
THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

A NEW TAX SYSTEM (TAX ADMINISTRATION) BILL (No. 2) 2000

EXPLANATORY MEMORANDUM

(Circulated by authority of the Treasurer, the Hon Peter Costello, MP)
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## Glossary

The following abbreviations and acronyms are used throughout this Explanatory Memorandum.

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<tr>
<th>Abbreviation</th>
<th>Definition</th>
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<tbody>
<tr>
<td>AAT</td>
<td>Administrative Appeals Tribunal</td>
</tr>
<tr>
<td>ABN</td>
<td>Australian Business Number</td>
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<tr>
<td>ANTS</td>
<td>Tax Reform: not a new tax, a new tax system</td>
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<tr>
<td>ATO</td>
<td>Australian Taxation Office</td>
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<tr>
<td>BAS</td>
<td>business activity statement</td>
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<tr>
<td>Commissioner</td>
<td>Commissioner of Taxation</td>
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<tr>
<td>DAFGSA 1999</td>
<td>Diesel and Alternative Fuels Grants Scheme Act 1999</td>
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<tr>
<td>FBT</td>
<td>fringe benefits tax</td>
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<tr>
<td>FBTAA 1986</td>
<td>Fringe Benefits Tax Assessment Act 1986</td>
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<tr>
<td>FS assessment debt</td>
<td>Financial Supplement assessment debt</td>
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<tr>
<td>GIC</td>
<td>general interest charge</td>
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<tr>
<td>GST</td>
<td>goods and services tax</td>
</tr>
<tr>
<td>GST Act</td>
<td>A New Tax System (Goods and Services Tax) Act 1999</td>
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<td>HECS assessment debt</td>
<td>Higher Education Contribution Scheme assessment debt</td>
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<td>ITAA 1936</td>
<td>Income Tax Assessment Act 1936</td>
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<tr>
<td>PAYE</td>
<td>pay as you earn</td>
</tr>
<tr>
<td>PAYG</td>
<td>pay as you go</td>
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<tr>
<td>RBA</td>
<td>running balance account</td>
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<tr>
<td>T(IOEP)A 1983</td>
<td>Taxation (Interest on Overpayments and Early Payments) Act 1983</td>
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<td>TAA 1953</td>
<td>Taxation Administration Act 1953</td>
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<tr>
<td>WTAA 1964</td>
<td>Wool Tax (Administration) Act 1964</td>
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</table>
General outline and financial impact

Administrative penalties

Schedules 1 and 2 to this Bill amend the TAA 1953, the ITAA 1936 and other Acts to introduce a uniform administrative penalty regime that will impose:

- penalties relating to statements and schemes;
- penalties for the late lodgment of returns and other documents; and
- penalties for failing to meet other taxation obligations.

Date of effect: For income tax, the new administrative penalty regime will generally apply to matters relating to the 2000-2001 income year and later years. Amendments relating to FBT matters will apply from 1 April 2001.

Proposal announced: The new administrative penalty regime is part of the Government’s commitment, announced in ANTS, to look at ways of streamlining administrative processes.

Financial impact: It is not possible to quantify the financial impact. Some penalties increase and some decrease. Overall, the measure is expected to be revenue neutral.

Compliance cost impact: The compliance cost impact is outlined in the regulation impact statement.

Provision of BAS services by people other than registered tax agents

Schedule 2 to this Bill amends the ITAA 1936 and the FBTAA 1986 by allowing the following people to prepare and lodge a BAS, and provide advice about BAS matters, on behalf of taxpayers:

- members of recognised professional associations that represent accountants and tax practitioners;
- bookkeepers working under the direction of registered tax agents; and
- persons that provide payroll bureau services to employers.

Date of effect: The amendments will apply from 1 July 2000.

Proposal announced: Not previously announced.

Financial impact: It is expected that there will be a small, positive gain in revenue through BAS service providers being able to assist more businesses to comply with their obligations under the new tax system.
**Compliance cost impact:** The compliance cost impact is outlined in the regulation impact statement.

**Miscellaneous – technical amendments**

*Schedules 2 to 5* to this Bill amend various tax laws to:

- round down to the nearest dollar all tax debts and credits notified to the Commissioner in returns and a BAS and, where the Commissioner determines the tax debt, round down the amount to the nearest multiple of 5 cents;
- give the Commissioner the discretion to defer the due date for notification of BAS liabilities;
- give the Commissioner a broader discretion to remit the GIC; and
- make a number of technical and miscellaneous amendments to the legislation supporting the new tax system including the PAYG withholding system.

**Date of effect:** The amendments will apply from 1 July 2000.

**Proposal announced:** Not previously announced.

**Financial impact:** The impact from the rounding and crediting measures is unquantifiable.

**Compliance cost impact:** None.

**Summary of regulation impact statement**

**Regulation impact on business**

**Impact:** Moderate

**Main Points:**

The proposed change to the law is part of a broad move to streamline administrative processes in line with the Government’s key reform objectives of certainty, robustness, fairness and simplicity.

The measure to increase the number of people who can provide BAS services will provide a wider choice to businesses in deciding who to engage to assist them in meeting their obligations under the new tax system.

**Policy Objective:**

The purpose of the proposed change is to introduce a new penalty regime to the laws administered by the Commissioner that is uniform, simple and equitable. The new penalty regime is necessary to support the ‘New Tax System’ that commences on 1 July 2000. The new regime will also remove weaknesses that are evident in the current penalty rules such as the poor structure of penalties for late lodgement of returns by individuals.
and difficulties in the administration of GIC penalties which don’t relate to late payment.

The purpose of the other proposed change is to allow people other than registered tax agents to prepare and lodge the BAS on behalf of taxpayers. These people will also be able to provide advice on BAS matters.
Chapter 1
Administrative penalties

Outline of Chapter
1.1 Schedules 1 and 2 to this Bill will introduce a uniform administrative penalty regime into Schedule 1 to the TAA 1953. The new administrative penalty regime is comprised of 3 distinct components:

- penalties relating to statements and schemes;
- penalties for late lodgment of returns and other documents; and
- penalties for failing to meet other taxation obligations.

1.2 The new administrative penalty regime will apply to all taxation laws for which the Commissioner has administration.

Context of Reform
1.3 The purpose of the amendments is to streamline the existing penalties framework and to support compliance under the new tax system. The new administrative penalty regime will impose uniform administrative penalties on taxpayers for failing to satisfy obligations under the taxation laws. It will:

- consolidate and standardise the provisions of the existing penalties framework throughout the different taxation laws;
- rectify current anomalies; and
- support the range of new taxes being reported on the BAS.

1.4 The new administrative penalty regime has been designed to be easily understood by taxpayers and easily administered by the Commissioner. It is equitable in that a common penalty will apply where a taxpayer fails to satisfy the same type of obligation under different tax laws. The regime is consistent with the ATO Compliance Model and the Taxpayers’ Charter.

1.5 These measures are the second phase of the uniform penalties regime. The GIC was introduced in 1999 in Taxation Laws Amendment Act (No. 3) 1999 to apply a uniform interest rate to all late payments of tax. A third phase of penalty amendments is proposed to be introduced in a Bill in the 2000-2001 year. It will deal with penalties relating to recommendations contained in A Tax System Redesigned.

Date of effect
1.6 The amendments contained in this Bill will generally apply from 1 July 2000. However, where the amendments relate to income tax return
matters they will apply to the 2000-2001 income year. Amendments relating to FBT return matters will apply from 1 April 2001.

Background to the legislation

1.7 The existing penalties framework is composed of disparate penalty provisions in the various taxation laws. For example, late lodgment of an FBT return attracts a penalty under section 114 of the FBTAA 1986 of double the amount of tax payable for the year, whereas late lodgment of an income tax return by the same person attracts a penalty of $10 for each week that the return is outstanding, up to a maximum of $200.

1.8 Another example of differing sanctions are penalties for understating tax payable. Where a taxpayer understates GST, the penalty is double the amount of the shortfall amount. This is high compared to the penalty for understated income tax of 25% of the understated tax where the taxpayer failed to exercise reasonable care. If the person did exercise reasonable care there is no penalty imposed on the shortfall amount.

1.9 A further problem with the current penalties framework is the duplication of penalty provisions in the different taxation laws. For example, the ITAA 1936 and the FBTAA 1986 each contain their own penalty provisions. As new tax obligations have been introduced, more penalty provisions have been added to existing legislation or included in new legislation. While many of the penalties serve a similar purpose, the progressive introduction of separate penalty provisions has led to a substantial amount of unnecessary duplication.

1.10 As well, the existing penalties framework does not impose penalties for breaches of some tax obligations. For example, the current penalties provisions in the income tax law do not impose a penalty where a taxpayer overclaims a credit (other than a credit under Division 19 of Part III or an offset under Division 1 of Part IIIAA of the ITAA 1936).

1.11 The implementation of the new tax system has introduced a number of new tax obligations. Taxpayers will be required to provide information about different types of taxes in the one approved form (a BAS). There needs to be a common penalty applying to understatements of these different taxes and overclaiming credits, as well as a common penalty for failing to notify the Commissioner of these debts by lodging a BAS. These obligations are self-reporting and, for some taxpayers, are required to be carried out electronically. The existing penalties framework was not designed to operate in this environment.

1.12 The new administrative penalty regime will overcome the problems within the existing penalties framework and the application of penalties to the new tax system by:

- grouping together existing penalty provisions which have a substantially similar operative effect;
- imposing the same administrative penalty for breaches of similar tax obligations; and
• applying the new administrative penalty regime uniformly to all taxation laws, including those recently introduced as part of the new tax system.

Detailed explanation of new law

1.13 The amendments contained in Schedules 1 and 2 to this Bill to introduce the new administrative penalty regime are explained in Table 1.1.

Table 1.1: Summary of amendments

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<td>Section 8</td>
<td>Consequential amendments</td>
<td>1.180 to 1.187</td>
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1.14 Where not specifically stated, legislative references throughout this Chapter (e.g. new Divisions, sections, subsections and paragraphs) about the new administrative penalty regime are references to provisions in Divisions 284 and 286 of Schedule 1 to the TAA 1953.

SECTION 1: GENERAL SHORTFALL AMOUNT PROVISIONS AND KEY CONCEPTS

1.15 Items 1 and 2 of Schedule 1 to this Bill introduce Division 284, which imposes administrative penalties for:

• making a statement that is false or misleading;
• taking a position that is not reasonably arguable; and
• participating in schemes.

