigenous Education Foundation covers the period after 1 August 2010 to before 2 August 2013. The amendment removes the time limitation, allowing gifts made to Roberta Sykes Indigenous Education Foundation to be claimed as a tax deduction on an ongoing basis. ***[Schedule 10, item 2, item 2.2.40 in the table in subsection 30-25(2) of the ITAA 1997]***

10.9 The Roberta Sykes Indigenous Education Foundation works to advance the education and life opportunities for Aboriginal and Torres Strait Islanders, and provides additional assistance to female Indigenous scholars undertaking programs overseas.

United Way Australia (ABN 60 002 806 215)

10.10 Taxpayers may claim a tax deduction for gifts made to United Way Australia after 25 April 2013. ***[Schedule 10, item 3, item 4.2.5 in the table in subsection 30-45(2) of the ITAA 1997]***

10.11 United Way Australia works to improve the lives of people living in disadvantaged communities, by working primarily in areas of need associated with education, income stability, health and homelessness.

Australian Neighbourhood Houses & Centres Association (ANHCA) Inc. (ABN 47 588 370 196)

10.12 Taxpayers may claim a tax deduction for gifts made to Australian Neighbourhood Houses & Centres Association (ANHCA) Inc. after 30 June 2013. ***[Schedule 10, item 4, item 4.2.8 in the table in subsection 30-45(2) of the ITAA 1997]***

10.13 Neighbourhood Houses & Centres Association (ANHCA) Inc. is the national body representing its member entities: Neighbourhood Houses, Community Houses, Learning Centres, Neighbourhood Centres and Community Centres. Providing DGR status to the Neighbourhood Houses & Centres Association (ANHCA) Inc. will permit them to coordinate the national fundraising efforts of their member entities.

The Australia Foundation in support of Human Rights Watch Limited (ABN 90 153 747 954)

10.14 Taxpayers may claim a tax deduction for gifts made to the Australia Foundation in support of Human Rights Watch Limited after 30 June 2013. ***[Schedule 10, item 5, item 9.2.11 in the table in subsection 30-80(2) of the ITAA 1997]***

10.15 The Australia Foundation in support of Human Rights Watch Limited is the Australian branch of Human Rights Watch, and will contribute to furthering and promoting Australia's commitment to the promotion and protection of universal human rights.

Layne Beachley — Aim for the Stars Foundation Limited (ABN 72 101 890 340)

10.16 Taxpayers may claim a tax deduction for gifts made to Layne Beachley — Aim for the Stars Foundation Limited after 30 June 2013. ***[Schedule 10, item 6, item 13.2.4 in the table in subsection 30-105 of the ITAA 1997]***

10.17 Layne Beachley — Aim for the Stars Foundation Limited conducts programs that aim to help women and girls with the cost of participating in sporting, cultural or educational activities.

The Charlie Perkins Scholarship Trust (ABN 22 789 846 363 — the trustee for the Charlie Perkins Scholarship Trust)

10.18 Taxpayers may claim a tax deduction for gifts made to the Charlie Perkins Scholarship Trust after 1 August 2010. The current DGR specific listing for the Charlie Perkins Scholarship Trust covers the period after 1 August 2010 to before 2 August 2013. The amendment removes the time limitation, allowing gifts made to Charlie Perkins Scholarship Trust to be claimed as a tax deduction on an ongoing basis. ***[Schedule 10, item 13, item 2.2.39 in the table in subsection 30-25(2) of the ITAA 1997]***

10.19 The purpose of the Charlie Perkins Scholarship Trust is to advance the education of Aboriginal and Torres Strait Islander people through the provision of scholarships to Indigenous persons for study at overseas institutions, such as Oxford and Cambridge University.

Application and transitional provisions

10.20 The listing of United Way Australia applies to gifts made after 25 April 2013; and the listings of Australian Neighbourhood Houses & Centres Association (ANHCA) Inc., the Australia Foundation in support

of Human Rights Watch Limited, Layne Beachley — Aim for the Stars Foundation Limited, and Aurora Education Foundation Limited apply to gifts made after 30 June 2013.

10.21 The listings for the Charlie Perkins Scholarship Trust and Roberta Sykes Indigenous Education Foundation apply to gifts made after 1 August 2010.

10.22 Item 2 removes the end date from the special condition of the existing listing of Roberta Sykes Indigenous Education Foundation. It commences on Royal Assent. ***[Schedule 10, item 2, item 2.2.40 in the table in subsection 30-25(2) of the ITAA 1997]***

10.23 Item 12 repeals the sunsetting provisions in the *Tax Laws Amendment (2011 Measures No. 2) Act 2011,* which would repeal the listings of the Charlie Perkins Scholarship Trust and the Roberta Sykes Indigenous Education Foundation from 1 July 2016. It commences on Royal Assent. ***[Schedule 10, item 12]***

10.24 The commencement of items 13, 14 and 15 is contingent on whether Schedule 1 to the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 commences. ***[Schedule 10, items 13 to 15]***

10.25 Schedule 1 to the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012, amongst other things, amends the sunsetting provisions under the *Tax Laws Amendment (2011 Measures No. 2) Act 2011* and moves the listing of the Charlie Perkins Scholarship Trust from the table of education deductible gift recipients in subsection 30-25(2) to the table of international affairs deductible gift recipients in subsection 30-80(2) of the ITAA 1997.

10.26 Items 13 and 14 remove the end date from the special condition of the existing listing for the Charlie Perkins Scholarship Trust. The two items reflect amendments made by Schedule 1 to the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 to move the listing of the Charlie Perkins Scholarship Trust. The commencement of each item depends on the date of commencement of that Schedule, which ensures the listing will be adjusted whether or not that Schedule commences. ***[Schedule 10, items 13 and 14, subsections 30-25(2) and 30-80(2) of the ITAA 1997]***

Consequential amendments

10.27 A change has been made to update the index in Division 30 to add the new listings. ***[Schedule 10, items 7 to 11]***

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Deductible gift recipients

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

Overview

10.29 This Schedule amends the list of deductible gift recipients (DGR) in Division 30 of the ITAA 1997. The income tax law allows income tax deductions for taxpayers who make gifts of $2 or more to DGRs.

