Tax Laws Amendment (2011 Measures No. 9) Bill 2011

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Economics Section

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## Glossary

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<tr>
<td>ADI</td>
<td>authorised deposit taking institution</td>
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<tr>
<td>APRA</td>
<td>Australian Prudential Regulation Authority</td>
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<td>ATO</td>
<td>Australian Taxation Office</td>
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<tr>
<td>CATSI Act</td>
<td><em>Corporations (Aboriginal and Torres Strait Islander) Act 2006</em></td>
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<td>CGT</td>
<td>capital gains tax</td>
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<tr>
<td>Commissioner</td>
<td>Commissioner of Taxation</td>
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<td>DGR</td>
<td>deductible gift recipient</td>
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<td>GST</td>
<td>goods and services tax</td>
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<td>GST Act</td>
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<td>ITAA 1997</td>
<td><em>Income Tax Assessment Act 1997</em></td>
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<td>RSA</td>
<td>retirement savings account</td>
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<td><em>Retirement Savings Accounts Act 1997</em></td>
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<tr>
<td>SIS Act</td>
<td><em>Superannuation Industry (Supervision) Act 1993</em></td>
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<tr>
<td>SMSF</td>
<td>self managed superannuation fund</td>
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<tr>
<td>TAA 1953</td>
<td><em>Taxation Administration Act 1953</em></td>
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<td>TFNs</td>
<td>tax file numbers</td>
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<td>TIES</td>
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Tax Laws Amendment (2011 Measures No. 9) Bill 2011

Date introduced: 23 November 2011  
House: House of Representatives  
Portfolio: Treasury  

Commencement: The formal sections of the Bill commence on Royal Assent. The commencement dates of the various Schedules and their application are indicated in the comments on each Schedule made in the main body of this Bills Digest.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/bills/. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The Bill contains six Schedules, each with a different purpose:

• to amend the Superannuation Industry (Supervision) Act 1993 and Retirement Savings Accounts Act 1997 to enable superannuation fund members with ‘lost’ superannuation accounts to electronically request consolidation of their superannuation benefits through the Australian Taxation Office (Schedule 1), and 

• to amend the Income Tax Assessment Act 1997 to provide for three separate changes to capital gains tax (CGT) arrangements:

  - so that entities in a restructure can use a share or interest sale facility to deal with foreign held interests without Australian tax residents automatically failing a key requirement of certain capital gains tax (CGT) roll-overs\(^1\)
  - so that an entity can be excluded from a member of a demerger group if the entity is a corporation sole or a complying superannuation entity (corporation sole is defined later in this Bills Digest), and
  - to expand the existing CGT roll-over to have application to entities which have changed incorporation to become a corporation under the Corporations Act 2001 or a corporation under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Schedule 2).

• to amend the GST financial supply provisions in A New Tax System (Goods and Services Tax) Act 1999 (the GST Act) that account on a cash basis to:

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1. A CGT roll-over allows the deferral of a capital gain (and thus tax liability) made on the disposal of an asset to a later income year.

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Committee consideration

On 24 November 2011, the Selection Committee referred this Bill to the House of Representatives Standing Committee on Economics for inquiry and report. The Economics Committee tabled its report in the House of Representatives on 8 February 2011, recommending that the House pass the Tax Laws Amendment (2011 Measures No. 9) Bill 2011 as proposed.² Details of the inquiry can be found on the inquiry’s web page.³

Background and key provisions

As each of the six Schedules to the Bill deals with a discrete issue, the background to, and key provisions of, each Schedule are discussed in turn.


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Schedule 1—Form for portability of superannuation

Background

There are around 12 million people who are members of a superannuation fund but as at 30 June 2010, there were around 31 million superannuation accounts with superannuation funds regulated by the Australian Prudential Regulation Authority. While in some cases it may be appropriate for individuals to have more than one superannuation account (for example, to provide for multiple insurance policies), the costs of maintaining multiple accounts may result in lower retirement earnings over the long run compared to consolidating all superannuation into a single account.

Some of these multiple accounts are ‘lost’—where the superannuation fund is unable to contact the member or the account has been inactive. When a member’s account is lost, their details are included on the ‘lost members’ register maintained by the Australian Taxation Office. As at 30 June 2010, there were 5.8 million lost superannuation accounts, with an accumulated balance of $18.8 billion.

Under existing arrangements, portability of superannuation benefits between funds requires that a member apply to a fund in writing, providing certified member identity documents (such as a drivers licence). The transferring fund must then send the member’s benefits to the receiving fund nominated by the member when all requirements have been satisfied.

Schedule 1 of the Bill amends the Retirement Savings Accounts Act 1997 and the Superannuation Industry (Supervision) Act 1993 to permit regulations to lay down the details for the operation of an electronic portability scheme and empower the Commissioner for Taxation to administer this scheme. This will mean that superannuation fund members can request the roll-over or transfer of their superannuation benefits. The Commissioner will then forward those requests to the trustee of the transferring fund.

The Explanatory Memorandum notes that the regulations will initially limit electronic portability to individuals who have a superannuation interest that is recorded on the ATO’s lost members register.

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and who are able to be located through the existing public search facility (‘SuperSeeker’). However, should the Bill be passed, electronic portability may be extended under the regulations to cover other circumstances.

An important part of implementing electronic portability is the use of Tax File Numbers (TFNs) to establish identity and provide for the relevant information to the transferring fund’s trustee. Under existing arrangements, it is not compulsory for a member to disclose their TFN. The Bill proposes to provide that the Commissioner of Taxation may request that a lost member quote their TFN and to pass the TFN to a superannuation or Retirement Savings Account (RSA) provider for the purposes of an electronic portability scheme.

Financial impact

According to the Explanatory Memorandum, there is no financial impact from the implementation of an electronic portability form.