1.16 The provisions of Division 284 are based on the existing penalty provisions in Part VII of the ITAA 1936. This structure of penalties is being adopted for understatements of all taxes. Table 1.2 summarises the existing penalty provisions in Part VII which have equivalent provisions in the new administrative penalty regime.
### Table 1.2: Existing and proposed penalty provisions

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<thead>
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<th><strong>New penalty provisions section title</strong></th>
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<td>284-90(1), item 1</td>
<td>226J</td>
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<td>Shortfall amount: recklessness</td>
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<td>Shortfall amount: lack of reasonable care</td>
<td>284-90(1), item 3</td>
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<td>284-90(1), item 5</td>
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<td>(trustee)</td>
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<td>Shortfall amount: unarguable position</td>
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<td>Shortfall amount: private ruling disregarded</td>
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<td>226M</td>
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<td>Increase in scheme base penalty amount</td>
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1.17 Where a provision in the new administrative penalty regime has no equivalent in the existing penalties framework, it will be fully explained in this Chapter.

Key Concepts

1.18 Subdivision 284-A contains a number of concepts which apply throughout the Division. These concepts are explained in paragraphs 1.20 to 1.35.

1.19 The explanation of reasonably arguable is taken from the explanatory memorandum to Taxation Laws Amendment (Self Assessment) Act 1992 and updated where necessary.

Reasonably arguable

1.20 ‘Reasonably arguable’ is a standard about the position taken by a person on a question of interpretation, including a conclusion of fact. It requires the treatment of a tax law to be about as likely to be correct as it is incorrect. Although the wording has been refined, the concept has the same meaning as in section 222C of the ITAA 1936. [Schedule 1, item 2, section 284-15]

1.21 A person can be liable for a penalty on a shortfall amount if he or she makes a statement about the treatment of an income tax law that is not reasonably arguable [Schedule 1, item 2, subsection 284-75(2)]. The reasonably arguable standard applies only to an income tax law, and does not apply to other tax laws, for example, FBT and GST matters. The standard applies only to taxpayers with large transactions that exceed the reasonably arguable position thresholds (see paragraphs 1.82 to 1.86) [Schedule 1, item 2, items 4 to 6 of subsection 284-90(1)]. The reasonably arguable position standard is also relevant in determining the amount of penalty that is payable as a result of a person participating in a scheme [Schedule 1, item 2, section 284-160].

1.22 A position taken by a taxpayer will be reasonably arguable if, on an objective analysis of the law and the application of the law to the relevant facts, it would be concluded that the taxpayer’s position was about as likely to be correct as incorrect. In other words, the position must be a contentious area of the law, where the relevant law is unsettled or where, although the principles of the law are settled, there is a serious question about the application of those principles to the circumstances of the particular case. [Schedule 1, item 2, subsection 284-15(1)]

1.23 The test does not require the taxpayer’s position to be the ‘better view’; the standard is ‘as likely correct as incorrect’, and not ‘more likely to be than not’. However, the reasonably arguable position standard would not be
satisfied if a taxpayer takes a position which is not defensible, or that is fairly unlikely to prevail in court. On the contrary, the strength of the taxpayer’s argument should be sufficient to support a reasonable expectation that the taxpayer could win in court. The taxpayer’s argument should be cogent, well-grounded and considerable in its persuasiveness.

1.24 For the purposes of determining whether a taxpayer has a reasonably arguable position about a tax-related matter, relevant authorities include the following:

- an income tax law, for example, a provision of the ITAA 1936 or ITAA 1997;
- material for the purposes of subsection 15AB(1) of the Acts Interpretation Act 1901, such as explanatory memoranda and second reading speeches;
- a decision of a court or the AAT; and
- a public ruling within the meaning of Part IVAA of the TAA 1953.

1.25 The list is not intended to be exhaustive, and a wider range of authorities may be taken into account in weighing up the merits of the competing arguments. For example, authorities relating to other areas of law (e.g. contract law) may provide support for a particular treatment of an item.

1.26 A taxpayer may have a reasonably arguable position about a tax-related matter despite the absence of authorities other than the law itself. What is required in such cases is that the taxpayer has a well-reasoned construction of the applicable statutory provision which it could be concluded was about as likely as not the correct interpretation.

1.27 An opinion expressed by an accountant, lawyer or other adviser is not an authority. However, the authorities used to support or reach the view expressed by the adviser, including a well-reasoned construction of the relevant statutory provisions, may support the position taken by a taxpayer.

1.28 The relevance of any authority is a matter to be weighed against other authorities, including the applicable statutory provisions and the facts of the case. An authority that has some facts in common with the tax treatment at issue is not particularly relevant if the authority is materially distinguishable on its facts, or is otherwise inapplicable to the tax treatment at issue. An authority that merely states the condition is ordinarily less persuasive than one that reaches its conclusion by cogently relating the applicable law to the pertinent facts. The source of an authority must be relevant. For example, a High Court decision on all fours with the tax treatment in question will be accorded more weight than a Federal Court decision, which in turn would be accorded more weight than a decision of the AAT.

1.29 There will be situations where a taxpayer, in applying the law to the facts, will need to make an assumption about the way in which the Commissioner would apply a discretion that is relevant to determination of taxable income. In these cases the taxpayer will have a reasonably arguable position to the extent that the assumption is in the range of positions which, if
decided by the Commissioner in the circumstances of the case, a court would be about as likely or not to conclude that the exercise of the discretion were in accordance with law. This approach effectively puts the taxpayer in the shoes of the Commissioner, and looks to whether the taxpayer, in making the assumption, has taken into account all relevant considerations, and not taken into account any irrelevant considerations, that bear materially on the decision reached. [Schedule 1, item 2, subsection 284-15(2)]

**Taxpayers who use tax agents**

1.30 Division 284 maintains the current position that a taxpayer is vicariously liable to any penalties arising from the conduct of an agent acting on behalf of the taxpayer. Where a taxpayer has a shortfall amount that is caused by an agent either failing to take reasonable care, behaving recklessly, intentionally disregarding the law or not having a reasonably arguable position, the taxpayer will be liable to pay a penalty at the appropriate rate. [Schedule 1, item 2, subsection 284-90(1), items 1 to 6 and 8]

1.31 Where the statement is made by the agent, the taxpayer is taken to have made the statement. [Schedule 1, item 2, section 284-25]

**Application of Division to trusts**

1.32 There are special rules that apply in determining the penalty on shortfall amounts relating to trusts. The trustee of a trust is liable to pay any penalty arising from statements made about the trust’s net income or obligations, or any penalty arising from the trust’s participation in a scheme. Any shortfall amount or scheme shortfall amount of a beneficiary that relates to the trust’s net income or obligations is taken to be the shortfall amount of the trustee. [Schedule 1, item 2, section 284-30]

**Application of Division to partnerships**

1.33 The existing penalties in Part VII of the ITAA 1936 impose the penalty on the ‘defaulting partner’. That is, the partner who makes the statement or enters into the scheme which causes the shortfall amount or the scheme shortfall amount pays the penalty for each partner in the partnership.

1.34 The new administrative penalty regime has not retained an equivalent ‘defaulting partner’ provision. Instead, for matters relating to the net income of the partnership or the partnership loss, each partner is liable for a penalty on the shortfall amount or scheme shortfall amount reflected in the partner’s income tax return. That is, an incorrect position taken in the partnership return will be a shortfall amount in each partner’s return. The penalty amount will be in proportion to the partner’s share of the net income or loss of the partnership. [Schedule 1, item 2, section 284-35]

**Example 1.1**

A partnership has a $25,000 shortfall amount because it omitted a capital gain on the disposal of a property from its net income. There are 2 partners who are entitled to an equal share of the profits of the partnership. Each partner will be liable for a penalty on a shortfall amount of $12,500. As it was determined that their agent had acted recklessly in not returning the capital gain, each partner is liable for a penalty of $6,250. This amount is calculated as follows:
50% (the base penalty amount) × $12,500 = $6,250

1.35 However, for all other shortfall amounts of tax-related liabilities of the partnership, for example, a PAYG withholding amount, section 444-5 of Schedule 1 to the TAA 1953 will apply. That provision makes each partner jointly and severally liable for the penalty imposed on the partnership shortfall amount or scheme shortfall amount. If one partner is not at fault for the partnership having a shortfall amount, then that partner may take action against the partner that caused the shortfall amount – but this does not affect that partner’s liability to pay the penalty amount.

SECTION 2: PENALTIES RELATING TO STATEMENTS

When is an administrative penalty imposed?

1.36 Subdivision 284-B, which deals with penalties relating to statements, provides that an administrative penalty relating to statements may be imposed if:

- the taxpayer or agent makes a statement to the Commissioner about a taxation law;
- the taxpayer has a shortfall amount as a result of the statement; and
- the statement is either:
  - false or misleading in a material particular [Schedule 1, item 2, subsection 284-75(1)];
  - in the statement, the taxpayer treated an income tax law applying to a matter in a way that was not reasonably arguable [Schedule 1, item 2, subsection 284-75(2)];
  - the taxpayer fails to make a statement [Schedule 1, item 2, subsection 284-75(3)]; or
  - the statement disregards a private ruling [Schedule 1, item 2, subsection 284-75(4)].

1.37 Diagram 1.1 illustrates when an administrative penalty relating to statements may be imposed.
Diagram 1.1: Penalty where there is a tax shortfall amount

Statements

Did the shortfall amount relate to a false or misleading statement?

Yes

Did the entity rely on Commissioner's advice?

Yes

No penalty

section 284-215 exceptions

No

Did the entity disregard a private ruling?

No

Was the shortfall amount above the reasonably arguable position threshold?

Yes

Base penalty amount (section 284-90)

Intentional disregard of the law: 75%

Recklessness: 50%

Lack of reasonable care: 75%

Disregarding a private ruling: 25%

Not having a reasonably arguable position: 25%

No

No penalty

Did the entity have a reasonably arguable position?

No

Did the entity exercise reasonable care?

No

Yes

Yes

No
1.38 A statement is anything disclosed to the Commissioner or to another entity about a tax-related matter. Statements made to the Commissioner include statements made to an employee of the ATO in the course of his or her duties. Statements made to an entity include statements made to a person other than a taxation officer about a tax-related matter, for example a tax agent preparing an income tax return.

1.39 The statement may be made in an application, approved form, BAS, instalment activity statement, certificate, declaration, notice, notification, return, statement or any other document made, prepared or given under a taxation law, or in answer to a question asked, or in any information given, under a taxation law. The current income tax penalty provisions exclude statements made in certain documents obtained under the Commissioner’s information gathering powers. That exclusion no longer applies under the new administrative penalty regime.

1.40 The statement may be made, lodged with or given to the Commissioner verbally, in writing, in an approved form or in any other way, including electronically. [Schedule 1, item 2, section 284-20]

1.41 A taxation law is defined in subsection 995-1(1) of ITAA 1997 to mean an Act of which the Commissioner has general administration, or regulations under such an Act.