10.30 The amendments add United Way Australia, Australian Neighbourhood Houses & Centres Association (ANHCA) Inc., the Australia Foundation in support of Human Rights Watch Limited, Layne Beachley — Aim for the Stars Foundation Limited and Aurora Education Foundation Limited as specifically listed DGRs on an ongoing basis.

10.31 The amendments extend the listings of the Charlie Perkins Scholarship Trust and Roberta Sykes Indigenous Education Foundation as specifically listed DGRs to apply on an ongoing basis.

Human rights implications

10.32 This Schedule does not engage any of the applicable rights or freedoms.

10.33 The amendments in this Schedule are beneficial to taxpayers.

Conclusion

10.34 This Schedule is compatible with human rights as it does not raise any human rights issues.

Assistant Treasurer, the Hon David Bradbury

Chapter 11
Miscellaneous amendments

Outline of chapter

11.1 Schedule 11 to this Bill makes a number of miscellaneous amendments to the taxation and superannuation laws. These amendments are part of the Government's commitment to the care and maintenance of the taxation and superannuation systems.

11.2 These amendments include: clarifying the tax treatment of native title benefits distributed through charities (Part 2); ensuring the fringe benefits tax rebate operates as intended (Part 3); and updating a number of significant taxation and superannuation thresholds to reflect reporting changes made by the Australian Bureau of Statistics (Part 4).

Context of amendments

11.3 Amendments to the taxation and superannuation laws, such as these, are periodically made to remove anomalies and correct unintended outcomes. Progressing such amendments gives priority to the care and maintenance of the tax system, a process supported by a 2008 recommendation from the Tax Design Review Panel.

Summary of new law

11.4 These miscellaneous amendments address technical deficiencies and legislative uncertainties within several taxation and superannuation provisions.

11.5 The table below lists the various parts of this Schedule.

Part	*Title*
1	Technical amendments to the tax law to ensure that it operates properly following the changes made by the *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012*
2	Amendments relating to Indigenous holding entities and native title
3	Fringe benefits tax minor amendments

Part	*Title*
4	Updating indexation provisions
5	Other minor amendments (including amendments to the exempt entity provisions and clarification of the research and development concession for exempt entities)

Detailed explanation of new law

Part 1 — Technical amendments to the tax law to ensure that it operates properly following the changes made by the *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012*

11.6 The amendments made to the *Income Tax Assessment Act 1997* (ITAA 1997) ensure that entities which fall within the scope of the Australian Charities and Not-for-profits Commission (ACNC) are not exempt from income tax unless the entity is registered under the *Australian Charities and Not-for-profits Commission Act 2012* (ACNC Act). These amendments maintain the integrity of the tax concessions by mirroring the previous law which required entities that fell within the scope of the Commissioner's endorsement requirements to be endorsed in order to be eligible for an exemption from income tax. ***[Schedule 11, items 1, 2 and 3]***

11.7 This Part also amends the *Income Tax (Transitional Provisions) Act 1997* to correct an incorrect reference in that Act. ***[Schedule 11, item 4]***

Application and commencement provisions

11.8 The amendments in Part 1 commence on 3 December 2012, which was the day the ACNC Act commenced. These amendments are required to ensure that the ACNC Act operates in accordance with its policy intent. The amendments do not impact on any criminal offences. The retrospective operation of these amendments is not intended to alter any decisions that have already been made by the Commissioner of the ACNC or the Commissioner of Taxation. In effect, this amendment merely ratifies the operation of the current regime.

Part 2 — Amendments relating to Indigenous holding entities and native title

11.9 The amendments correct an issue with the application to charitable trusts of recent native title amendments to the income tax law.

11.10 Schedule 1 to the Tax Laws Amendment (2012 Measures No. 6) Bill 2012 clarifies the circumstances in which a native title benefit is not subject to income tax. In broad terms, such benefits are not taxable if they are paid, directly or indirectly, to an Indigenous person or to an Indigenous holding entity (see section 59-50 in item 3 of that bill).

11.11 ***Indigenous holding entities*** are defined to be either distributing bodies,[5] or trusts whose beneficiaries can only be Indigenous persons or distributing bodies.

11.12 It has been drawn to the Government's attention that some trusts in receipt of native title payments do not have beneficiaries at all because they are trusts with charitable objects rather than beneficiaries.

11.13 A charitable trust would not generally be taxable on the receipt of a native title payment anyway because all its income would be exempt from income tax. However, if it was not an Indigenous holding entity, the chain of payments would be broken, and subsequent payments it makes out of the native title payment could become taxable in the hands of those who receive it, even if they were Indigenous persons or Indigenous holding entities. For example, certain scholarships are not exempt income and so would be assessable to an Indigenous person even if paid by a charitable trust out of a native title payment.

11.14 That is not the intended result of the provisions in the Tax Laws Amendment (2012 Measures No. 6) Bill 2012. Accordingly, this Bill amends those provisions to include 'registered charities' in the definition of Indigenous holding entities. The result is that native title payments made by such entities are still exempt from income tax in the hands of an Indigenous person. ***[Schedule 11, item 6, paragraph 59-50(6)(c) of the ITAA 1997]***

11.15 A 'registered charity' is an entity registered as a charity under the *Australian Charities and Not-for profits Commission Act 2012*. Such entities are exempt from income tax (see section 50-5 of the ITAA 1997).

11.16 A registered charity can be an Indigenous holding entity even if it does not confine its charitable activities to Indigenous persons. However, the native title payments it makes are only made non-assessable non-exempt income if made to an Indigenous person or to another Indigenous holding entity.