Policy development

The proposal was first announced by the Government in September 2011. An Exposure Draft of the Bill and Explanatory Memorandum were issued by the Treasury on 23 September 2011 and six submissions were made by organisations and individuals. The Treasury made the following comments in relation to the submissions:

All submissions received supported the introduction of the electronic portability form.

Some submissions noted that the regulations that will support the form will need to be consistent with the rules that apply to the existing standard portability form, and suggested specific amendments to the regulations. These issues are being considered in the preparation of draft regulations. Consultation will be undertaken on the draft regulations.

One submission noted that individuals should retain the ability to rollover or transfer their benefits without quoting their tax file number (TFN). While the electronic portability form will require members to quote their TFN, they will retain the option of using an existing paper form to transfer their benefits. A tax file number is not mandatory information on existing paper forms.

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11. Explanatory Memorandum, p. 3.

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No changes to the proposed amendments were required as a result of the consultation.\(^{14}\)

Submissions from the Australian Institute of Superannuation Trustees and Association of Superannuation Funds of Australia to the House of Representatives Standing Committee on Economics Review of the Bill supported the development of electronic portability forms and the provisions related to the use of TFNs.\(^{15}\)

Key provisions

**Amendments to the Retirement Savings Accounts Act 1997**

**Item 3** inserts *proposed paragraph 3(1)(e)* to give the Commissioner of Taxation general administration of the electronic portability form under the Act and of the provisions relating to the use of TFNs. These amendments do not change the general administration of the existing portability arrangements by the Australian Prudential Regulation Authority (APRA).

**Item 8** inserts *proposed section 39A* into the Act to establish a provision for regulations to be established that allow a holder of an RSA to request the Commissioner of Taxation to transfer the holder’s benefits (with a further request by the Commissioner of Taxation to the provider of the RSA) to a nominated superannuation account or RSA account. The regulations may provide that the request be given to the Commissioner in the approved form.

**Item 9** inserts *proposed section 38A* to provide that the Commissioner of Taxation may request a holder of an RSA to quote their TFN to the Commissioner for the purposes of an electronic portability scheme proposed in section 39A. The holder is not required to comply with such a request, but the regulations may provide that a failure to quote a TFN affects whether the Commissioner may make a request for funds to be transferred by an RSA provider under the electronic portability scheme.

**Amendments to the Superannuation Industry (Supervision) Act 1993**

**Item 13** inserts *proposed paragraph 6(1)(g)* to give the Commissioner of Taxation general administration of the electronic portability form under the Act and of the provisions relating to the

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use of TFNs. These amendments do not change APRA’s general administration of the existing portability arrangements.

**Item 17** inserts **proposed section 34A** into the Act to establish a provision for regulations to be established that allow a fund member\(^{16}\) to request the Commissioner of Taxation to transfer the holder’s benefits (with a further request by the Commissioner of Taxation to the fund member’s provider) to a nominated superannuation or RSA account. The regulations may provide that the request be given to the Commissioner in the approved form.

**Item 18** inserts **proposed section 299NA** to provide that the Commissioner of Taxation may request a holder of a superannuation account to quote their TFN to the Commissioner for the purposes of an electronic portability scheme proposed in section 39A. The holder is not required to comply with such a request, but the regulations may provide that a failure to quote a TFN affects whether the Commissioner may make a request for funds to be transferred by an RSA provider under the electronic portability scheme.

**Application**

**Schedule 1** to the Bill commences on Royal Assent.

Because the provisions dealing with the portability form and disclosure of TFNs are taxation laws, their operation will be captured by schedule 1 to the **Taxation Administration Act 1953** (TAA) relating to taxation laws. This means that offences relation to TFNs will apply, as will penalties for false and misleading statements. The provisions will also be subject to confidentiality of taxpayer information under Division 355.

**Schedule 2—Capital gains tax and certain business restructures**

**Background**

On 11 May 2010, the then Assistant Treasurer in a media release titled ‘Reforms to Capital Gains Tax to Make It Easier for Businesses to Restructure’, announced that the Australian Government will:

- extend the Capital Gains Tax (CGT) roll-over for the conversion of a body to an incorporated company
- broaden the range of CGT roll-overs where entities can use a share or interest sale facility for foreign residents in a restructure, and

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16. *The Superannuation Industry Supervision Act 1993* uses the term ‘beneficiary’ of a regulated superannuation fund or approved deposit fund to define eligibility to apply for benefits to be rolled over or transferred (Section 10).

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• allow CGT demerger relief for demerger groups that include corporations sole or complying superannuation entities that currently cannot access the relief.¹⁷

The three measures will apply to CGT events happening after 7.30 pm (AEST) on 11 May 2010.

Initial consultation was undertaken on the design of these tax amendments with a consultation paper released on 11 May 2010 providing further information about these measures.¹⁸ The Government also released an Exposure Draft of the legislation on 13 May 2011 and a revised Exposure draft of the legislation on 20 September 2011.¹⁹

The amendments proposed in Parts 1, 2 and 3 of Schedule 2 of this Bill implement the reform measures proposed on 11 May 2010. The background to each part will be considered separately below.

Part 1—Share and interest sale facilities for foreign interest holders in a restructure

Background

In the media release of 11 May 2010 referred to above, the then Assistant Treasurer made the following comments on broadening the range of roll-overs, to include the use of share or interest sale facility for foreign residents in a restructure:

The Government will allow Australian interest holders access to a broader range of CGT roll-overs where an entity restructures using a share or interest sale facility for foreign interest holders. ...

This measure will make it more attractive for certain entities with foreign investors to restructure. ...