**False or misleading statements**

1.42 A statement is false or misleading in a material particular when something in the statement is false or misleading, or something is omitted from the statement. If something is included in, or left out of, a statement relating to a tax matter which, if known, would cause a taxation officer to determine a claim in another way, it will be a material particular. In short, if a matter is important enough to affect a decision relevant to determining a taxpayer’s tax liability, the matter is to be regarded as material and must be disclosed correctly. [Schedule 1, item 2, paragraph 284-75(1)(b)]

**Example 1.2**

A taxpayer claims a deduction in an income tax return to which he or she is not entitled. The return contains a false or misleading statement.

A taxpayer does not include an amount of taxable income in his or her return, such as interest. The tax return contains a false or misleading statement because of this omission.

A taxpayer who states the wrong industry code in an income tax return will not be regarded as making a false or misleading statement in a material particular, as an incorrect code will generally not affect the taxpayer’s tax liability. Similarly, small or insignificant income omissions will be regarded as immaterial if there is little or no effect on the tax liability and the omission was caused by an honest oversight.

1.43 It is irrelevant whether the taxpayer knows that the statement is false or misleading or not. However, there are exclusions from the penalty where the taxpayer and the agent (if any) exercised reasonable care or followed the advice of the Commissioner (see paragraphs 1.108 to 1.112). The Commissioner may also remit the penalty under section 298-20 in Schedule 1 to the TAA 1953.
Reasonably arguable statements

1.44 The concept of whether a taxpayer or agent treated an income tax law applying in a way that was not reasonably arguable is discussed at paragraphs 1.20 to 1.29. [Schedule 1, item 2, paragraph 284-75(2)(b)]

1.45 Where a shortfall amount is caused by the taxpayer treating the law as applying in a particular way in respect of a number of different matters, the taxpayer will only need to have a reasonably arguable position in respect of the treatment of those matters that cause a part of the shortfall to exceed the threshold. However, if any of the matters are identical, for example, 2 separate lease payments for the same item of plant, the parts of a shortfall caused by the treatment of the 2 payments will be amalgamated for the purposes of testing that part of the shortfall against the threshold. [Schedule 1, item 2, paragraph 284-75(2)(b)]

1.46 This rule is designed primarily to prevent taxpayers seeking to split up single matters so as to come under the threshold. It is not intended, for example, that many small repairs to many substantially similar but discrete items of plant would be treated as single matters. This is one of the reasons why the penalty does not apply to other taxes such as GST.

Failure to make a statement

1.47 A taxpayer is liable to an administrative penalty under this section if he or she fails to give the Commissioner the required return, notice or other document from which a liability can be established. In these cases there is no false or misleading statement, or a statement which is not reasonably arguable, because a statement has not been made. [Schedule 1, item 2, subsection 284-75(3)]

1.48 For example, this penalty would apply if a taxpayer failed to lodge an income tax return, and the Commissioner issued a default assessment under section 167 of the ITAA 1936. In this situation, the taxpayer would also be liable for a penalty for failing to lodge a return under Subdivision 286-C.

1.49 An equivalent penalty for failing to make a statement is not included in the current penalties framework. It is being introduced into the new administrative penalty regime to provide a measure of fairness. Otherwise, a taxpayer who makes a statement that is false or misleading, or is not reasonably arguable, is subject to a penalty, but a taxpayer who does not make a statement at all would not be subject to a penalty.

Failure to follow a private ruling

1.50 A taxpayer who applies for and receives a private ruling on the way in which the law will apply to an arrangement is required to follow the ruling when determining the tax position in the relevant return. If the taxpayer does not follow the ruling and makes a statement treating the tax law as applying in a different way, the taxpayer will be liable to a penalty on any resulting shortfall amount. This penalty applies to both income tax and FBT rulings. [Schedule 1, item 2, subsection 284-75(4)]

1.51 The penalty does not apply if there has been a decision of the AAT or of a court that applies to the ruling. In such a case, the taxpayer would be expected to follow the decision when determining taxable income or the taxable value of fringe benefits, even if the taxpayer has appealed against the decision.
Failure to follow a decision of the AAT or court would ordinarily amount to a lack of reasonable care. A shortfall amount will not exist to the extent that the AAT or court supports the taxpayer’s treatment of the law as applying to the arrangement. [Schedule 1, item 2, subsection 284-215(3)]

**What is the shortfall amount?**

1.52 A *shortfall amount* will arise where there is a difference between the amount of tax, credit or payment entitlement, calculated on the basis of the entity’s statement in the document, and the tax properly payable according to law. The items in the table at section 284-80 describe these differences. A shortfall amount arises where:

- a tax-related liability is less than what it would be otherwise if the statement:
  - had not been false or misleading (This applies to tax-related liabilities for an accounting period and also to liabilities for GST arising on the importation of goods.) [Schedule 1, item 2, item 1 in section 284-80];
  - had not treated the income tax law in a way that is not reasonably arguable [Schedule 1, item 2, item 3 in section 284-80]; or
  - had not been inconsistent with a private ruling [Schedule 1, item 2, item 5 in section 284-80]; and

- a payment or credit is greater than what it would be otherwise, if the statement:
  - had not been false or misleading [Schedule 1, item 2, item 2 in section 284-80];
  - had not treated the income tax law in a manner that is not reasonably arguable [Schedule 1, item 2, item 4 in section 284-80]; or
  - had been consistent with a private ruling [Schedule 1, item 2, item 6 in section 284-80].

1.53 The *shortfall amount* is the amount by which:

- the relevant liability is less than it would otherwise have been; or
- the payment or credit is greater than it would otherwise have been.

1.54 The current penalties framework does not impose a penalty where a taxpayer overclaims a credit (other than a credit under Division 19 of Part III or an offset under Division 1 of Part IIIAA of the ITAA 1936). New penalties have been introduced into the new administrative penalty regime to rectify this problem. An amount that the Commissioner must pay or credit to a taxpayer includes an amount credited under Part IIB of the TAA 1953. [Schedule 1, item 2, items 2, 4 and 6 of section 284-80]

1.55 The penalty is calculated on the shortfall amount. The shortfall amount may be reduced or eliminated under section 284-215. If the taxpayer does not have a shortfall amount, there is no penalty.
Accounting period

1.56 The accounting period is the period for which the tax-related liability or credit is calculated. The period is not necessarily a financial year and may differ according to the type of tax involved. Table 1.3 provides some examples of accounting periods for a number of tax obligations.

Table 1.3: Relevant accounting period

<table>
<thead>
<tr>
<th>Tax obligation</th>
<th>Accounting period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Income tax</td>
<td>Income year, 1 July to 30 June (or substituted period).</td>
</tr>
<tr>
<td>FBT</td>
<td>FBT income year, 1 April to 31 March.</td>
</tr>
<tr>
<td>GST</td>
<td>Monthly or quarterly tax period.</td>
</tr>
<tr>
<td>PAYG Withholding</td>
<td>Weekly, quarterly or monthly.</td>
</tr>
<tr>
<td>PAYG Instalments</td>
<td>Quarterly or annually.</td>
</tr>
</tbody>
</table>

What is the base penalty amount?

1.57 Where there is a shortfall amount, the Commissioner identifies the cause of the shortfall amount, and applies the appropriate percentage to arrive at the base penalty amount. [Schedule 1, item 2, section 284-90]

1.58 Table 1.4 summarises the causes of the shortfall amount, and the percentage applied in each situation. The base penalty amount is the relevant percentage of the shortfall amount. [Schedule 1, item 2, section 284-90]

Table 1.4: Base penalty amount percentage

<table>
<thead>
<tr>
<th>Shortfall amount</th>
<th>Base penalty amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shortfall amount caused by intentional disregard of a taxation law.</td>
<td>75%</td>
</tr>
<tr>
<td>Shortfall amount caused by recklessness.</td>
<td>50%</td>
</tr>
<tr>
<td>Shortfall amount caused by lack of reasonable care.</td>
<td>25%</td>
</tr>
<tr>
<td>Shortfall amount where an unarguable position is taken and threshold applies.</td>
<td>25%</td>
</tr>
<tr>
<td>Liability under subsection 284-75(3) for failing to provide a document to the Commissioner as required.</td>
<td>75%</td>
</tr>
<tr>
<td>Shortfall amount under subsection 284-75(4) where a private ruling is disregarded.</td>
<td>25%</td>
</tr>
</tbody>
</table>

If more than one shortfall section applies

1.59 It is possible that more than one shortfall section may apply in respect of a shortfall amount. For example, a taxpayer may be reckless in making a claim for a deduction, and so be liable for penalty under item 2 of subsection 284-90(1), and also be liable for penalty under item 4 of subsection 284-90 (1) for not having a reasonably arguable position in respect of the claim. In such a case the taxpayer is liable to pay only one of the penalties. If one penalty is higher than the other (e.g. if items 2 and 4 of subsection 284-90 (1) both apply),
the taxpayer is liable to pay the higher base penalty amount. [Schedule 1, item 2, subsection 284-90(2)]

1.60 If the taxpayer is subject to 2 base penalty amounts of the same percentage on 2 different shortfall amounts, for example, items 3 and 4 of subsection 284-90(1) both apply, then that percentage will be applied to the total shortfall amount.

**Intentional disregard of a taxation law**

1.61 A taxpayer will be liable to pay a base penalty amount of 75% of a shortfall amount caused by the taxpayer or agent intentionally disregarding a taxation law. [Schedule 1, item 2, item 1 in subsection 284-90(1)]

1.62 For example, the base penalty amount of 75% would apply to the shortfall amount where a taxpayer or agent deliberately excludes from the taxpayer’s assessable income an amount knowing it to be assessable, or deliberately claims a deduction, rebate, credit or offset knowing that it is not allowable.

**Recklessness**

1.63 A taxpayer will be liable to pay a base penalty amount of 50% of a shortfall amount caused by the taxpayer or agent behaving recklessly with regard to the operation of a taxation law. [Schedule 1, item 2, item 2 in subsection 284-90(1)]

1.64 A taxpayer would be behaving recklessly if the taxpayer’s conduct shows disregard of, or indifference to, consequences foreseeable by a reasonable person. A finding of dishonesty is not necessary for a taxpayer to be subject to this penalty.

1.65 For example, a taxpayer who purchases shares in a company, but makes no attempt to find out the tax consequences of receiving dividends, and who destroys letters from the company (after banking the dividend cheque) without reading them would be penalised 50% of any shortfall amount which results from the taxpayer failing to return the dividends as income. The concept of recklessness for the purposes of this penalty covers behaviour that could be described as gross negligence.