11.17 As a consequence of adding registered charities to the definition of 'Indigenous holding entity', the list of permitted beneficiaries of trusts

---

[5] Broadly, these are land councils and other bodies established under laws relating to indigenous persons.

that come within that definition is expanded to include registered charities. ***[Schedule 11, item 5, paragraph 59-50(6)(b) of the ITAA 1997]***

Transitional provision

11.18 The amendment to the provisions clarifying the treatment of native title payments extends the definition of 'Indigenous holding entity' to include registered charities. However, registered charities only came into existence on 3 December 2012 with the commencement of the *Australian Charities and Not-for profits Commission Act 2012*. To cover earlier periods, the amendments apply to an entity before that time if it was endorsed as a tax exempt charitable entity under section 50-5 of the ITAA 1997 at that time. ***[Schedule 11, items 7 and 8, heading to Part 2-15 and section 59-50 of the Income Tax (Transitional Provisions) Act 1997]***

Application and commencement provision

11.19 The amendments apply to income years starting on or after 1 July 2008. That aligns the application of the amendments with the application of the provisions they amend, so that those provisions will always apply as altered by the amendments. ***[Schedule 11, item 9]***

11.20 The amendments, which can only benefit affected taxpayers, commence immediately after the commencement of Schedule 1 to the Tax Laws Amendment (2012 Measures No. 6) Bill 2012. This ensures that those amendments are only made if the provisions they amend are enacted. ***[Clause 2, table item 16]***

Part 3 — Fringe benefits tax minor amendments

11.21 This Part contains minor amendments to ensure that certain provisions in the *Fringe Benefits Tax Assessment Act 1986* (FBTAA) operate effectively and as intended by Parliament.

11.22 Section 65J of the FBTAA sets out the categories of employers that are able to access a fringe benefits tax rebate. These employers include registered charities, scientific institutions and public educational institutions.

11.23 The amendments in Part 3 of this Schedule introduce minor changes to correct anomalies that resulted from consequential amendments contained in the *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012* that did not entirely achieve Parliament's intention.

11.24 This Part reinserts the substantive special conditions previously contained in section 65J of the FBTAA which were unintentionally

removed by the *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012*.

11.25 Section 65J has also been rewritten to improve readability. This is achieved by inserting the substantive provisions in a table and explicitly cross referencing the income tax exempt entity provisions. These amendments will ensure consistency and will simplify the tax laws. ***[Schedule 11, items 13 and 14]***

11.26 Consequential amendments are made in the FBTAA and the *Taxation Administration Act 1953* to ensure that the text in the relevant sections reflects the updated text in section 65J. ***[Schedule 11, items 10 to 12 and 15 to 26]***

Application provision

11.27 The amendments in Part 3 apply for the 2013-14 fringe benefit tax (FBT) year and later FBT years. ***[Schedule 11, subitem 27(1)]***

11.28 The 2013-14 FBT year has already commenced, however, as discussed above, these amendments essentially confirm existing practice and ensure the law operates in accordance with the policy intent behind the provisions.

11.29 These amendments provide greater certainty for taxpayers by ensuring that the effect of section 65J is largely unchanged from that which existed prior to the commencement of the ACNC Act, with updates to the terminology and structure of the section.

11.30 The amendments apply prospectively in that they do not affect any existing entitlements prior to the commencement of this legislation. This is because Part 3 applies to endorsements for the FBT rebate by the Commissioner of Taxation after the commencement of this legislation, and the amendments do not adversely affect any entity which has already been endorsed by the Commissioner of Taxation.

11.31 Where an entity has been endorsed under subsection 123E(1) of the FBTAA immediately before the commencement of Part 3, the amendments apply to an entity for the 2014-15 FBT year and later FBT years. This reflects that the entity will have already been endorsed for the 2013-14 FBT year, so it would be inappropriate to change the requirements for these entities part way through an FBT year. ***[Schedule 11, subitem 27(2)]***

11.32 A transitional provision is inserted so that an endorsement in place at the end of the 2013-14 FBT year will continue to have effect as if it were an endorsement under subsection 123E(1) of the FBTAA as amended by this Schedule. This means that an entity endorsed under the

old regime of section 65J need not seek re-endorsement following these amendments. ***[Schedule 11, subitem 27(3)]***

Part 4 — Updating indexation provisions

Why do the thresholds require updating?

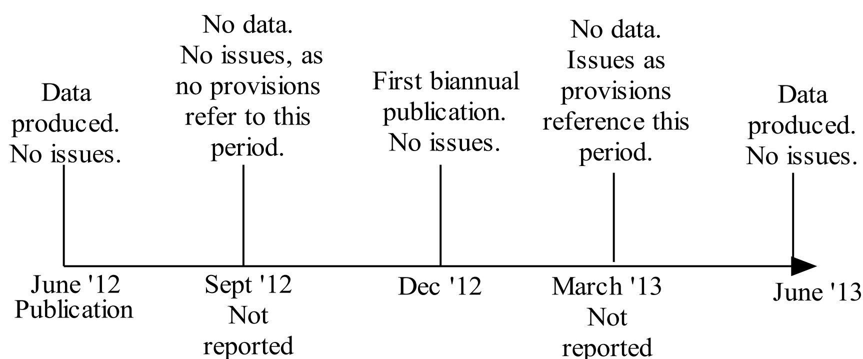
11.33 In 2012, the Australian Bureau of Statistics (ABS) announced that, instead of reporting the average weekly ordinary time earnings (AWOTE) survey for each quarter of the year (March, June, September and December), it will only do so for two quarters of the year (June and December).

11.34 This change in frequency took effect during 2012 with the June period publication being the last quarterly issue and the December period publication the first produced on a biannual basis, although still determined in respect of the December quarter.

11.35 A number of thresholds in laws administered by the Commissioner of Taxation reference the December and March quarters. No provisions reference the September or June quarters.

11.36 Therefore, as data is no longer produced for the March quarter, a number of significant thresholds become inoperative from the 2013-14 income or financial year (depending on the relevant threshold) if these provisions are not amended. The diagram below reports the timeline of ABS publications.

Diagram 11.1: Timeline of ABS AWOTE publications



What thresholds reference the March quarter?

11.37 The following thresholds reference the March quarter.

Superannuation Guarantee (Administration) Act 1992

11.38 Employers must pay into an applicable superannuation account on a quarterly basis a minimum of 9.25 per cent of their eligible employees' earnings from 1 July 2013 (increasing progressively to 12 per cent from 1 July 2019 onwards).

11.39 Section 15 limits the maximum amount of superannuation that an employer has to provide for an employee. The amount (called the 'maximum contributions base') is indexed each financial year in accordance with the AWOTE for the March quarter (see section 9).