Currently some of these entities can be reluctant to restructure because their Australian investors face immediate CGT consequences and could even have to sell their interest to meet any CGT liability.²⁰

When an entity with foreign interest holders restructures, the interests issued or transferred under the restructure will be allocated to and handled by the share sale facility instead of to the foreign

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¹⁷ N Sherry (then Assistant Treasurer and Minister for Superannuation and Corporate Law), Reforms to capital gains tax to make it easier for businesses to restructure, media release, no. 090, 11 May 2010, viewed 30 January 2012, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FBOOW6%22


²⁰ Ibid.
interest holders.\textsuperscript{21} The share sale facility owns these interests, but eventually sells them and transfers the net capital proceeds to the foreign interest holders.

The interposing of the share sale facility in the entity restructure process may mean that some of the roll-over requirements are not satisfied. Thus some of the roll-overs require that all of the interest holders must exchange their interests in the original entity for interests in the new entity and that each interest holder owns the same, or substantially the same, percentage of interests in the new entity. This requirement is referred to as the ‘same ownership requirement’.

**Financial implications**

The Explanatory Memorandum states that this measure is expected to have an unquantifiable, but expected to be negligible, revenue impact.\textsuperscript{22}

**Key provisions**

The provisions in the *Income Tax Assessment Act 1997* (ITAA 1997), which allow the roll-over of capital gains when an entity restructures, subject to the same ownership requirement, are briefly indicated below.

Division 124 of Part 3.3 of the ITAA 1997 deals with replacement-asset roll-overs. The following provisions of Division 124 which deals with different types of replacement-asset roll-overs include the same ownership requirement:

- Subdivision 124-G which deals with the exchange of shares in one company for shares in another company includes the same ownership requirement in sections 124-365 and 124-380
- Subdivision 124-H which deals with the exchange of units in a unit trust for shares in a company includes the same ownership requirement sections 124-450 and 124-465
- Subdivision 124-I which deals with the conversion of a body to an incorporated company includes the same ownership requirement in section 124-520
- Subdivision 124-N which deals with the disposal of assets by a trust to a company includes the same ownership requirement in subsections 124-860(6) and (7), and
- Subdivision 124-Q which deals with the exchange of stapled ownership interests for ownership interests in a unit trust includes the same ownership requirement in section 124-1050.

Stapled securities are where two or more different securities are contractually stapled so that they cannot be sold separately. Section 124-1050 envisages stapled ownership interests in two or more trusts, or in one or more companies and one or more trusts which are stapled together to form

\textsuperscript{21} Share sale facilities are common in the context of arrangements or restructures, as part of takeover bids, or as a protective device to pre-empt unsolicited offers that might be made to investors on terms which might be significantly below market value.

\textsuperscript{22} Explanatory Memorandum, p. 4.
stapled securities. Stapling is commonly used to provide investors with access to returns through the use of tax-effective structures.

The same ownership requirement is also in section 125-55 for roll-over in Division 125 dealing with demerger relief.

**Item 1** of Part 1 of Schedule 2 adds *proposed section 124-20* at the end of Subdivision 124-A to enable foreign interest holders to access the relevant CGT entity restructure roll-overs in Division 124, where the share and interest sale facility becomes the owner of the interest. The CGT consequences are deferred for the foreign interest holder until a later dealing with the asset, such as when the share sale facility disposes of the interest.

**Item 9** of Part 1 of Schedule 2 adds at the end of Division 125 *proposed Subdivision 125-E* which includes *proposed section 125-235* to enable foreign interest holders to access the roll-over on demergers.

**Item 10** of Part 1 of Schedule 2 adds *proposed section 126-265* at the end of Subdivision 126-G, which deals with roll-over on transfer of assets between certain trusts. The proposed provisions will apply where a foreign law impedes the entity’s ability to issue or transfer the interest to the foreign interest holder, or where it would be impractical or unreasonably onerous to determine whether a foreign law impedes the ability of the receiving trust to issue or transfer the roll-over interest.

**Application**

**Item 11** of Part 1 provides that the amendments made by this Part apply to CGT events happening after 7:30 pm (by legal time in the Australian Capital Territory) on 11 May 2010.

**Part 2—CGT demerger relief**

**Background**

In the media release of 11 May 2010, referred to above, the then Assistant Treasurer made the following comments on the proposed CGT demerger relief measures:

The Government will amend the CGT demerger relief provisions so that demerger groups which currently include corporations sole or complying superannuation entities can benefit from the CGT demerger roll-over. This will be done by allowing another entity to be the head entity of such demerger groups.

This will remove a current defect in the CGT legislation that has prevented these groups from accessing CGT demerger relief. ...

This measure will make it possible for a wider range of business restructures to result by expanding the scope of entities that can benefit from the roll over.

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In certain circumstances they will be able to restructure their underlying ownership interests without adverse tax consequences.  

Financial impact

The Explanatory Memorandum states that this measure is expected to have an unquantifiable but negligible revenue cost.

Key provisions

A demerger is a form of restructure in which investors in the head entity (for example, shareholders or unitholders) gain direct ownership in an entity that they formerly owned indirectly (the ‘demerged entity’). Underlying ownership of the companies and/or trusts that formed part of the group does not change. The company or trust that ceases to own the entity is known as the ‘demerging entity’. A demerger group consists of a head entity and one or more entities known as ‘demerger subsidiaries’. The group can comprise companies and/or fixed trusts.

Division 125 of the ITAA 1997 deals with demerger relief, where, under Subdivision 125-B, owners of ownership interests in the head entity of a demerger group can obtain a roll-over to defer CGT consequences for the CGT events that happen to their interests under the demerger. Also, capital gains and capital losses made by members of the demerger group from certain CGT events that happen under the demerger are disregarded under Subdivision 125-C.