**Lack of reasonable care**

1.66 A taxpayer will be liable to pay a base penalty amount of 25% of a shortfall amount caused by a failure by the taxpayer or the agent to take reasonable care to comply with a taxation law. [Schedule 1, item 2, item 3 in subsection 284-90(1)]

1.67 The reasonable care test requires a taxpayer to exercise the care that a reasonable person would be likely to have exercised in the circumstances of the taxpayer to fulfil the taxpayer’s tax obligations. Taxpayers must take reasonable care not only in the preparation of their tax returns, but throughout the year on matters that may impact on their tax obligations, for example, record keeping. A shortfall amount may be caused not only by the taxpayer being careless in making (or not making) taxation statements, but also by careless acts or omissions of the taxpayer which lie behind the statements that are (or are not) made. Whether a taxpayer has behaved reasonably will depend on all the facts of each case.
1.68 The test looks to whether a person, in all the circumstances of the taxpayer, would have foreseen as a reasonable probability or likelihood the prospect that the act or failure to act would result in a shortfall amount. It is not a question of whether the taxpayer actually foresaw the probable impact of the act or failure to act, but whether a person in the same circumstances of the taxpayer would have foreseen it. The test does not depend on the actual intentions of the taxpayer.

1.69 Reasonable care requires a taxpayer to make a reasonable attempt to comply with the provisions of a taxation law. The effort required is one commensurate with all the taxpayer’s circumstances, including the taxpayer’s knowledge, education, experience and skill.

1.70 The reasonable care test is not intended to be overly onerous for taxpayers. For most taxpayers, an earnest effort to follow TaxPack instructions would usually be sufficient to pass the test. For example, if a taxpayer made a claim for a deduction without being able to substantiate the deduction in accordance with the substantiation provisions, then this would tend to indicate that the taxpayer had not taken reasonable care about the claim, since TaxPack emphasises the requirement to be able to substantiate work-related expenses.

1.71 On the other hand, if the taxpayer who could not meet the substantiation requirements was able to show that he or she did not know and could not reasonably be expected to have known of the substantiation requirements, and had in fact incurred the relevant expenditure which would be deductible but for the substantiation requirement, the taxpayer would not be liable for penalty. Whether penalty is attracted will depend on the circumstances of the case.

1.72 For business taxpayers, reasonable care would require the putting into place of an appropriate record-keeping system and other procedures to ensure that the income and expenditure of the business is properly recorded and classified for tax purposes. The fact that an employee of the business makes a careless error would not necessarily mean that the business taxpayer is subject to penalty. For example, a penalty would not apply where the taxpayer can show that its procedures are designed to prevent such errors from occurring. What is reasonable will depend, among other things, on the nature and size of the business, but could include, for example, internal audits, sample checks of claims made, adequate training of accounting staff and instruction manuals for staff.

What is reasonable care?

1.73 On questions of interpretation, reasonable care requires a taxpayer to come to conclusions that would be reasonable for an ordinary person to come to in the circumstances of the taxpayer. If the taxpayer is uncertain about the correct treatment of a tax-related matter, reasonable care requires that taxpayer to make reasonable enquiries to resolve the issue. Reasonable enquiry would include the taxpayer consulting someone or some text like an ATO publication or other reference in an effort to satisfy the taxpayer about the proper tax treatment of the matter. The taxpayer would need to have reasonable grounds for believing the source consulted reflected the true tax position in respect of the matter. A mere reading of a provision of the relevant tax law which the
taxpayer believed to be relevant might not constitute reasonable enquiry unless the taxpayer had reasonable grounds for believing that he or she had understood the requirements of the law. For example, a wrong interpretation of a statutory provision that is clear and unambiguous would tend to suggest that the taxpayer did not exercise reasonable care. The ultimate consideration would be the honest efforts of the taxpayer, as displayed by the actions of the taxpayer in the context of the taxpayer’s circumstances, to ascertain the proper tax position.

1.74 The taking of a position with respect to a tax matter that is frivolous, or which lacks a reasonable basis, would be a strong indication of a lack of reasonable care.

1.75 A taxpayer who prepares his or her own return or BAS would usually be taken to have exercised reasonable care if in doing so the taxpayer relies upon the advice of a registered tax agent, accountant or lawyer or other person whom the taxpayer could reasonably expect to provide competent advice on the relevant matter. On the other hand, where such advice is not followed this would usually mean that the taxpayer did not exercise reasonable care.

1.76 If a taxpayer seeks to rely upon the wrong advice, and the taxpayer’s skill and education was such that the taxpayer could reasonably be expected to have known or suspected that the advice was wrong, the taxpayer would risk penalty. A taxpayer would also risk penalty if the taxpayer was careless in presenting all of the relevant facts to the adviser and this had materially affected the advice on which the taxpayer sought to rely.

1.77 Where a taxpayer uses a registered tax agent or other person to help prepare and lodge a BAS or tax return, the taxpayer will be vicariously liable for any penalties caused by the agent providing information that results in a shortfall amount. This includes the tax agent not taking reasonable care. The standard expected of a tax agent will be much higher than the standard expected of the client.

1.78 A taxpayer who relies upon the advice from a third party of a fact that is material to the preparation of the taxpayer’s return (e.g. a bank providing a statement of the amount of interest earned by the taxpayer) will not usually be liable for penalty if the advice is wrong, as taxpayers are ordinarily entitled to rely on such advice. However, if the taxpayer knew, or could reasonably be expected to have known or suspected that the advice was wrong, the taxpayer would risk penalty. For example, a group company may not have exercised reasonable care in claiming a deduction for a group loss transferred to it, if the company could reasonably be expected to have known or suspected (e.g. because of common management and control of the transferor and transferee companies) that the deduction giving rise to the loss was not properly allowable to the transferor company.

1.79 Arithmetic errors may indicate a failure to take reasonable care but are not conclusive. For business taxpayers, as indicated above, it would depend on the procedures in place to detect such errors. In other cases it may depend on the size, nature and frequency of error, or the circumstances of the taxpayer making the error, for example, if the taxpayer was under extreme stress at the time of preparing the return.
Reasonably arguable

1.80 A taxpayer may be liable to pay a base penalty amount of 25% of a shortfall amount where the taxpayer or agent treats an income tax law as applying in a particular way that is not reasonably arguable. The reasonably arguable standard is fully explained above in paragraphs 1.20 to 1.29. [Schedule 1, item 2, item 4 in subsection 284-90(1)]

1.81 A taxpayer will be taken to have treated an income tax law as applying in a particular way even where the taxpayer treats a provision as not applying to a matter. For example, where the taxpayer treats a provision as not applying to include an amount in assessable income.

Reasonably arguable threshold

1.82 A taxpayer will only be liable for penalty for not having a reasonably arguable position where the shortfall amount caused by that position is more than the greater of $10,000 or 1% of the income tax payable calculated on the basis of the taxpayer’s return. [Schedule 1, item 2, item 4 of subsection 284-90(1)]

1.83 Under section 226K of the ITAA 1936, foreign tax credits and franking deficit tax offsets were deducted from tax payable in determining the 1% of income tax payable threshold. This rule will not apply under the new penalty regime.

1.84 Where the reasonably arguable position relates to a matter about the application of an income tax law to a partnership or a trust, the threshold is doubled to the greater of $20,000 or 2% of net income of the partnership or the trust calculated on the basis of the return. [Schedule 1, item 2, items 5 and 6 in subsection 284-90(1)]

1.85 The use of these thresholds significantly reduces the number of taxpayers to which the requirement to have a reasonably arguable position applies.

Example 1.3

Where a shortfall amount is less than the threshold.

On the basis of a taxpayer’s return, the taxpayer is liable to pay $40,000 tax in respect of a year of income.

The taxpayer has claimed a non-allowable deduction, resulting in a shortfall amount of $6,000.

In this case, the greater of $10,000 and 1% of the tax payable (i.e. $400) is $10,000.

As the shortfall amount ($6,000) is less than $10,000, the shortfall amount is not subject to penalty under item 4 of section 284-90(1). (Note: the taxpayer may be subject to penalty under another shortfall section.)

Example 1.4

Where a shortfall amount is more than the threshold.

On the basis of a taxpayer’s return, the taxpayer is liable to pay $10 million in respect of a year of income.

The taxpayer has omitted income from the sale of property, resulting in a shortfall amount of $500,000.
In this case, the greater of $10,000 and 1% of the tax payable (i.e. $100,000) is $100,000.

As the shortfall amount ($500,000) is more than $100,000, the taxpayer must have a reasonably arguable position to support the omission of the income from the sale of the property to avoid being penalised under subsection 284-90(1). (Note: even if the taxpayer has a reasonably arguable position, the taxpayer may be subject to penalty under another shortfall section).

1.86 Where a position taken by a taxpayer results in a shortfall amount in 2 or more years of income, each shortfall amount is tested against the income tax payable for the year to which it relates, to determine whether the reasonably arguable position test is satisfied in respect of that shortfall amount.

Example 1.5

In year one a taxpayer has incorrectly claimed a deduction of $1 million, which has resulted in a loss for that year of $1 million;

- the ‘loss’ is recouped over the next 3 years in the amounts of $200,000, $750,000 and $50,000 respectively; the tax payable in years 2 and 3 is nil, and in year 4 is $6 million;

- for years 2 and 3 the taxpayer must have a reasonably arguable position supporting the claiming of the loss to prevent being penalised under subsection 284-75(2), since the shortfall amounts (assuming a flat rate of tax of 30%) of $60,000 and $225,000 respectively exceed the greater of $10,000 and 1% of tax payable (i.e. nil); and

- for year 4 the shortfall amount, $15,000 (30% of $50,000) is less than the greater of $10,000 and 1% of tax payable ($60,000), so the taxpayer would not be subject to penalty under subsection 284-75(2).

Failure to make a statement

1.87 A taxpayer may be liable to pay a base penalty amount of 75% of a shortfall amount where the taxpayer fails to make a statement [Schedule 1, item 2, item 7 in subsection 284-90(1)]. This penalty is explained in paragraphs 1.47 to 1.49.

Failure to follow a private ruling

1.88 A taxpayer will be liable to pay a base penalty amount of 25% of a shortfall amount where a statement is made in a return about the treatment of a taxation law that disregards a private ruling [Schedule 1, item 2, item 8 in subsection 284-90(1)]. This penalty is explained in paragraphs 1.50 to 1.51.

How to calculate the penalty

1.89 The following steps and example shows how the amount of penalty is calculated.

Step 1: work out the shortfall amount under section 284-80.

Step 2: the shortfall amount may be reduced by section 284-215. The reduced amount, if any, is the shortfall amount on which the base penalty amount is calculated under step 3.

Step 3: work out the base penalty amount under section 284-90. If there is no increase or reduction in the base penalty amount,
this is the amount of the penalty that the taxpayer is liable to pay.