Superannuation (Government Co-contribution for Low Income Earners) Act 2003

11.40 The Government Superannuation Co-contribution is a payment made by the Government to the superannuation accounts of eligible members. It is designed to boost any personal (after-tax) contributions made during the income year.

11.41 The maximum co-contribution is payable to individuals with incomes up to the 'lower income threshold'. The maximum amount progressively reduces when income exceeds the 'lower income threshold' until it is phased out completely at the 'higher income threshold'. These thresholds are indexed each income year in accordance with the AWOTE for the March quarter (see subsection 10A(5)).

Income Tax Assessment Act 1997

11.42 Subsection 960-275(1A) applies an indexation formula to various provisions, outlined below.

<u>Genuine redundancy payments and early retirement scheme payments</u>

11.43 Section 83-170 allows a taxpayer to calculate the tax-free limit of a genuine redundancy payment and an early retirement scheme payment. These payments are tax-free up to a limit worked out under that section.

11.44 Subsections 960-275(1A) and 960-280(4) index the tax-free limit for an income year in accordance with the AWOTE for the March quarter.

Pre-1 July 1988 funding credits

11.45 Since 1 July 1988, most contributions to superannuation schemes have been subject to a 15 per cent earnings tax in the hands of the fund (see Subdivision 295-C). An exception applies where there are pre-1 July 1988 funding credits (see subsection 295-265(2)).

11.46 Funding credits were granted to unfunded superannuation schemes so that contributions made after 1 July 1988 to provide for benefits that accrued prior to 1 July 1988 are not taxed. This ensures consistency with funded superannuation schemes that only pay tax on contributions from 1 July 1988.

11.47 Subsections 960-275(1A) and 960-280(4) index the amount of unused pre-1 July 1988 funding credits for an income year in accordance with the AWOTE for the March quarter.

How do these amendments resolve this issue?

11.48 These amendments ensure that income and superannuation thresholds that reference the March AWOTE quarter instead reference the preceding December AWOTE quarter. ***[Schedule 11, items 28 to 31, subsection 960-275(1A) (formula) of the ITAA 1997, subsection 10A(5) (definition of current year) of the Superannuation (Government Co-contribution for Low Income Earners) Act 2003, and paragraph 9(1)(b) and subsection 9(1) (note) of the Superannuation Guarantee (Administration) Act 1992]***

Example 11.1: Superannuation guarantee maximum contribution base for the 2013-14 financial year

The superannuation guarantee maximum contribution base for the 2012-13 financial year is $45,750 per quarter.

To determine this amount for the 2013-14 year using the December AWOTE quarter rather than the March AWOTE quarter, the following formula in section 15 of the *Superannuation Guarantee (Administration) Act 1992* is used:

$$\text{Maximum contribution base for a quarter in the immediately preceding year} \times \text{Indexation factor for the year}$$

These amendments provide that the indexation factor for the year is determined by dividing the December 2012 AWOTE quarter (1396.00) by the December 2011 AWOTE quarter (1330.10). This results in an indexation factor for the year of 1.050 (rounded to three decimal places — see section 9).

Therefore, under these amendments, the maximum contribution base that an employer must use for the 2013-14 financial year is $48,040 per quarter (rounded up to the nearest $10 dollars as required under section 15). This amount is calculated below:

$$\$45,750 \times 1.050 = \$48,040$$

11.49 The data for determining the thresholds need to be available before the start of the relevant income year to fulfil legislative obligations (see subsection 10A(8) of the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*) and administrative requirements, for example, to employers. Using the preceding December quarter allows this requirement to be satisfied.

Application and commencement provision

11.50 To ensure the thresholds that rely on the AWOTE data continue to operate, these amendments apply in relation to the 2013-14 income year and later years in respect to the changes to the ITAA 1997 and the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*. As the threshold test in the *Superannuation Guarantee (Administration) Act 1992* is based on a financial year, these amendments apply in relation to that Act from the 2013-14 financial year and later years. ***[Schedule 11, item 32]***

11.51 Schedule 7 to the Tax and Superannuation Laws Amendment (2013 Measures No. 1) Bill 2013 contains technical corrections relating to the indexation formula in subsection 960-275(1A) of the ITAA 1997 (see above in paragraphs 11.42 to 11.47 for a description of the provisions that rely on this formula). As the technical corrections do not incorporate the indexation changes described in this Part, these amendments commence at either the later of the start of the day after these amendments receive Royal Assent or immediately after the technical corrections in Schedule 7 commence. This ensures the technical corrections do not override these amendments. ***[Clause 2, table items 18 and 20)]***

Part 5 — Other minor amendments

Minor amendments to Division 50

11.52 Part 5 amends the ITAA 1997 to maintain the operation of minor tax integrity requirements as well as simplifying the expression of these rules.

11.53 The ITAA 1997 is also amended to reduce the reporting burden on certain environmental institutions where those institutions are registered charities.

11.54 The current law requires certain specifically listed environmental entities to report statistical information to the Environment Secretary. However, following the commencement of the ACNC, many of these entities (those which are charities registered with the ACNC) will be required to report to the ACNC.

11.55 To reduce duplicative reporting, section 30-60 of the ITAA 1997 is repealed and replaced with a new section 30-60 which requires additional information to be given to the Environment Secretary only where the entity is not a registered charity. This reflects the fact that registered charities already provide information to the ACNC. ***[Schedule 11, item 35]***

11.56 Sections 50-15, 50-50, 50-55, 50-65, 50-70 and 50-72 of the ITAA 1997 are amended to standardise requirements that an entity falling within those sections must comply with all the substantive requirements in their governing rules and apply its income and assets solely for the purpose for which the entity is established. ***[Schedule 11, items 36, 37, 40, 41, 44, 45, 48, 49 and 52 to 54]***

11.57 Endorsement of entities as exempt from income tax under a general category is decided by reference to the entity's stated purposes and objectives.

11.58 For established entities, some reference can be had to the entity's actual activities to determine whether those activities demonstrate the pursuit of alternative or inconsistent purposes and objectives. The operations of the entity are important and can be used to determine the purposes for which an entity is established.

11.59 However, this can create some difficulty for the Australian Taxation Office because 'inappropriate conduct' may not always manifest pursuit of an alternate purpose but nonetheless should result in an entity no longer being entitled to endorsement.