Paragraph 125-55(1)(a) provides that the roll-over is available if the company or trust is the head entity of a demerger group. Section 125-65 provides definitions of demerger group, head entity and demerger subsidiary.

Item 12 of Part 2 of Schedule 2 inserts proposed subsection 125-65(2A) to provide that neither a corporation sole nor a complying Superannuation entity is a member of a demerger group.

A corporation sole is a legal entity consisting of a single (“sole”) incorporated office, occupied by a single (“sole”) man or woman. A corporation sole does not issue ownership interests and hence does not have shareholders to whom it can demerge its interests. As the amendment by proposed subsection 126-65(2A) excludes a corporation sole from being a member of a demerger group, this allows an entity owned by the corporation sole to qualify as the head entity of a demerger group. At present, an entity owned by a corporation sole cannot demerge because the corporation sole is still the head entity and Division 125 relief does not apply.

Under paragraph 125-70(1)(g) a demerger cannot happen if the head entity or the demerged entity is a trust that is a superannuation fund. The amendments by proposed section 125-65(2A) to

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23.  N Sherry, op. cit.

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exclude complying superannuation funds from being a member of a demerger group and the amendment by item 13 to restrict the prohibition in subparagraph 125-70(1)(g) to non-complying superannuation funds, allow an entity owned by a complying superannuation fund to be the head entity of a demerger group.

Part 3—Roll-overs for change of incorporation

Background

The media release of the then Assistant Treasurer of 11 May 2010, referred to above, made the following comments on roll-overs for change of incorporation:

The roll-over will now allow Indigenous incorporated bodies to convert to a company incorporated under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act) without immediate CGT consequences. Also, Indigenous companies will be able to move between the Corporations Act 2001 and the CATSI Act without CGT consequences.

The roll-over has also been made more flexible to better accommodate business practices. This caters for situations where bodies are wound up and subsequently reincorporated and also allows for taxpayers to receive shares on incorporation to reflect all of the interests and rights they held in the original body.

To make sure that companies reincorporating are not disadvantaged by tax consequences, the roll-over will cover any gains or losses realised by the original entity when it ceases to own its CGT assets, trading stock and depreciating and revenue assets that then become assets of the newly incorporated entity as part of the reincorporation.

This will provide more flexibility for businesses that are reincorporating.26

The amendments to the ITAA 1997 proposed by Part 3 of Schedule 2 give effect to the measures announced by the then Assistant Treasurer on 11 May 2010.

Financial impact

The Explanatory Memorandum states that this measure is expected to have an unquantifiable but negligible revenue cost.27

Key provisions


27. Explanatory Memorandum, p. 5.

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The Guide to **proposed Subdivision 124-I** in **proposed section 124-510** states that roll-over relief is available for members of a body that is incorporated under one law and is converted to, or replaced with a body incorporated under another law.

**Proposed section 124-515** states that the object of this Subdivision is to ensure that capital gains tax (CGT) considerations for members of a body incorporated under a law do not impede a change of incorporation involving converting the body to, or replacing it with a company incorporated under:

(a) the * Corporations Act 2001* (the Corporations Act) or a similar foreign law; or  
(b) the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act).

**Change of incorporation without change in entity**

**Proposed section 124-520** of **proposed Subdivision 124-I** provides that the section applies and in consequence the roll-over relief is available under **proposed subsection 124-520(2)** to:

(a) a member of a body incorporated under a law other than the Corporations Act or a similar foreign law and when that body is converted into a company incorporated under the Corporations Act or a similar foreign law relating to companies  
(b) a member of a body incorporated under a law other than the CATSI Act when that body is converted into a company under the CATSI Act, and  
(c) it is reasonable to assume there is no significant difference between:
   (i) the ownership of the body, and of the rights relating to the body held by entities that owned the body, just before the conversion and the ownership of the company just after the conversion, or  
   (ii) the mix of ownership of the body, and of the rights relating to the body held by entities that owned the body, just before the conversion and the mix of ownership of the company just after the conversion.

**Proposed subsection 124-520(2)** provides that the member of a body referred to in **proposed subsection 124-520(1)** can choose to obtain roll-over if:

(a) as a result of the conversion the member is issued with shares in the company and nothing else, and  
(b) either the member is an Australian resident at the time of the conversion, or  
(c) if the member is a foreign resident at that time:  
   (i) each of that member’s interest and other rights (if any) was taxable Australian property just before the time of conversion, and  
   (ii) the shares are taxable Australian property when they are issued.

If a company is incorporated under the CATSI Act, **proposed subsection 124-520(3)** provides that the roll-over under **proposed subsection 124-520(2)** applies to the rights of a member of the company in the same way as the roll-over applies to shares in a company.
Proposed subsection 124-520(4) provides that these measures do not apply to demutualization of a body, if Division 326 in Schedule 2H to the *Income Tax Assessment Act 1936* (ITAA 1936) applies to the demutualization.

**Old Corporation is wound up**

Proposed section 124-525 provides a roll-over for a member of a body that changes their incorporation from one law to another and where the old incorporated body is wound up and is replaced by another corporation.

As with the roll-over for conversions of incorporation under proposed section 124-520 described above, the members of the original body must receive only shares, or rights as a member of the company incorporated under the CATSI Act as required by proposed paragraph 124-525(1)(d).

Similarly, as for roll-over for conversions of incorporation in proposed section 124-520, there is a requirement in proposed paragraph 124-525(1)(e) that it must be reasonable to conclude that there is no significant difference between the ownership or the mix of ownership of the body before the switch time to the company and the ownership or the mix of ownership of the company after the switch time.

A requirement under proposed paragraph 124-525(1)(f) is that the original body must dispose of all of its CGT assets to the company. However, this proposed paragraph also grants an exception for the retention by the original body of any assets needed to meet the body’s existing or expected liabilities before it ceases to exist.