If there is an increase under section 284-220 or reduction under section 284-225 in the base penalty amount, the formula in subsection 284-85(2) applies to determine the amount of penalty the taxpayer is liable to pay. The formula is:

\[
\text{base penalty amount } + [\text{base penalty amount } \times (\text{increase } \% \text{ less reduction } \%)]
\]

**Example 1.6**

Narda’s Consulting Services Pty Ltd received notice from the Commissioner that an audit was to be conducted into the company’s taxation affairs. This was part of a compliance program in the industry. After receiving the notice and prior to the visit from the ATO, the company disclosed a shortfall amount of understated PAYG withholding amounts from earlier periods of $5,000.

As a result of the audit, the company was found to have understated its net GST debts resulting in another shortfall amount of $2,500. It was concluded that the company had inadequate accounting systems giving rise to careless errors in calculating its tax liabilities. It was decided that there was a lack of reasonable care so the base penalty amount for the GST shortfall amount was 25% \(\text{[Schedule 1, item 2, item 3 in subsection 284-90(1)]}\). However, for the understated PAYG withholding amounts, the base penalty amount of 25% was reduced by 80%, because the Commissioner treated the company as having made the voluntary disclosure before the audit \(\text{[Schedule 1, item 2, subsection 284-225(2)]}\). This decision was taken because of the Commissioner’s policy of encouraging voluntary disclosures.

To calculate the amount of the penalty:

(a) **Determine the base penalty amounts**

Base penalty amount on PAYG shortfall = 25% × $5,000

= $1,250

Base penalty amount on GST shortfall = 25% × $2,500

= $625

(b) **Calculate adjustment on PAYG base penalty amount**

base penalty amount plus [base penalty amount × (increase % less reduction %)]

= $1,250 + [$1,250 × (0% – 80%)]

= $1,250 – $1,000

= $250

Therefore the total penalties from both shortfall amounts is $875.
SECTION 3: PENALTIES RELATING TO SCHEMES

1.90 The current penalties framework contains provisions which impose penalties on benefits obtained from specified avoidance and transfer pricing schemes. For example, the current penalty provisions of the income tax law impose common penalties on tax shortfalls arising from Part IVA, Division 13 of Part III and other specified anti-avoidance provisions of the ITAA 1936. The new administrative penalty regime takes a more generic approach. In broad terms, uniform penalties will be imposed on any benefits obtained from any scheme under a taxation law. They will apply to the anti-avoidance measures currently contained in the taxation law and to transfer pricing adjustments in Division 13 of Part III of the ITAA 1936.

When is an administrative penalty imposed?

1.91 An administrative penalty will be imposed where a provision in a tax law (called the adjustment provision, including anti-avoidance scheme provisions such as Part IVA of the ITAA 1936 or Division 165 of the GST Act) operates to eliminate a scheme benefit.

1.92 Under current tax law, 3 requirements need to be satisfied before the anti-avoidance scheme provisions are triggered. These are:

- an entity participates in a scheme;
- an entity obtains a benefit from a scheme; and
- an outcome of the scheme was to obtain that tax benefit.

1.93 The first 2 requirements are common to all schemes to which the administrative penalty provisions of Subdivision 284-C apply. It is the third requirement, or purpose test, where there are differences among the schemes.

1.94 Most scheme penalties require that it is reasonable to conclude that the sole or dominant purpose of participating in the scheme was for the entity or another entity to get a benefit. It is not necessary for the entity that participates in the scheme to get the scheme benefit. The dominant purpose of a scheme is the prevailing or most influential purpose. [Schedule 1, item 2, subparagraph 284-145(1)(b)(i)]

1.95 There are 2 schemes with unique features. The first is a scheme under Division 165 of the GST Act. In addition to the dominant purpose test applying to some schemes to avoid GST, Division 165 can also be triggered where the scheme satisfies a principle effect test. That is, the principle effect of the scheme or part of the scheme is that the entity got a benefit. The principle effect test only applies to the entity and does not look at the effect on other entities. For this test, principal effect means an important effect, as opposed to merely an incidental effect. This is in contrast to the dominant purpose referred to in paragraph 1.94 which is concerned about the prevailing or most influential purpose of the scheme. [Schedule 1, item 2, subparagraph 284-145(1)(b)(ii)]
1.96 The second scheme with unique features is one where arrangements are caught by sections 136AD and 136AE in Division 13 of Part III of the ITAA 1936. These sections allow the Commissioner to make determinations that arm’s length consideration should apply to certain international transactions. These arrangements are not expressed as tax avoidance schemes and for the provisions of Subdivision 284-C, they are identified separately as schemes to which the transfer pricing provisions apply. [Schedule 1, item 2, paragraph 284-145(2)(a)]

1.97 Penalties for these schemes are currently imposed under section 225 of the ITAA 1936. That provision has a dual penalty structure where the amount of penalty imposed is dependent on whether there was a sole or dominant purpose of obtaining a tax benefit. In schemes where that purpose test is not satisfied a lower penalty is imposed. The same structure is maintained under the new penalty provisions. It is necessary to identify whether the purpose test is satisfied and the base penalty amount will vary accordingly. [Schedule 1, item 2, paragraph 284-145(2)(b)]

**Scheme**

1.98 A scheme is defined in subsection 995-1(1) of the ITAA 1997 to mean:

- any arrangement; or
- any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

1.99 The fact that a scheme or any part of a scheme is entered into or carried out outside of Australia does not affect the application of Subdivision 284-C. [Schedule 1, item 2, subsection 284-145(3)]

**Scheme benefit**

1.100 An entity will get a scheme benefit from a scheme if its tax-related liability is less than it would otherwise be, or a credit is larger than it would otherwise be, as a result of participating in the scheme [Schedule 1, item 2, subsection 284-150(1)]. The amount of scheme benefit that the taxpayer got from the scheme, apart from the application of either an adjustment provision or a transfer pricing provision, is called the scheme shortfall amount.

**What is the scheme shortfall amount?**

1.101 A scheme shortfall amount will arise if one of the following situations applies:

- a tax-related liability is less than what it would be, as a result of participating in a scheme; and
- a payment or credit is greater than what it would be, as a result of participating in a scheme (credit includes amounts under Part IIB of the TAA 1953).

[Schedule 1, item 2, subsection 284-150(2)]

1.102 The penalty is calculated on the scheme shortfall amount. If the entity does not have a scheme shortfall amount, there is no penalty.
What is the base penalty amount?

1.103 Where there is a scheme shortfall amount, the base penalty amount is:
- 50% of the scheme shortfall amount; or
- 25% of the scheme shortfall amount, if it is reasonably arguable that an adjustment provision does not apply.

[Schedule 1, item 2, paragraph 284-160(a)]

1.104 However, where the scheme benefit relates to a transfer pricing adjustment and the scheme was not entered into with the sole or dominant purpose to obtain a tax benefit, the base penalty amount is:
- 25% of the scheme shortfall amount; or
- 10% of the scheme shortfall amount, if it is reasonably arguable that the transfer pricing provision does not apply.

[Schedule 1, item 2, paragraph 284-160(b)]

1.105 See paragraphs 1.20 to 1.29 for an explanation of the reasonably arguable standard. The thresholds that apply to penalties relating to statements for taxpayers that have a reasonably arguable position (see items 4-6 in subsection 284-90(1)) do not apply to penalties relating to schemes.

How to calculate the penalty

1.106 The following steps show how the amount of penalty is calculated.

Step 1: work out the scheme shortfall amount under subsection 284-150(2).

Step 2: the scheme shortfall amount may be reduced by section 284-215. The remaining balance is the scheme shortfall amount on which the base penalty amount is calculated under step 3. If the remaining balance is nil, there is no penalty.

Step 3: work out the base penalty amount under section 284-160. If there is no increase or reduction in the base penalty amount, this is the amount of the penalty that the taxpayer is liable to pay.

If there is an increase in the base penalty amount under section 284-220 or a reduction under section 284-225, the formula in subsection 284-155(2) applies to determine the amount of penalty the taxpayer is liable to pay. The formula is:
base penalty amount + [base penalty amount × (increase % less reduction %)]

SECTION 4: COMMON PROVISIONS RELATING TO SHORTFALL AMOUNTS

1.107 Subdivision 284-D contains provisions which may apply to the calculation of penalties relating to statements and schemes. Under these provisions:
- shortfall amounts or scheme shortfall amounts may be reduced;
• base penalty amounts may be increased; or
• base penalty amounts may be reduced.

Reduction in shortfall or scheme shortfall amounts

Exclusion where a taxpayer relies on the Commissioner’s advice

1.108 A shortfall amount or scheme shortfall amount will be reduced where the taxpayer has relied on advice from the Commissioner. [Schedule 1, item 2, subsection 284-215(1)]

1.109 Advice from the Commissioner includes the following:

• advice given to the taxpayer in writing, electronically or orally, such as:
  − correspondence from the Commissioner about a matter or matters relating to a taxation law;
  − a private ruling given under Part IVAA of the TAA 1953; or
  − an oral ruling given under Part 5-5 of Schedule 1 to the TAA 1953;
• statements in public rulings issued under Part IVAAA of the TAA 1953; and
• statements in approved publications, for example TaxPack, or in published information about specific aspects of a taxation law that are available to taxpayers.

Exclusion where the taxpayer takes reasonable care

1.110 A taxpayer will be treated as not having a shortfall amount relating to a statement that was false or misleading where the taxpayer, and the agent if the agent made the statement, took reasonable care in making the statement. This exclusion does not apply to shortfall amounts where the taxpayer failed to have a reasonably arguable position or to scheme shortfall amounts. A detailed explanation of what constitutes reasonable care is at paragraphs 1.66 to 1.79. [Schedule 1, item 2, subsection 284-215(2)]

1.111 Under the current law, section 226U of the ITAA 1936 excludes from penalty a shortfall amount relating to a statement treating an income tax law applying in a particular way where the taxpayer has sought a ruling about that arrangement prior to lodging the return. This exclusion will not be part of the new regime. Instead, any penalty imposed under subsection 284-75(1) would be subject to the reasonable care exclusion provision where the Commissioner is satisfied that the taxpayer made a genuine attempt to flag the transaction by seeking a ruling prior to lodging the return. Where a ruling is sought after the return is lodged, or the ruling is about the treatment of an income tax law to which a reasonably arguable threshold applies, this would amount to a voluntary disclosure (see paragraphs 1.124 to 1.138) and the shortfall amount will be reduced.
1.112 Similarly, section 226A excludes from penalty a shortfall amount relating to a scheme where the taxpayer has sought a ruling about that scheme prior to lodging the return. This exclusion will not be part of the new regime. If a taxpayer seeks a ruling on the scheme prior to lodging the return, this will be accepted as a voluntary disclosure (see paragraphs 1.124 to 1.138) and the scheme shortfall penalty under Subdivision 284-C will be remitted by 80%.