11.60 For this reason, a special condition generally imposed on exempt entities is that they operate only in a manner consistent with their substantive governing rules and purpose. Therefore, while an entity's governing rules and purposes may initially determine their eligibility for endorsement/eligibility for an income tax exemption, they are expected to operate in a manner consistent with those rules and purposes to remain eligible.

11.61 Requiring an exempt entity to comply only with their substantive governing rules and purposes allows an entity to keep its income tax exempt status for minor procedural irregularities, such as an absence of quorum at a meeting or missing a required lodgement date.

Breaches of procedural irregularities will not, of themselves, affect an entity's continued entitlement to income tax exempt status.

11.62 Substantive governing rules are those rules of core importance to the operation of the entity and would include those related to an entity's object and purpose and those relating an entity's not-for-profit status.

11.63 This requirement applies equally to the income tax exempt categories that are not the subject of the endorsement rules. However, because the entity is not endorsed, the Commissioner will consider the same issues if he decides to issue an assessment for income tax payable because the entity is not considered to be income tax exempt.

11.64 The new law confirms the Court's interpretation in *Commissioner of Taxation v Bargwanna* [2012] HCA 11, relating to whether a charitable trust is applied for the purposes for which it was established.

11.65 Corrections are made to the references in the *Income Tax Assessment Act 1936* and the ITAA 1997 to give effect to the changes above. ***[Schedule 11, items 33, 34, 38, 39, 42, 43, 46, 47, 50 and 51]***

Application provision

11.66 The amendments in Part 5 to this Schedule (other than item 55) apply in relation to income tax years starting on or after the commencement of Part 5, which occurs on the day after this Act receives the Royal Assent. ***[Schedule 11, subitem 56(1)]***

Clarification of R&D concession for exempt entities

11.67 The research and development (R&D) provisions provide that R&D entities that are controlled by exempt entities are entitled to an R&D tax offset equal to 40 per cent of their relevant deductible expenditure on R&D (rather than the 45 per cent offset that otherwise applies for taxable entities whose aggregated turnover is under $20 million for the year). Questions have been raised about whether the reference to an entity being controlled by exempt entities requires the entity to have been controlled for the whole year, only at the end of the year, or at any time during the year. The amendments clarify that the provisions apply to an entity that is controlled by an exempt entity *at any time* during the year. ***[Schedule 11, item 55, table item 2 in subsection 355-100(1) of the ITAA 1997]***

Application provision

11.68 These amendments apply to assessments for income years starting on or after 1 July 2013. For earlier periods, the existing meaning of the provision continues. However, no inference is to be drawn from the

clarification that the unamended provision must have had a different meaning. ***[Schedule 11, subitems 56(2) and (3)]***

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Miscellaneous amendments

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

Overview

11.70 Schedule 11 to this Bill makes a number of miscellaneous amendments to the taxation and superannuation laws. These amendments are part of the Government's commitment to the care and maintenance of the taxation and superannuation systems.

11.71 These amendments include: clarifying the tax treatment of native title benefits distributed through charities (Part 2); ensuring the fringe benefits tax rebate operates as intended (Part 3); and updating a number of significant taxation and superannuation thresholds to reflect reporting changes made by the Australian Bureau of Statistics (Part 4).

Human rights implications

11.72 These amendments make a number of minor and machinery changes to the taxation and superannuation provisions to ensure the provisions are consistent with their original policy intent. As such, this Schedule does not engage any of the applicable rights or freedoms.

Amendments relating to Indigenous holding entities and native title

11.73 In relation to the amendments in Part 2 regarding charitable entities and native title, these amendments supplement the amendments contained in the Tax Laws Amendment (2012 Measures No. 6) Bill 2012.

11.74 These amendments promote the right to self-determination as recognised in Article 1 of the International Covenant on Civil and

Political Rights (ICCPR) and Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This includes individuals being free to pursue their economic, social and cultural developments. This includes the rights to and interests in land held by Indigenous persons under their traditional law and customs recognised by native title.

11.75 The amendments in Part 2 promote this principle by making clear that distributions of native title benefits to Indigenous persons or Indigenous holding entities from registered charities retain both their status as native title benefits and the tax treatment that goes with that status.

11.76 Article 2 of the ICCPR and Article 2(2) of the ICESCR require State Parties to respect and ensure all individuals the rights recognised in the Covenants without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

11.77 Differences in treatment will not amount to prohibited discrimination (that is, they will be legitimate) if the reasons for such differentiation are reasonable and objective, and if the aim is to achieve a purpose which is legitimate (see the Committee on the Elimination of Racial Discrimination, in its General Recommendation No. 32 (at paragraph 8)).

11.78 Therefore, the amendments in Part 2 engage the rights to equality and non-discrimination because they apply only to a certain group of individuals within the population and draw a distinction between individuals who have native title rights (namely, Indigenous people) and persons who do not (namely, non-Indigenous people). Although, prima facie, this Schedule provides differential treatment in favour of Indigenous people who obtain native title benefits, the purpose which the amendments aim to achieve is legitimate and the reasons for differentiation are reasonable and objective.

Conclusion

11.79 The amendments in Part 2 are compatible with human rights as it advances the protection of human rights and to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate.