**Roll-over applying to assets generally**

Item 16 of Schedule 2 inserts Part 3-80 titled: Roll-overs applying to assets generally. Part 3-80 includes proposed Division 620 into the ITAA 1997 to provide for roll-over for assets of a wound-up corporation passing to a corporation with not significantly different ownership.

Proposed Subdivision 620-A deals with corporations covered by Subdivision 124-I.

Proposed section 620-5 states that the measures in Subdivision 620-A ensure that there are tax neutral consequences when a body, that is incorporated under one law and ceases to exist after disposing of an asset to a company incorporated under another law, provided that the ownership of the company is not significantly different from the ownership of the body. Thus:

(a) proposed section 620-10 makes provision to disregard the body’s capital gains and losses from CGT assets which a body disposes of to the company

(b) proposed subsection 620-25(2) provides for the first element of CGT asset cost base for the company to be equal to the asset’s cost base for the body in connection with the disposal to the company

(c) proposed subsection 620-25(3) provides for the first element of the CGT asset’s reduced cost base for the company to be worked out similarly

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(d) **proposed subsection 620-25(4)** provides that if a body acquired the CGT asset before 20 September 1985, the company is taken to have acquired the CGT asset before that day

(e) **proposed section 620-30** provides for roll-over relief for balancing adjustment events

(f) **proposed section 620-40** provides for the body to have sold trading stock to the company and the company is taken to have held such items as trading stock, and

(g) **proposed section 620-50** provides for the body to have sold revenue assets to the company and at an amount that the body would not make a profit or loss on the disposal.

**Application**

**Division 3 of Part 3 of Schedule 2** provides for the application of amendments made in Part 3 by amendments to the *Income Tax (Transitional Provisions) Act 1997*.

**Item 24** inserts Subdivision 124-I titled: Change of incorporation, and **proposed section 124-520** to deal with the application of **proposed Subdivision 124-I** of the ITAA 1997. It states that Subdivision 124-I of the ITAA 1997 applies to CGT events happening after 7.30pm (by legal time in the Australian Capital Territory) on 11 May 2010.

**Item 25** inserts Part 3-80 including Division 620 and subdivision 620-A and **proposed section 620-10** states that **proposed Subdivision 620-A** of the ITAA 1997 applies in relation to the cessation of existence of bodies corporate occurring after 7.30pm (by legal time in the Australian Capital territory) on 11 May 2010.

**Schedule 3—GST financial supply provisions**

**Background**

The background to the introduction of the three measures in this Bill for the reform of the GST financial supply provisions is briefly as follows:

- on 11 June 2008, the then Assistant Treasurer announced that he had asked the Board of Taxation to undertake a review of the legal framework for the administration of the GST
- on 12 May 2009, the then Assistant Treasurer and Minister for Competition Policy and Consumer Affairs released the report of the Board of Taxation and announced the Government's response to the Board of Taxation's Review of the legal framework for the administration of the GST. Attachment A to the media release included the Government’s response to the Board’s recommendations. At the same time, the then Assistant Treasurer, announced that the Treasury would undertake a review of the financial supply provisions
- also on 12 May 2009, the Treasury released a consultation paper on the Review of the Financial Supply Provisions, and

28. C Bowen (then Assistant Treasurer and Minister for Competition Policy and Consumer Affairs), *Government acts to reduce GST compliance costs for business*, media release, June 2008, viewed 30 January 2012, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FP8PQ6%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FP8PQ6%22)

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• in the 2010-11 Budget, the Government announced that it would amend the financial supply provisions of the GST law to clarify the operation of the legislation and reduce compliance and administrative costs, particularly for many small businesses, with effect from 1 July 2012.  

The measures in Schedule 3 implement three of the seven measures which require legislative change, as indicated under the key provisions section below.

The implementation of the four remaining recommendations requires changes to the A New Tax System (Goods and Services Tax) Regulations 1999.

Financial impact

The Explanatory Memorandum states the package of financial supply measures is expected to be revenue neutral when taken as a whole.

Key provisions

Amendments made by Part 1—increasing financial acquisitions thresholds

Division 189 of the A New Tax System (Goods and Services Tax) Act 1999 (the GST Act) provides you can be entitled to input tax credits for your acquisitions of financial supplies if you do not exceed the financial acquisitions threshold, although the acquisition of financial supplies is normally input taxed and in consequence, there is no entitlement to input tax credit.

Section 189-15 states that a financial acquisition is an acquisition that relates to the making of a financial supply (except a supply consisting of a borrowing).

The financial acquisitions threshold under Division 189 is determined by the application of a test which has two limbs. An entity will exceed the financial acquisitions threshold if the dollar value of notional input tax credits for current or future financial acquisitions made by the entity exceeds either:

(a) $50 000 in the relevant period (the first limb), or
(b) 10 per cent of input tax credits the entity could claim for all its purchases, including notional input tax credits for financial acquisitions, during the relevant period (the second limb).

The first limb of the test as applicable generally to current financial acquisitions of an entity is set out in paragraph 189-5(1)(a) and that applicable to GST groups is set out in paragraph 189-5(2)(a). The

amendment by item 1 of Part 1 of Schedule 3 increases the limit of $50 000 in the first limb of the test to $150 000 as applicable to current financial acquisitions.

The first limb of the test as applicable generally to future financial acquisitions of an entity is set out in paragraph 189-10(1)(a) and that applicable to GST groups is set out in paragraph 189-10(2)(a). The amendment by item 2 of Part 1 of Schedule 3 increases the limit of $50 000 in the first limb of the test as applicable to future financial acquisitions.

The relevant period for current financial acquisitions is the current month plus the previous 11 months. The relevant period for future financial acquisitions is the current month plus the following 11 months.