Increase in base penalty amounts for shortfall amounts

1.113 The base penalty amount imposed on a shortfall amount or a scheme shortfall amount may be increased by 20%. [Schedule 1, item 2, section 284-220]

1.114 There are 5 situations where the penalty imposed on a shortfall amount for an accounting period may be increased.

1.115 **Situation 1:** A taxpayer takes steps to prevent or hinder the Commissioner from finding out about the shortfall amount or scheme shortfall amount. [Schedule 1, item 2, paragraphs 284-220(1)(a) and (2)(a)]

1.116 This would include, for example, unreasonable delay by the taxpayer in responding to enquiries by taxation officers, or the taxpayer failing to attend an interview at a time previously agreed without a reasonable excuse. It would also include instances where the taxpayer destroyed relevant records, or colluded with other persons (after the relevant statement had been made) to conceal part or all of the shortfall amount.

1.117 **Situation 2:** A taxpayer becomes aware of a shortfall amount after the statement has been made, and does not tell the Commissioner about it within a reasonable time. [Schedule 1, item 2, paragraph 284-220(1)(b)]

1.118 This covers situations such as where a taxpayer relies upon factual information from a third party in preparing an approved form to be given to the Commissioner, and subsequently finds that the information supplied was inaccurate (e.g. the separate net income of a taxpayer’s spouse). This rule does not require a taxpayer to monitor developments in the law, but rather looks solely at errors of a factual nature.

1.119 **Situation 3:** A taxpayer has, in a previous accounting period, been penalised for a shortfall amount caused by intentional disregard of a taxation law, recklessness or lack of reasonable care in a previous accounting period, or been penalised for a scheme shortfall amount in a previous accounting period. [Schedule 1, item 2, paragraphs 284-220(1)(c) and 284-220(2)(b)]

1.120 **Situation 4:** A taxpayer has, in a previous accounting period, been penalised for a shortfall amount resulting from the taxpayer or agent treating an income tax law as applying to a matter in a particular way that was not reasonably arguable, or for disregarding a private ruling, in a previous accounting period. [Schedule 1, item 2, paragraph 284-220(1)(d)]

1.121 **Situation 5:** A taxpayer has, in a previous accounting period, been penalised because the taxpayer refused to give a return, statement or other document in which a statement can be made about a tax-related matter. These cases of deliberate non-compliance require the Commissioner to make a default assessment, or to determine the amount of non-assessed tax liabilities. [Schedule 1, item 2, paragraph 284-220(1)(e)]
1.122 A transitional provision allows the rules in situations 3 and 4 to operate where a penalty was previously imposed under Part VII of the ITAA 1936. [Schedule 1, item 3]

**Reduction in base penalty amounts for shortfall amounts**

1.123 The base penalty amount imposed on a shortfall amount or a scheme shortfall amount will be reduced where the entity makes a voluntary disclosure of the shortfall amount or scheme shortfall amount. [Schedule 1, item 2, section 284-225]

**Voluntary disclosure after a tax audit has commenced**

1.124 The penalty on a shortfall amount or a scheme shortfall amount may be reduced by 20% where a taxpayer voluntarily tells the Commissioner about a shortfall amount or scheme shortfall amount after the Commissioner has told the taxpayer that a tax audit of his or her financial affairs for a particular accounting period is to be conducted. [Schedule 1, item 2, paragraphs 284-225(1)(a) and (b)]

1.125 The voluntary disclosure must be expected to save the Commissioner a significant amount of time or resources in the audit in order for the base penalty amount to be reduced. [Schedule 1, item 2, paragraph 284-225(1)(c)]

1.126 For example, where the shortfall amount was due to a failure to take reasonable care, and the taxpayer tells the auditor about the shortfall amount before the auditor finds it, the base penalty amount of 25% of the shortfall amount is reduced by 20%. The taxpayer’s disclosure must bring all the relevant facts and other information to the attention of the auditor that will allow the auditor to readily identify the amount and nature of the shortfall amount or scheme shortfall amount. The disclosure should be such that it could reasonably be estimated to have saved the auditor a significant amount of time or resources in looking into the matter disclosed.

1.127 A taxpayer need not admit liability in respect of the shortfall amount or scheme shortfall amount disclosed. A taxpayer is eligible for the reduced penalty whether or not the taxpayer maintains an opinion contrary to that of the auditor, or disputes the adjustment made to the taxpayer’s assessment.

1.128 **Tax audit** is defined in subsection 995-1(1) of the ITAA 1997 to mean an examination of an entity’s financial affairs by the Commissioner for a purpose of a taxation law. [Schedule 5, item 14]

**Voluntary disclosure before a tax audit commences or in response to a request made by the Commissioner**

1.129 The penalty on a shortfall amount or a scheme shortfall amount will be reduced where a taxpayer voluntarily tells the Commissioner about a shortfall amount or scheme shortfall amount before the Commissioner tells the taxpayer that a tax audit of his or her financial affairs for a particular accounting period is to be conducted. Telling the Commissioner about the shortfall will require a taxpayer to disclose the relevant facts and other information to enable the Commissioner to adjust the tax-related liability. [Schedule 1, item 2, paragraph 284-225(2)(a)]
1.130 The penalty will also be reduced where the taxpayer responds to a request made by the Commissioner in a public statement for taxpayers to make voluntary disclosures about participation in tax avoidance schemes or other arrangements relating to their financial affairs. Where a taxpayer comes forward and makes a disclosure on or by the day specified in the public statement, the penalty will be reduced (see paragraphs 1.132 to 1.134). Any disclosure made after that day will not qualify for this reduction. Instead, the disclosure will be treated as having been made after the audit had commenced. [Schedule 1, item 2, paragraph 284-225(2)(b)]

1.131 Although the new administrative penalties regime will apply to income tax matters in returns for the 2000-2001 year of income and later years, this new voluntary disclosure rule will apply to any announcements made by the Commissioner after 1 July 2000. [Schedule 2, item 30, paragraph 226Z(b)]

1.132 In the case of a shortfall amount, the penalty is:

- reduced by 80% where the shortfall amount is $1,000 or more [Schedule 1, item 2, paragraph 284-225(3)(a)]; or
- reduced to nil where the shortfall amount is less than $1,000 [Schedule 1, item 2, paragraph 284-225(3)(b)].

1.133 For example, where a shortfall amount greater than $1,000 is due to a failure to exercise reasonable care, and a voluntary disclosure is made before the taxpayer is advised of a tax audit, the base penalty amount of 25% of the shortfall amount is reduced by 80% to 5% of the shortfall amount. If the shortfall amount had been less than $1,000, the shortfall amount would be reduced to nil and there would be no penalty.

1.134 In the case of a scheme shortfall amount, the penalty is reduced by 80%. The threshold of $1,000 does not apply in scheme cases. [Schedule 1, item 2, subsection 284-225(4)]

1.135 Voluntary disclosures must be given to the Commissioner in an approved form. Under the rules in Part VII of the ITAA 1936, they had to be given in writing. This is no longer the case. Disclosing in an approved form is a new requirement specifying the procedure for giving information to the Commissioner about tax obligations under the new tax system. Most tax liabilities are required to be notified in an approved form and the Commissioner can determine the manner for giving that information, for example, on paper, by electronic transmission or by telephone. The rules about the approved form are explained in Section 6.

*Commissioner’s discretion regarding when the disclosure is made*

1.136 In some instances it may be appropriate to reduce the taxpayer’s base penalty amount by 80%, even though the taxpayer made the voluntary disclosure after being advised of the tax audit. This may be the case, for example, where an audit of a group of companies has commenced and a company which is a part of the group, but not the focus of the audit, voluntarily discloses a matter which was unlikely to have been detected by the audit.

1.137 To enable the Commissioner to grant this concession in the appropriate circumstances, the Commissioner has a discretion to deem a disclosure to have
been made before the taxpayer was advised of a tax audit. [Schedule 1, item 2, subsection 284-225(5)]

Disclosure in scheme cases by applying for a private ruling

1.138 Section 226A currently excludes from penalty any scheme shortfall that arises where the taxpayer applies for a private ruling before lodging a return. This provision is being repealed [Schedule 2, item 29] and the lodgment of a private ruling will be given the same status of a voluntary disclosure under section 284-225. That is, a penalty on a scheme shortfall amount resulting from participation in a scheme will be reduced by 80% where a taxpayer applies for a ruling prior to an audit commencing or prior to the date in the Commissioner’s public statement about the scheme.

Remissions of shortfall amount penalties

1.139 All penalties imposed under Part 4-25 of Schedule 1 to the TAA 1953 will be subject to uniform machinery provisions. These provisions which are in Division 298 require the Commissioner to give a notice of penalty to the taxpayer: the penalty is due and payable 14 days after the notice is given to the taxpayer. The GIC is payable on any penalty unpaid after the due date. Section 298-20 allows the Commissioner to remit a penalty in whole or in part. A decision of the Commissioner not to remit the penalty, or to remit it only in part, is a reviewable decision under Part IVC of the TAA 1953.

1.140 There are a number of factors which the Commissioner takes into account when deciding to remit a penalty. These include:

- treating taxpayers in like circumstances consistently;
- considering a taxpayer’s particular circumstances and compliance history; and
- tailoring the penalty to secure improvements in compliance behaviour.

1.141 Remission guidelines for statement and scheme penalties will be published by the ATO. The guidelines will be based on the ATO Compliance Model and will be consistent with the principles contained in the Taxpayers’ Charter. While recognising that all taxpayers are required to comply with the requirements of the taxation law, the guidelines will reflect the above factors and the reality that taxpayers have to adapt to a new tax system.

1.142 The guidelines will look to remit penalties where taxpayers and their agents make a genuine attempt to meet their obligations, but will maintain an appropriate level of penalty where taxpayers don’t make an effort to do the right thing. For taxpayers that deliberately flout the law or participate in fraudulent activity, the maximum penalties will be imposed with prosecution action being taken in appropriate cases.

Assessment of penalties

1.143 The Commissioner will be required to make an assessment of all penalties imposed under Division 284. A taxpayer will have a right to object to the assessment of penalty and the Commissioner’s decision on the objection will be reviewable under Part IVC of the TAA 1953. This assessment and review process is necessary because, unlike other administrative penalties, the
Commissioner is making a determination about the behaviour of the taxpayer. Issues about the wrongfulness of acts in making the statement or participating in the scheme, and any factors that could result in an increase in the penalty under subsection 284-220, need to be subject to judicial review. [Schedule 2, item 117, section 298-30 in Schedule 1 of the TAA 1953]

1.144 The notice of assessment of the penalty is conclusive evidence of the liability. This means that, in recovery proceedings, the taxpayer cannot contest the correctness of the assessment. This can only be done through the review process under Part IVC of the TAA 1953. [Schedule 2, item 117, subsection 298-30(3) in Schedule 1 of the TAA 1953]

SECTION 5: PENALTIES FOR FAILING TO LODGE RETURNS AND OTHER DOCUMENTS

1.145 Division 286 will impose a uniform administrative penalty for failing to give returns, statements, notices or other documents to the Commissioner on time and in the approved form. This Division consolidates the late lodgment and failure to lodge penalty provisions in a number of different taxation laws. For the purposes of this Explanatory Memorandum, returns, statements, notices and other documents will be referred to collectively as ‘taxation documents’. Similarly, ‘BAS’ is used to refer to both the BAS and to notifications of other obligations under the new tax system, such as the instalment activity statement.