11.80 The other Parts are compatible with human rights as they do not encroach upon any applicable rights or freedoms.

Assistant Treasurer, the Hon David Bradbury

Index

Schedule 1: Monthly PAYG instalments

Bill reference	*Paragraph number*
Items 1 to 2, 11 to 17, 18 to 44, sections 45-1, 45-125, 45-130, 45-200, 45-205, 45-225, 45-597, 45-703, 45-715, 45-870, subsections 45-132(4), 45-200(2), 45-705(4), 45-915 of Schedule 1 to the TAA 1953, and sections 721-10 and 995-1 of the ITAA 1997	1.60
Items 3 to 8 and 19, sections 45-5, 45-20, 45-50 and 45-136	1.15
Items 5, 9 and 10, sections 45-67, 45-72 and subsection 45-20(2)	1.20
Items 9 and 11, section 45-65 and subsection 45-114(1)	1.16
Item 9, subsection 45-67(2)	1.21
Item 11, section 45-114	1.19
Item 11, subsection 45-114(3) to (6)	1.18
Items 11 and 21 to 24, sections 45-200, 45-225 and subsection 45-114(2)	1.17
Item 19, paragraph 45-136(2)(a)	1.41
Item 19, subsection 45-136(3) and paragraph 45-136(2)(b)	1.40
Item 19, subsection 45-136(4)	1.43
Item 19, paragraph 45-136(4)(b)	1.42
Item 19, subsection 45-138(1)	1.22
Item 19, subsection 45-138(2)	1.23
Item 19, paragraph 45-138(2)(a)	1.34
Item 19, paragraph 45-138(2)(b)	1.24, 1.32
Item 19, subsection 45-138(3)	1.36
Item 19, paragraph 45-138(4)(a)	1.39
Item 19, paragraph 45-138(4)(b)	1.37
Item 19, subsections 45-138(5) to (7)	1.28
Item 45 and subitem 47(1)	1.45
Subitem 46	1.58, 1.59
Subitem 47(4)	1.56
Subitem 47(5)	1.55
Item 48, and subitem 47(1)	1.48
Subitems 48(1) and (2)	1.47
Subitems 48(3) and (4)	1.53

Bill reference	***Paragraph number***
Subitem 49(2)	1.51

Schedule 2: Incentives for designated infrastructure projects

Bill reference	***Paragraph number***
Item 1, section 272-100 in Schedule 2F to the ITAA 1936	2.59
Items 2 to 4, paragraphs 165-35(b) and (c), and subsection 415-35(7)	2.44
Item 4, sections 415-1, 415-5, 415-10 and 415-50	2.118
Item 4, paragraph 415-10(5)(b)	2.26
Items 4, 47 and 48, subsection 415-55(1) and section 415-10 of the *Income Tax (Transitional Provisions) Act 1997*	2.18
Item 4, subsection 415-15(1)	2.22, 2.23
Item 4, subsections 415-15(2) and (3)	2.27
Item 4, subsection 415-15(2) and paragraphs 415-15(3)(a) and (c)	2.28
Item 4, subsection 415-15(2) and paragraph 415-15(3)(d)	2.30
Item 4, paragraph 415-15(3)(b)	2.29
Item 4, subsection 415-15(4)	2.24
Item 4, subsection 415-15(5)	2.25
Item 4, subsection 415-15(6)	2.17
Item 4, subsection 415-20(1)	2.62
Item 4, paragraphs 415-20(1)(a) and (b)	2.70
Item 4, paragraphs 415-20(1)(b), (c) and (d)	2.19
Item 4, paragraphs 415-20(1)(b) and (2)(a)	2.20
Item 4, paragraph 415-20(1)(d)	2.73
Item 4, paragraph 415-20(2)(a) and subsection 415-55(1)	2.71
Item 4, paragraphs 415-20(2)(b), (c) and (d)	2.72
Item 4, subsections 415-20(3) and (4)	2.76
Item 4, subsection 415-20(5)	2.64
Item 4, subsection 415-20(6)	2.69
Item 4, sections 415-25 and 415-30	2.61
Items 4 and 47, subsection 415-35(3) and paragraph 415-10(a) of the *Income Tax (Transitional Provisions) Act 1997*	2.32
Items 4, 47 and 48, subsection 415-15(1), paragraph 415-20(1)(a) and section 415-10 of the *Income Tax (Transitional Provisions) Act 1997*	2.16
Item 4, subsection 415-35(2)	2.33, 2.37

Bill reference	***Paragraph number***
Item 4, subsections 415-35(2) and (3)	2.35
Item 4, subsections 415-35(4) and (5)	2.39
Item 4, subsections 415-35(4) to (6)	2.42
Item 4, subsection 415-35(8)	2.45, 2.46, 2.58
Item 4, section 415-40	2.49
Item 4, subsections 415-40(2) and (3)	2.50, 2.57
Item 4, subsections 415-40(2), (4) and (5)	2.53
Item 4, subsection 415-40(4)	2.52
Item 4, subsections 415-40(4) and (5)	2.51
Item 4, subsection 415-40(6)	2.56
Item 4, subsection 415-40(8)	2.54
Item 4, subsections 415-55(1), (2) and (4)	2.79
Item 4, subsection 415-55(2) and 415-75(4)	2.106
Item 4, subsection 415-55(3)	2.107
Item 4, subsections 415-55(4), 415-60(1), 415-65(2), and (3), 415-70(4) and (8) and 415-80(1), (3), (4) and (5) and sections 415-65, 415-70 and 415-90	2.98
Item 4, subsections 415-60(1), (2) and (4)	2.81
Item 4, subsections 415-60(2) and (3) and paragraph 415-85(a)	2.86
Item 4, subsections 415-60(2) and (3) and paragraph 415-85(c)	2.93
Item 4, subsections 415-60(3), 415-65(1) and 415-70(1) and (2)	2.82
Item 4, subsection 415-60(5)	2.80
Item 4, subsections 415-65(3) and (4), and 415-70(4) to (6)	2.75
Item 4, paragraphs 415-65(1)(a) to (c) and subsections 415-65(2) to (4)	2.84
Item 4, paragraphs 415-65(1)(c) and 415-70(1)(c) and subsection 415-75(1)	2.103
Item 4, paragraph 415-65(1)(d))	2.85
Item 4, subsection 415-65(2)	2.87
Item 4, paragraphs 415-65(1)(c) and (d), and 415-70(1)(c) and (d)	2.101
Item 4, subsections 415-65(5) to (7)	2.88
Items 4 and 35, section 415-70 and subsection 995-1(1)	2.77
Item 4, subsections 415-70(1) and (2)	2.90
Item 4, paragraph 415-70(2)(b)	2.92
Item 4, subsections 415-70(6) and (7)	2.94
Item 4, subsections 415-70(8)	2.91
Item 4, subsection 415-70(9)	2.95