**Application**

The amendments made by Part 1 of Schedule 3 apply for working out whether you exceed the financial acquisitions threshold at a time during July 2012 or a later month.

**Amendments made by Part 2—Treatment of borrowings**

Division 11 of the GST Act deals with creditable acquisitions. Section 11-15 states the meaning of creditable purpose. Paragraph 11-15(2) provides that you do not acquire the thing for a creditable purpose to the extent that:

(a) the acquisition relates to making supplies that would be input taxed, or
(b) the acquisition is of a private or domestic nature.

Thus paragraph 11-15(2)(a) denies input tax credits when the acquisition relates to making supplies that are input taxed.

Paragraph 11-15 (5) provides that an acquisition is not treated, for the purposes of paragraph (2)(a), as relating to making supplies that would be input taxed to the extent that:

(a) the acquisition relates to making a financial supply consisting of a borrowing, and
(b) the borrowing relates to you making supplies that are not input taxed.

Item 4 of Part 2 of Schedule 3 amends section 11-15(5)(a), to exclude borrowings made through a deposit account, from a financial supply consisting of borrowing referred to in paragraph 11-15(5)(a) of the GST Act.

Item 5 inserts into section 195-1, the Dictionary in the GST Act, a meaning of ‘deposit account’. It states that an account is a deposit account if:

(a) the account is made available by an Australian authorised deposit taking institution (ADI), within the meaning of the Corporations Act 2001 (Corporations Act), in the course of carrying on a banking business, as defined in the Banking Act 1959

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(b) amounts credited to that account represent money taken by the ADI on deposit, other than as part-payment for identified goods and services; and
(c) amounts credited to the account do not relate to a debenture for the purposes of the Corporations Act.

The consequence of these amendments is that input tax credits denied under paragraph 11-15(2)(a) for acquisitions that relate to an Australian ADI making a financial supply, consisting of a borrowing through a deposit account, are not allowed under subsection 11-15(5) as is possible under current law.

Application

The amendments made by Part 2 of Schedule 3 apply in relation to acquisitions made on or after 1 July 2012.

Amendments made by Part 3—Hire purchase agreements

Under Division 156 of the *A New System (Goods and Services Tax) Act 1999* (the GST ACT) supplies and acquisitions made for a period or on a progressive basis are treated as separate supplies or acquisitions for some purposes, including supplies under hire purchase agreements.

Item 9 of Schedule 3 inserts proposed section 156-23 to provide that a supply or acquisition of goods or credit under a hire purchase agreement is treated as not being a supply or acquisition made on a progressive or periodic basis; instead supplies under hire purchase agreements are dealt with under proposed Division 158.

Item 10 of Schedule 3 inserts proposed Division 158 and proposed section 158-5 of this new Division provides that if you account on a cash basis, you are treated as if you do not account on a cash basis for:

(a) any acquisition made under a hire purchase agreement, or
(b) any input tax you are entitled to, or an adjustment you have under section 58-10(1) for an acquisition made under a hire purchase agreement.

Application

Item 11 of Schedule 3 provides that the amendments made by Part 3 of Schedule 3 apply in relation to supplies under hire purchase agreements entered into on or after 1 July 2012.

Schedule 4—New residential premises

Background

In *Commissioner of Taxation v Gloxinia Investments (Trustee)* [2010] FCAFC 46 (Gloxinia) handed down on 24 May 2010, the Full Federal Court found that the sale by developers of newly constructed residential premises that had been subject to development lease arrangements was input taxed.

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Therefore, when they were sold by developers to home buyers and investors, GST was not payable on the full value added by developers to premises.

On 27 January 2011, the Assistant Treasurer and Minister of Financial Services announced that the *A New Tax System (Goods and Services Tax) Act 1999* (the GST Act) would be amended to ensure that new residential premises constructed under development lease arrangements are treated as taxable supplies, rather than input taxed supplies, where the premises are sold by developers to home buyers or investors.32

These amendments in **Schedule 4** contain a transitional provision to ensure that taxpayers who have entered into arrangements on a basis consistent with the Court’s findings, prior to 27 January 2011, in respect of newly constructed residential premises, are not disadvantaged.

**Financial impact**

The Explanatory Memorandum states that this measure results in an ongoing gain to GST revenue estimated at $60 million over the forward estimates period, with cash receipts from this measure paid to the states and territories. This results in additional payments of $55 million to the states and territories over the forward estimates period, with the difference between revenue and payments due to a timing delay between the accrual of GST revenue and cash collections.33

**Key provisions**

Subdivision 40-C of the GST Act deals with supplies of residential premises that are input taxed.

Section 40-65 provides that the sale of residential premises to be used predominantly for residential accommodation is input taxed to the extent that the premises are not commercial residential premises or new residential premises.

Section 40-70 states that a supply by way of long term lease of residential premises to be used predominantly for residential accommodation is also input taxed to the extent that the premises are not commercial residential premises or new residential premises.

The Explanatory Memorandum to the Bill in paragraph 6.9 states that the Full Federal Court decision in *Gloxinia*, which held that a developer’s sales of newly constructed residential premises, under a development lease arrangement with the land owner are input taxed, is contrary to the policy intent, which was to subject the supply of newly constructed residential premises to the GST.

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Section 40-75 currently deals with the meaning of new residential premises. The Australian Government has also taken this opportunity to make amendments to section 40-75 to ensure that where it was the policy intent to treat certain supplies as input taxed, the decision in *Gloxinia* is not taken to indirectly imply that those supplies are liable to the GST. As examples, the Explanatory Memorandum in paragraph 6.11 states that the decision in *Gloxinia* may suggest that the subdivision of an existing block of flats into strata title units, or the excising of a vacant lot from land comprising residential premises, may result in the premises becoming new residential premises and their subsequent supply being subject to GST instead of being input taxed. In paragraph 6.12 the Explanatory Memorandum reiterates that these outcomes are contrary to the general policy intent in relation to the taxation of property under the GST.