When is an administrative penalty imposed?

1.146 An administrative penalty for failing to lodge taxation documents is imposed where:

- the taxpayer is required under a taxation law to give a taxation document to the Commissioner by a particular day; and
- the taxpayer does not give the taxation document to the Commissioner:
  - by the particular day; or
  - in the approved form, if required.

[Schedule 1, item 2, subsection 286-75(1)]

1.147 Taxation documents required to be given to the Commissioner under the Superannuation Contributions Tax (Assessment and Collection) Act 1997, the Superannuation Guarantee (Administration) Act 1992 and the Superannuation (Self Managed Superannuation Funds) Supervisory Levy Imposition Act 1991 are excluded from the operation of this Division. That is because of the special nature of the reporting obligations in those laws.

[Schedule 1, item 2, subsection 286-75(2)]

1.148 Some taxation documents, for example an objection lodged under Part IVC of the TAA 1953, are not required to be lodged in an approved form. In these cases, there is no penalty for not lodging the document in an approved form. What constitutes an approved form is explained in Section 6.
How to calculate the penalty

1.149 All entities, which include individuals, are liable for the base penalty amount where they fail to give relevant documents to the Commissioner as required. The base penalty amount is one penalty unit for each period of 28 days (or part of a period of 28 days) that the taxation document remains outstanding, either as a result of the entity not giving the Commissioner the document or not giving it in the approved form. The current value of a penalty unit under section 4AA of the *Crimes Act 1914* is $110. Therefore, the longer the relevant document remains outstanding the higher the penalty will become. The maximum base penalty amount will not exceed 5 penalty units. The maximum base penalty amount of 5 penalty units will be payable if the entity has not complied with the lodgment obligation within 16 weeks and one day of the due date. *[Schedule 1, item 2, subsection 286-80(2)]*

1.150 The penalty will exist once the due date to lodge the relevant taxation document has passed. This means that the Commissioner can issue a notice of penalty at any time after the due date. Another notice of penalty can issue after each 28 day period. *[Schedule 1, item 2, subsection 286-80(6)]*

1.151 For the purposes of Division 286, the base penalty amount also increases according to the size of the entity. It is subject to a multiplier factor that reflects the size of the business for taxation purposes. A large business whose information is likely to have a greater significance for compliance purposes will pay a higher penalty than a small business. The multiplier categories are:

- small entity – liable to pay the base penalty amount;
- medium entity – liable to pay double the base penalty amount *[Schedule 1, item 2, subsection 286-80(3)]; and
- large entity – liable to pay 5 times the base penalty amount *[Schedule 1, item 2, subsection 286-80(4)].*

1.152 There are 3 threshold tests to determine the size of an entity. Satisfying any one of these thresholds places the taxpayer in the relevant multiplier category. A medium entity is an entity that, at the time it is required to give the relevant document to the Commissioner:

- is a medium withholder under the PAYG withholding system;
- has assessable income of more than $1 million but less than $20 million; or
- has a current annual turnover for GST purposes of more than $1 million but less than $20 million. *[Schedule 1, item 2, subsection 286-80(3)]*

1.153 A large entity is an entity that, at the time it is required to give the relevant document to the Commissioner:

- is a large withholder under the PAYG withholding system;
- has an assessable income of $20 million or more; or
• has a current annual turnover for GST purposes of $20 million or more.

[Schedule 1, item 2, subsection 286-80(4)]

1.154 For the purposes of Division 286, a small entity is an entity which is not a medium or a large entity. A small entity is liable to pay only the base penalty amount. This includes most individuals.

Example 1.7

A medium size taxpayer was due to give a BAS to the Commissioner by 21 May 2001. The document was given to the Commissioner on 6 July 2001. The taxpayer was therefore 46 days late in lodging the document. The base penalty amount is one penalty unit for each 28 days (or part of this period), so the base penalty amount is 2 penalty units. This base penalty amount is multiplied by a factor of 2 because the taxpayer is a medium sized entity.

[Schedule 1, item 2, subsection 286-80(2) and (3)]

1.155 The BAS is a document that requires an entity to notify the Commissioner of a number of obligations under taxation laws. It is the approved form for giving the Commissioner:

• a GST return under sections 31-10 and 31-20 of the GST Act;
• notification of a PAYG withholding amount under section 16-150 of Schedule 1 to the TAA 1953;
• notification of a PAYG instalment amount under section 45-20 of Schedule 1 to the TAA 1953; and
• notification of a FBT instalment under section 104 of the FBTAA 1986.

1.156 The lodgment penalty in Division 286 applies separately to each of these lodgment or notification obligations. Lodging the BAS by the due date will satisfy all these obligations, even if the entity does not advise the Commissioner of a particular tax-related liability. Where a liability is not disclosed in a BAS, the entity will have made a false or misleading statement by omission and will be liable for a penalty on the shortfall amount.

Remission of lodgment penalties

1.157 Remission guidelines for lodgment penalties will be published by the ATO. The guidelines will be based on the ATO Compliance Model and be consistent with the principles contained in the Taxpayers’ Charter.

1.158 These late lodgement penalties are the maximum amounts imposed by the law and, where appropriate, they will be remitted to take into account the circumstances of the particular taxpayer. Factors such as the amount of tax payable, compliance history and whether remission is likely to secure future improvements in lodgment behaviour will be taken into account.

1.159 The Commissioner has the authority to defer the time for lodgment of taxation documents and also to defer the time for payment of tax-related liabilities. To make it easier for small businesses to comply with the requirements of the new tax system, the Commissioner advised tax agents on 12 October 1999 of a deferral of time for lodgment of the quarterly BAS and
deferral of the payment. This is the 3-2-1-0 concession which gives an extra 3 weeks for lodgment of the first BAS, 2 weeks extra for lodgment of the second BAS and one week extra for lodgment of the third BAS. The fourth BAS must be lodged on or before 21 July 2001.

1.160 Any BAS lodged after the deferred due date is subject to the lodgment penalty. With large and medium size businesses that are required to lodge monthly there is an expectation that they should be able to satisfy their lodgment obligations on time. Nevertheless, the circumstances of the taxpayer may be such that it is appropriate to remit the lodgment penalty. The emphasis in the first year of the new tax system will be to educate and assist entities to meet their obligations. This will be tempered by the need to penalise cases of apathy and deliberate non-compliance.

SECTION 6: APPROVED FORMS, DECLARATIONS AND SIGNATURES

1.161 The GST, ABN and PAYG laws currently require returns, applications and notices to be given to the Commissioner in an approved form. This requirement is being extended to other taxation documents which have to be given to the Commissioner, such as income tax and FBT returns. The approved form is the new statutory tool for the Commissioner to obtain information from an entity about its tax obligations and financial affairs. Part 2 of Schedule 2 to this Bill consolidates the approved form requirements into Division 388 of Part 5-25 in Schedule 1 to the TAA 1953. Division 388 also consolidates other requirements about declarations, signatures, electronic notification of BAS amounts and truncating amounts.

Approved forms

What is an approved form?

1.162 Approved form is a defined term that allows the Commissioner to determine:

- the kind of form to be used by a particular entity or type of entities, for example, entities in different industries can be required to lodge different forms;

- the information that the entity must provide in the form and any further information, additional statement or document that must be given, whether in the form, attached to it, or otherwise provided separately; and

- the manner in which the form is to be given to the Commissioner. For example, this can be either in paper, by electronic transmission, by facsimile, or by telephone. This discretion can operate independently from other notification requirements such as section 388-80 of Schedule 1.

[Schedule 2, item 143, section 388-50]
1.163 The Commissioner may combine different taxation documents in the one approved form. For example, the BAS contains information relating to a number of taxation laws which is required to be given to the Commissioner in an approved form. The information is given in one BAS, rather than in several different forms. [*Schedule 2, item 143, subsection 388-50(2)*]

1.164 The current income tax and FBT return provisions contain rules about the content, manner of giving and signing of return forms. These provisions also require the regulations to prescribe certain matters. These provisions are being amended as the requirements will be covered by the definition of approved form. For example, section 162 of the ITAA 1936 is being amended to allow the Commissioner to require a further or fuller return to be given in the approved form. The amendments also reiterate the type of information that an approved form can require a taxpayer to provide to the Commissioner under paragraph 388-50(1)(c). [*Schedule 2, item 138, paragraph 162(b)*]

1.165 The approved form replaces the need for regulations to prescribe the form, content and manner of giving returns to the Commissioner. Amendments will be made to the *Income Tax Regulations* and the *Fringe Benefits Tax Regulations* to repeal redundant regulations.

**Additional time for notifying the Commissioner of BAS amounts**

1.166 The Commissioner will have a discretion to allow taxpayers further time for lodging any approved form. This deferral power is the same as the discretion to defer the time for lodgment of an income tax return, an FBT return or a GST return. The general deferral discretion will allow for an extension of the time for notifying the Commissioner of BAS amounts. Currently the discretion only exists for a GST return. [*Schedule 2, items 132 and 143, subsection 388-55(1)*]

1.167 It is important to note that a deferral of the due date for lodgment does not defer the due date for the payment of tax-related liabilities notified in the approved form. The deferral of payment requires the Commissioner to exercise a separate discretionary power under section 255-10 in Schedule 1 to the TAA 1953. This will allow the Commissioner, if necessary, to defer the due date for lodgment but maintain the due date for payment. For example, a PAYG large withholder is required by section 16-150 in Schedule 1 to notify the Commissioner of amounts it withholds by the due date in the table in subsection 16-75(1). The Commissioner may defer the date of notification, but the payments are still required to be made the date in the table unless the large withholder has been granted a deferral of payment under section 255-10. [*Schedule 2, item 143, subsection 388-55(2)*]

1.168 Conversely, the Commissioner may defer the due date for payment but require an approved form to be given by the statutory due date. For example, the Commissioner may defer the due date for payment of a PAYG instalment by annual payers, but still require notification of the election (under subsection 45-140(2) in Schedule 1 to the TAA 1953) to become an annual payer to be made by the original due date for payment.