Bill reference	***Paragraph number***
Item 4, subsection 415-75(2)	2.104
Item 4, subsection 415-75(3)	2.102
Item 4, subsection 415-80(1)	2.108
Item 4, subsections 415-80(2) to (4)	2.110
Item 4, subsections 415-80(5) and (6)	2.109
Item 4, paragraph 415-85(b)	2.89
Item 4, paragraph 415-85(d)	2.96
Item 4, section 415-90	2.111
Item 4, section 415-95	2.112
Item 4, subsection 415-100(1)	2.97
Item 4, subsection 415-100(2)	2.100
Items 5 and 6, subsections 707-120(5) and 719-265(3A)	2.67
Items 7 to 14, 14A, 14B, 14C, 24, 28 and 32, sections 266-15, 266-30, 266-65, 266-80, 266-100, 266-115, 266-140, 266-155, 267-15, 267-55 and 267-60 in Schedule 2F to the ITAA 1936, and sections 165-5, 165-117 and 707-300 (notes)	2.120
Item 15, subsection 268-20(4) in Schedule 2F to the ITAA 1936	2.123
Item 16, subsection 272-140(1) in Schedule 2F to the ITAA 1936 (definition of 'designated infrastructure project entity')	2.116
Items 17 and 36 and 38 to 42, subsection 272-140(1) definition of 'tax loss', subsection 995-1(1) definitions of 'ownership test period', 'same business test period', 'test period', 'tax loss' and 'test time'	2.117
Items 18 to 23, tables in sections 12-5 and 36-25	2.119
Items 29 to 31, subsections 707-120(1), and 707-130(1) and paragraph 707-125(1)(b)	2.124
Items 33 and 34, paragraph 707-265(1)(a), and subsection 719-265(7)	2.125
Items 35 and 37, subsection 995-1(1) (definitions of 'designated infrastructure project', 'designated infrastructure project entity', 'infrastructure project capital expenditure', 'infrastructure project designation rules' and 'provisionally designated infrastructure project')	2.115
Items 39 and 40, subsection 995-1(1) paragraphs (a) and (d) of the definition of tax loss	2.21
Items 43 to 46, subsections 28(2) to (4) and 40(1) of the *Infrastructure Australia Act 2008*	2.122
Item 43, subsection 28(2) of the *Infrastructure Australia Act 2008*	2.121
Items 47 and 48, section 415-10 of the *Income Tax (Transitional Provisions) Act 1997*	2.113

Bill reference	*Paragraph number*
Items 49 to 65, subsections 266-185(1), 267-90(1), 268-10(2), 268-15(2), 268-20(2), 268-25(2), 268-75(1), 268-85(5), 269-65(1), 269-25(1) and paragraphs 269-25(1)(a), 269-100(4)(a), 271-80(a), 272-80(6B)(a) and (b) and 272-85(5C)(a) and (b) and subparagraph 272-80(6A)(i) of Schedule 2F to the ITAA 1936	2.126
Item 66 and clause 2 (table item 3)	2.114

Schedule 3: Creating a regulatory framework for tax (financial) advice services

Bill reference	*Paragraph number*
Items 1 to 3, 21, 26, 31 and 32	3.110
Item 4	3.63
Items 5 and 7	3.65
Items 6 and 8	3.66, 3.69
Item 9	3.108
Item 10	3.60
Items 11 and 13	3.64
Item 12, paragraph 20-30(2)(a) and item 20, paragraph 40-20(3)(a)	3.90
Item 12, paragraph 20-30(2)(b)	3.93
Item 14	3.81
Items 15 and 16	3.74
Items 17, 18 and 19	3.77
Item 20, paragraph 40-20(3)(b)	3.93
Items 22 and 24	3.106
Item 23, paragraph 50-5(2A)(d)	3.100
Item 23	3.99
Item 25	3.102
Item 27	3.105
Item 28	3.107
Items 29 and 30	3.82
Item 33	3.56, 3.88
Items 34 to 36	3.93
Items 37 to 39	3.90
Item 40	3.90
Item 41	3.92

Bill reference	***Paragraph number***
Item 42	3.109
Item 43, subsection 90-15(1)	3.41, 3.44
Item 43, paragraph 90-15(1)(a)	3.52
Item 43, paragraph 90-15(1)(b)	3.49
Item 43, subsection 90-15(2)	3.57
Item 43, paragraph 90-15(3)(b)	3.54, 3.58
Items 44 to 46	3.164
Items 47 and 48, subitem 48(4)	3.148
Item 47, subitem 48(1)	3.154, 3.157
Item 47; subitem 48(2)	3.156
Item 47, subitem 48(3)	3.158
Item 47, subitem 48(4)	3.149
Item 47, subitem 48(5)	3.150
Item 47 and item 49, paragraphs 49(c) and (d)	3.161
Item 47 and paragraphs 49(a) and (b)	3.160
Item 50	3.162

Schedule 4: Other amendments to the *Tax Agents Services Act 2009*

Bill reference	***Paragraph number***
Item 1, paragraph 20-5(1)(c) and items 2 to 4	3.112
Item 1, paragraph 20-5(1)(d)	3.116
Items 5 to 7	3.132
Items 8 to 10	3.119
Items 11, 12, 17 and 26	3.137
Items 13 to 16	3.130
Item 18	3.143
Item 19, subsections 60-67(1) and (2)	3.144
Item 19, subsection 60-67(3)	3.145
Items 20 and 21	3.123
Item 22	3.113
Item 23	3.121
Item 24	3.139
Item 25	3.126

Bill reference	*Paragraph number*
Item 27	3.129
Items 28 and 29	3.163

Schedule 5: Tax secrecy and transparency

Bill reference	*Paragraph number*
Item 1, section 3C	5.21
Item 1, subsections 3C(1), 3D(1) and 3E(1)	5.23
Item 1, subsections 3C(3), 3D(3) and 3E(3)	5.24
Item 1, paragraph 3C(3)(a)	5.28
Item 1, paragraphs 3C(3)(a), 3D(3)(a) and 3E(3)(a)	5.26
Item 1, paragraph 3C(3)(b)	5.29
Item 1, paragraph 3C(3)(c)	5.30, 5.31
Item 1, paragraph 3C(3)(d)	5.32
Item 1, subsections 3C(2), 3D(2) and 3E(2)	5.36
Item 1, subsections 3C(4) and (5), 3D(4) and (5) and 3E(4) and (5)	5.44
Item 1, subsections 3C(6), 3D(6) and 3E(6)	5.43
Item 1, sections 3D and 3E	5.22, 5.33
Item 2, subsection 355-47(1) of Schedule 1	5.51
Item 2, paragraph 355-47(2)(a) of Schedule 1	5.50
Item 2, paragraph 355-47(2)(b) of Schedule 1	5.58
Items 3 and 4, note to section 355-50 of Schedule 1	5.47, 5.69
Item 5, subsection 355-65(4)	5.61
Item 6, section 355-172 of Schedule 1	5.52
Subitem 8(1)	5.66
Subitem 8(2)	5.68