The Australian Government has also taken the opportunity to restructure section 75 by inserting four subtitles to section 40-75 and these reform measures will be briefly considered under each subtitle.

**When premises are new residential premises**

Presently, section 40-75 of Subdivision 40-C of the GST Act provides a definition of new residential premises.

Subsection 75(1) provides that residential premises are new residential premises if they have:

(a) not previously been sold as residential premises (other than commercial residential premises) and have not previously been the subject of a long term lease

(b) been created through substantial renovations of a building; or

(c) been built, or contain a building that has been built, to replace demolished premises on the same land.

Item 2 of Part 1 of Schedule 4 adds at the end of subsection 40-75(1), the sentence “Paragraphs (b) and (c) have effect subject to paragraph (a).” In addition, notes 1, 2 and 3 have been added after this new sentence which clarify that premises become new residential premises because:

(a) of substantial renovations, or

(b) they have been built to replace demolished premises, and cease to be new residential premises after they are sold or supplied by way of a long term lease as residential premises.

**Subdivisions etc. may not result in new residential premises**

Section 75 of Subdivision 70-C of the GST Act which provides a meaning of “new residential premises” will be amended by item 5 of Part 1 of Schedule 4 by inserting proposed subsection 40-75(2AA) to ensure that residential premises are not “new residential premises” if:

(a) they are created from residential premises that became the subject of a property subdivision plan; and

(b) the residential premises referred to in paragraph (a) were not new residential premises immediately before they became the subject of that plan.

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Item 10 of Part 1 of Schedule 4 inserts the following definition of “property subdivision plan” into the Dictionary in section 195-1 of the GST Act. It states that property subdivision plan means a plan:

(a) for the division of real property; and
(b) that is registered under an Australian law.

A note to Item 10 adds that examples are strata title plans and plans to subdivide land.

Disregard certain supplies of the premises

Subsection 40-75(2A) of the GST Act provides the circumstances when a supply of premises is disregarded as a sale for the purposes of applying paragraph 40-75(1)(a) referred to above.

Item 7 of Part 1 of Schedule 4 substitutes the words “premises is disregarded as a sale” with the words “residential premises is disregarded as a sale or supply”.

Item 8 inserts:

(a) proposed subsection 40-75(2B) to disregard what are described as “the wholesale supply” of residential premises under certain arrangements for the purposes of applying paragraph 40-75(1)(a), and
(b) proposed subsection 40-75(2C) to disregard as a sale or supply for the purposes of applying paragraph 40-75(1)(a), if it is made because a property subdivision plan relating to the premises was lodged for registration by the recipient of the supply or the recipient’s associate.

Note 3 to proposed subsection 40-75(2B) states that this subsection does not apply if certain commercial commitments were in place before 27 January 2011.

A note to proposed subsection 40-75(2C) states that this subsection does not apply to a supply if the plan was lodged for registration before 27 January 2011.

The amendments to give effect to the above exceptions for matters arising before 27 January 2011 are dealt with by items 12 and 13 of Part 2 of Schedule 4. A brief commentary on these amendments is given in the section on the application of the amendments in Schedule 4 below.

New residential premises include associated land

Item 9 of Part 1 of Schedule 4 inserts the subtitle: New residential premises include associated land, before subsection 40-75(3) which provides that to avoid doubt, if the residential premises are new residential premises because of paragraph 40-75(1)(b) or (c), the new residential premises include land of which the new residential premises are a part.

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Application of amendments by Schedule 4

Sub-item 11(1) of Part 2 of Schedule 4 provides that the amendments made by Schedule 4, other than those referred to in sub-item 11(2), apply in relation to supplies of residential premises on or after 27 January 2011.

Sub-item 11(2) provides that sub-item 11(1) has effect subject to items 12 and 13.

Sub-item 11(3) provides that that the amendment made by item 2, namely, that paragraphs 40-75(1) (b) and (c) are subject to subparagraph 75-(1)(a), applies in relation to supplies of residential premises on or after the day after this Schedule commences.

Item 1 in the table in proposed section 2 of the Bill states that Schedule 4 commences on the day this Act receives the Royal Assent.

Exception from the new law for arrangements made before 27 January 2011 to develop premises

Item 12 of Schedule 4 provides the first exception from the application of the new law, and relates to the wholesale supply of residential premises under arrangements made before 27 January 2011 to develop premises. Sub-item 12(3) provides that an arrangement includes an agreement.

Sub-item 12(1) provides that this exception applies to the wholesale supply of residential premises and

(a) such supply takes place:
   (i) on or after 27 January 2011
   (ii) before 27 January 2011 and the next supply of residential premises takes place on or after 27 January 2011, and

(b) such supply satisfies the conditions in sub-item 12(2).

Sub-item 12(2) sets out the following conditions that must be satisfied by the wholesale supply.

(a) the premises from which the residential premises were created had been supplied earlier to the recipient of the wholesale supply or one or more of its associates
(b) immediately before 27 January 2011 the recipient of the wholesale supply, or one or more of its associates, were commercially committed to an arrangement
(c) under the arrangement, the wholesale supply was conditional on specified building or renovation work being undertaken by the recipient of the wholesale supply or one or more of its associates, and
(d) no GST return, or a GST return as amended, given to the Commissioner has reported for a tax period, a net amount that includes input tax credits that the recipient of the wholesale supply would have been entitled to, if the next sale or long term lease of residential premises were creditable acquisitions.