Schedule 6: Petroleum resource rent tax

Bill reference	*Paragraph number*
Items 1 and 2, subsection 37(1) of the PRRTAA, items 4 and 5, subsection 38(1) of the PRRTAA and Schedule 6, item 7, subsection 39(1) of the PRRTAA	6.33
Items 3, 6, and 8, subsections 37(3), 38(3) and 39(5) of the PRRTAA	6.55
Item 9, subsection 41(1) of the PRRTAA	6.34, 6.45

Bill reference	***Paragraph number***
Item 9, subsections 41(1) and 41(1A) of the PRRTAA	6.37
Item 9, subsection 41(1A) of the PRRTAA	6.41
Item 9, subsections 41(1B) and 41(1D) of the PRRTAA	6.53
Item 9, paragraph 41(1)(b) of the PRRTAA	6.39, 6.46
Item 9, subsection 41(1C) of the PRRTAA	6.44
Item 9, paragraph 41(1)(c) of the PRRTAA	6.51
Item 9, paragraph 41(1)(d) of the PRRTAA	6.38, 6.49
Item 9, subparagraph 41(1)(d) of the PRRTAA	6.50
Item 10, subsection 41(3) of the PRRTAA	6.56
Paragraph 11(1)(a)	6.63
Paragraphs 11(1)(b) and 11(1)(c)	6.64
Subitem 11(2)	6.69
Subitem 11(3)	6.68
Subitem 11(4)	6.72

Schedule 7: Removing CGT discount for foreign individuals

Bill reference	***Paragraph number***
Items 1 to 4, subsection 115-30(1) and section 115-100	7.66
Item 5, subsection 115-100	7.67
Item 5, paragraph 115-115(4)(d)	7.56
Item 6, subsection 115-105(1)	7.14
Item 6, paragraph 115-105(2)(d)	7.26
Subsection 115-105(3)	7.28
Item 6, table item 1 in subsection 115-110(2)	7.29
Item 6, table item 2 in subsection 115-110(2)	7.37
Item 6, table item 3 in subsection 115 -110(2)	7.41
Item 6, section 115-115	7.20
Item 6, subsection 115-115(2)	7.45
Item 6, subsection 115-115(3)	7.62
Item 6, subsections 115-115(3) to (6)	7.21
Item 6, subsection 115-115(4)	7.56
Item 6, subsections 115-115(4) and (5)	7.55
Item 6, subsection 115-115(5)	7.56, Example 7.15
Item 6, subsection 115-115(6)	7.59

Bill reference	Paragraph number
Item 6, section 115-120	7.42
Item 6, subsection 115-120	7.15

Schedule 8: Tax exemption for payments under Defence Abuse Reparation Scheme

Bill reference	Paragraph number
Item 1	8.11
Item 2, item 1.7 in table in section 51-5	8.10
Item 3	8.13

Schedule 9: GST-free treatment for National Disability Insurance Scheme funded supports

Bill reference	Paragraph number
Item 1, paragraph 38-38(a)	9.19
Item 1, paragraphs 38-38(a) and (b)	9.17
Item 1, paragraph 38-38(c)	9.20
Items 1 and 2, paragraph 38-38(d) and subsection 177-10(5)	9.23
Item 2, subsection 177-10(6)	9.25
Item 3, section 195-1	9.27
Item 4	9.28

Schedule 10: Deductible gift recipients

Bill reference	Paragraph number
Item 1, item 2.2.5 in the table in subsection 30-25(2) of the ITAA 1997	10.6
Item 2, item 2.2.40 in the table in subsection 30-25(2) of the ITAA 1997	10.8, 10.22
Item 3, item 4.2.5 in the table in subsection 30-45(2) of the ITAA 1997	10.10
Item 4, item 4.2.8 in the table in subsection 30-45(2) of the ITAA 1997	10.12

Bill reference	***Paragraph number***
Item 5, item 9.2.11 in the table in subsection 30-80(2) of the ITAA 1997	10.14
Item 6, item 13.2.4 in the table in subsection 30-105 of the ITAA 1997	10.16
Items 7 to 11	10.27
Item 12	10.23
Item 13, item 2.2.39 in the table in subsection 30-25(2) of the ITAA 1997	10.18
Items 13 to 15	10.24
Items 13 and 14, subsections 30-25(2) and 30-80(2) of the ITAA 1997	10.26

Schedule 11: Miscellaneous amendments

Bill reference	***Paragraph number***
Items 1, 2 and 3	11.6
Item 4	11.7
Item 5, paragraph 59-50(6)(b) of the ITAA 1997	11.17
Item 6, paragraph 59-50(6)(c) of the ITAA 1997	11.14
Items 7 and 8, heading to Part 2-15 and section 59-50 of the *Income Tax (Transitional Provisions) Act 1997*	11.18
Item 9	11.19
Items 10 to 12, 15 to 26	11.26
Items 13 and 14	11.25
Subitem 27(1)	11.27
Subitem 27(2)	11.31
Subitem 27(3)	11.32
Items 28 to 31, subsection 960-275(1A) (formula) of the ITAA 1997, subsection 10A(5) (definition of current year) of the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*, and paragraph 9(1)(b) and subsection 9(1) (note) of the *Superannuation Guarantee (Administration) Act 1992*	11.48
Item 32	11.50
Items 33, 34, 38, 39, 42, 43, 46, 47, 50 and 51	11.65
Item 35	11.55
Items 36, 37, 40, 41, 44, 45, 48, 49 and 52 to 54	11.56
Item 55, table item 2 in subsection 355-100(1) of the ITAA 1997	11.67

Bill reference	***Paragraph number***
Subitem 56(1)	11.66
Subitems 56(2) and (3)	11.68