Sub-item 12(3) provides a definition of ‘commercially committed’ for the purposes of item 12 in relation to an arrangement entered into by the recipient of the wholesale supply.
Such a recipient is commercially committed if:

(a) the arrangement is legally binding on the recipient
(b) the recipient is a preferred tenderer in the final step in a bidding or tendering process relating to the arrangement
(c) the recipient has directly or with associates made acquisitions having a total GST exclusive value of at least $200,000, in relation to the arrangement, or
(d) the recipient has directly or with associates incurred internal direct costs of at least $200,000, in relation to the arrangement.

Exception from the new law for property subdivision plans lodged for registration before 27 January 2011

Item 13 of Schedule 4 provides the second exception from the application of the new law and relates to the supply of residential premises made on or after 27 January 2011. This exception relates to the supply made in respect of a property subdivision plan that was lodged for registration before 27 January 2011 by the recipient of the supply or the associate of the recipient.

Schedule 5—Deductible Gift Recipients

Background

A deductible gift recipient (DGR) is an organisation that is entitled to receive income tax deductible gifts and deductible contributions. There are two methods of gaining DGR status:

• by applying to the Commissioner of Taxation for endorsement as a DGR, and
• where the organisation has not met the requirements for approval by the Commissioner, by having the organisation listed by name in Division 30 of the Income Tax Assessment Act 1997 (ITAA 1997) or in the Income Tax Regulations 1997.34

Key provisions

Amendments to the Income Tax Assessment Act 1997

Items 1 and 3 amend subsections 30-70(2) and 30-315(2) to repeal the name ‘Playgroup Australia Incorporated’ and replace it with the name ‘Play Group Australia Limited’. Play Group Australia Limited is the peak representative body for play groups in Australia, with its membership comprising

34. Income Tax Assessment Act 1997, sections 30.17 and 30.120.

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state-based associations.  

The change in name reflects the change in legal structure from an incorporated entity to a company limited by guarantee.  

**Items 2 and 4** amend subsections **30-80(2) and 30-315(2)** to provide for one new organisation—‘Rhodes Trust in Australia’—to be included in the list of DGRs. Rhodes Trust in Australia is proposed to be listed as item 9.2.24 in the table of specific international affairs recipients. The Explanatory Memorandum notes that the purpose of Rhodes Trust in Australia is:

[R]aise monies in Australia to augment the existing Rhodes Scholarship program at Oxford University in the United Kingdom. All monies raised in Australia will be used to provide scholarships to Australians to undertake tertiary education at Oxford University in the United Kingdom.  

Company records show that the shares in Rhodes Trust in Australia are beneficially held by the United Kingdom Rhodes Trust. This organisation notes that tax deductibility is available for contributions from a number of countries and that the tax deductibility of gifts from Australia is expected to be completed in 2011.  

The cost of providing for tax deductible gifts and donations for Rhodes Trust in Australia is estimated to be $2.31 million over the four years to 2014–15. 

**Comment**

The most recent version of the ITAA, compiled on 15 November 2011, lists the Christchurch Earthquake Appeal Trust of New Zealand as item 9.2.24, with the condition that the gift must be made after 21 March 2011 and before 22 March 2013. An unintended consequence of the proposed amendment is that the use of the item number 9.2.24, which had been allocated to the Christchurch Earthquake Appeal Trust, would be that two organisations would have the same item number. This anomalous situation could be avoided by allocating the item number 9.2.25 to the Rhodes Trust in Australia in an amendment to the Bill.

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37. Explanatory Memorandum, p. 78.

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Application

The Bill provides for the listing of Rhodes Trust in Australia apply to gifts made after 21 October 2011. The name change from Playgroup Australia Incorporated to PlayGroup Australia Limited will apply from 25 October 2010.

Comment

There is an inconsistency between the Bill and the Explanatory Memorandum in the proposed application of DGR status for Rhodes Trust in Australia, with the Bill specifying that the listing applies to gifts made after 21 October 2011 (proposed subsection 30-80(2)) and the Explanatory Memorandum noting the date of effect to be for gifts made after 20 October 2011.41

Company record information provided to the Australian Securities and Investments Commission specify a registration date for Playgroup Australia Limited of 25 March 2010. It is unclear why the date of 25 October 2010 is nominated in the Bill.

Schedule 6—Miscellaneous amendments

Background

Schedule 6 to the Bill makes a number of miscellaneous amendments to tax laws to ensure that tax laws operate as intended. These changes include:

• the correction of technical or drafting defects
• the removal of anomalies
• addressing unintended outcomes, and
• repealing inoperative provisions.

The amendments were presented as an Exposure Draft on 11 October 2011 and submissions closed on 1 November 2011.42 The majority of the amendments are the product of input from members of the public and tax professionals via the Tax Issues Entry System (TIES).43

A comprehensive list of the amendments and their intended effects is available on pages 79 - 116 of the Explanatory Memorandum. The amendments are dealt with in Parts 1 to 31 of Schedule 6 to the Bill, comprising items 1 to 255.

41. Explanatory Memorandum, p. 7.

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Financial impact

The Explanatory Memorandum (page 8) states that the amendment which gives the Commissioner discretion to extend the two-year period that applies to the capital gains tax exemptions on the disposal of a dwelling or an interest in it, by a trustee of a deceased estate, is expected to result in a small but unquantifiable cost to revenue. The extension of time is given effect by amendments in items 94 and 95 of Part 8 of Schedule 6 and item 96 of Part 8 provides that the proposed amendments apply to CGT events that happen in the 2008-09 income year and later income years. The Explanatory Memorandum (page 8) also adds that the other amendments are expected to have nil to minimal revenue impacts.

Application

Items 6 to 31 of the table in clause 2 of the Bill give various dates of commencement for the amendments proposed in the various parts and items of Schedule 6.

The application of the amendments in each Part is where it is different from the commencement date provided for at the end of each Part.

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