**Declarations**

1.169 A declaration must be completed by an entity that gives an approved form to the Commissioner. A declaration is necessary to ensure that the person
who is liable for a penalty for a statement that is false or misleading was the entity responsible for the statement. Declarations can only be made by the person making the statement. That is, if an entity is giving an approved form to the Commissioner, the entity is the person that must make the declaration. On the other hand, if the approved form is being given by an agent on behalf of the entity, the agent must make the declaration.

Declarations by an entity

1.170 Where the entity gives an approved form to the Commissioner the entity must make a declaration that the information is true and correct. \[Schedule 2, item 143, section 388-60\]

1.171 Where the approved form is given to the Commissioner by an agent, the entity is required to make a declaration. However, this is a declaration from the entity to the agent attesting to the correctness of the information given to the agent and authorising the agent to give the approved form to the Commissioner. This declaration must be in writing. It cannot be a verbal declaration. It can be made in any form determined by the entity or the agent. For example, it can be given in paper, by facsimile, or electronic transmission. It must be made each time an agent is to give an approved form to the Commissioner. It must be signed, although the electronic signature on these forms does not need to be the signature approved by the Commissioner. \[Schedule 2, item 143, subsections 388-65(1) and (2)\]

1.172 The taxpayer must retain this declaration or a copy of it for 5 years after it is made, and produce it within the 5 year period if requested to do so by the Commissioner. This period is only 2 years in the case of taxpayers with a shorter period of review (SPOR). There is an administrative penalty of 20 penalty units for failing to keep and produce this declaration. These arrangements complement the existing record keeping requirements in the ITAA 1936 under section 161E (for SPOR taxpayers) and 262A (for business taxpayers). \[Schedule 2, item 143, subsections 388-65(3) and (4), item 115, section 288-30\]

Agent’s declarations

1.173 If an agent gives a taxation document to the Commissioner on behalf of a taxpayer, the agent must declare that:

- the document has been prepared according to the information supplied by the taxpayer;
- the agent has received a declaration from the entity (under section 388-65) stating that the information is true and correct; and
- the agent is authorised by the taxpayer to give the document to the Commissioner. \[Schedule 2, item 143, section 388-70\]

1.174 In the case of an approved form in paper that is given by an agent on behalf of an entity, the agent does not need to make this declaration if the entity has made the declaration on the form prior to lodgment.

Signing declarations

1.175 All declarations must be signed by the person making the declaration. Where an approved form is given by electronic transfer it must contain the
**electronic signature** of the person. This is defined in the tax dictionary in section 995-1 of the ITAA 1997 as a unique identification of the person in electronic form that is approved by the Commissioner. The Commissioner has different requirements for electronic signatures depending on the type of approved form being lodged, who is giving the form and the technology used for the electronic transmission. [Schedule 2, item 143, section 388-75; Schedule 5, item 4]

1.176 Approved forms can also be given over the telephone. For example, an entity or an agent may be able to phone the ATO and advise an adjustment to a previously notified tax-related liability. It may be possible in the future to lodge approved forms using interactive voice response. It is therefore necessary to be able to validate such information. Information can only be accepted where the entity or the agent provides a verbal declaration supported by a **telephone signature**. Telephone signature is also defined in section 995-1 as a unique identification of the entity that can be given over the telephone and that is approved by the Commissioner. For example, this could be something as simple as a personal identification number (PIN) or, something more detailed, like a voice recognition signature. [Schedule 2, item 143, subsection 388-75(4); Schedule 5, item 16]

**SECTION 7: PENALTY FOR FAILING TO MEET OTHER TAXATION REQUIREMENTS**

1.177 Amendments to Division 288 in Schedule 1 to the TAA 1953 consolidate a number of miscellaneous penalties in different taxation laws into 3 generic penalty provisions. These will apply where a person fails to:

- keep or retain a record [Schedule 2, item 115, section 288-25];
- retain or produce a declaration about an agent giving an approved form to the Commissioner on the taxpayer’s behalf [Schedule 2, item 115, section 288-30]; or
- assist a taxation officer to carry out his or her duties [Schedule 2, item 115, section 288-35].

1.178 The administrative penalty in each of the above cases is 20 penalty units. The generic machinery provisions in Division 298, as explained in paragraph 1.139, will apply to these penalties. Table 1.5 summarises the existing penalty provisions and their equivalent provision in the new administrative penalty regime.

**Table 1.5: Existing and proposed penalty provisions**

<table>
<thead>
<tr>
<th>Section title</th>
<th>New penalty provisions</th>
<th>Current penalty provisions</th>
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</thead>
<tbody>
<tr>
<td>Penalty for failure to keep or retain records</td>
<td>288-25</td>
<td>ITAA 1936, section 262A</td>
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<tr>
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<td>ITAA 1936, section 222(1B)</td>
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<td>ITAA 1936, Schedule 2C, section 245-265</td>
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<tr>
<td>Section title</td>
<td>New penalty provisions</td>
<td>Current penalty provisions</td>
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<tr>
<td>Penalty for failure to retain or produce declarations</td>
<td>288-30</td>
<td>ITAA 1936, section 161E, FBTAA 1986, section 70B</td>
</tr>
</tbody>
</table>

1.179 As an alternative to the above administrative penalties, the Commissioner can decide to prosecute a record-keeping or an access matter as a taxation offence under the TAA 1953. Such action is only taken in the most serious cases. The various taxation laws provide different offence penalties for failing to comply with a statutory requirement relating to record-keeping and access. These offence provisions are being amended to establish a uniform maximum penalty of 30 penalty units.

SECTION 8: CONSEQUENTIAL AMENDMENTS

1.180 A number of consequential amendments need to be made as a result of the new administrative penalty regime described in Sections 1 to 7. One of these amendments is explained in paragraphs 1.181 to 1.186 and the remaining technical changes are summarised in Tables 1.6 to 1.11.

Due date for payment of income tax by individuals

1.181 Section 204 of the ITAA 1936 is being amended to introduce a statutory due date for payment for taxpayers who are not full self-assessment taxpayers, for example, individuals. [Schedule 2, items 145 to 147, section 204]

1.182 Section 161 of the ITAA 1936 provides that the due date for lodgment of income tax returns is specified by the Commissioner in the Gazette of the Commonwealth of Australia (Gazette). For individuals, this date is usually 31 October after the end of the year of income. Where a return is lodged by the due date, the due date for payment of income tax for the year of income will be the later of 21 days after the date specified in the Gazette, or 21 days after a notice of assessment is given to the taxpayer. [Schedule 2, item 145, paragraph 204(1)(a)]
1.183 For taxpayers who do not lodge on time, the due date is 21 days after
the date specified in the Gazette [Schedule 2, item 145, paragraph 204(1)(b)]. This
due date will also apply to tax due under amended assessments for those
taxpayers. The GIC which is calculated under section 170AA of the ITAA 1936
where an assessment is amended increasing the taxpayer’s liability will no
longer apply. Instead, GIC will be calculated under subsection 204(3) from the
statutory due date. The due date for tax payable under amended assessments
where the return is lodged on time is the date explained in paragraph 1.182.
[Schedule 2, item 23, section 170AA]

1.184 The current late lodgment penalty that applies to income tax returns of
individual taxpayers is in section 163B of the ITAA 1936. It imposes the GIC
to compensate the Revenue for not having the income tax paid when it should
have been, had the taxpayer lodged the return on time. For individuals, tax is
currently not due and payable until the Commissioner has made an assessment,
which is contingent on the lodgment of a return. In most cases the GIC is
applied to the amount of tax payable on assessment for the period commencing
on the due date for lodgment and ending on the date the return is lodged. This
penalty is easy to avoid by taxpayers making a payment immediately prior to
lodging the late return. As this penalty is being replaced by a new penalty in
Division 286 in Schedule 1 of the TAA 1953, it is necessary to have a provision
that can compensate the Revenue for not having tax paid on time where returns
are lodged late.

1.185 The statutory due date rules will apply in the same way to taxpayers
who lodge their income tax returns under a tax agent lodgment program. As the
program has staggered deferred due dates for lodgment, the tax payable will be
21 days after the notice of assessment is given to the taxpayer. However, where
the return is lodged late the tax payable will have a due date of the deferred
lodgment date under the program.

1.186 The lodgment program is determined by the Commissioner in
consultation with tax agents. The Commissioner defers the lodgment date of a
client or a group of clients of the tax agent by exercising his discretion under
subsection 388-55(1) in Schedule 1 to the TAA 1953 (see paragraphs 1.166 to
1.168). The deferral does not extend the statutory due date for payment under
subsection 204(1) of the ITAA 1936. The Commissioner can, in appropriate
circumstances, exercise a discretion under section 255-10 in Schedule 1 to the
TAA 1953 to extend the due date for payment. [Schedule 2, item 143, subsection
388-55(1)]

Other amendments

1.187 The amendments in Schedule 2 to this Bill fall into several groups and
are summarised in Tables 1.6 to 1.11. The consequential amendments relating
to the BAS, RBA, GIC and the PAYG withholding provisions are explained in
Chapters 2 and 3 of this Explanatory Memorandum.
### Table 1.6: Summary of consequential amendments relating to statements and schemes

| Item no. in Schedule 2 | 4, 19, 28, 54, 63, 84, 85, 87, 93 to 95, 107, 108, 122 and 125 |

### Table 1.7: Summary of consequential amendments relating to failure to lodge returns, etc.

| Item no. in Schedule 2 | 20, 21, 73, 74, 92 and 101 |

### Table 1.8: Summary of consequential amendments relating to miscellaneous administrative penalties

<table>
<thead>
<tr>
<th>Type of amendment</th>
<th>Item no. in Schedule 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Penalty for failure to keep or retain records</td>
<td>12, 16 to 18, 37 to 40, 42 to 51, 56, 65 to 67, 83, 96, 97, 126 and 127</td>
</tr>
<tr>
<td>Penalty for failure to retain or produce declarations</td>
<td>52, 53 and 62</td>
</tr>
<tr>
<td>Penalty for preventing access etc</td>
<td>5 to 7, 11, 41, 55, 58 to 60, 64, 82, 123, 124 and 128</td>
</tr>
<tr>
<td>Miscellaneous amendments</td>
<td>9, 61, 78, 86, 106, 110 to 114, 116 and 120</td>
</tr>
</tbody>
</table>

### Table 1.9: Summary of consequential amendments relating to approved forms, declarations and signatures

<table>
<thead>
<tr>
<th>Type of amendment</th>
<th>Item no. in Schedule 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Approved forms</td>
<td>13, 14, 22, 26, 75, 79, 80, 109, 130 to 134, 139, 148, 152 and 155</td>
</tr>
<tr>
<td>Declarations</td>
<td>57, 136, 137, 140, 142 and 149 to 151</td>
</tr>
<tr>
<td>Signature requirements</td>
<td>1, 68, 135, 141, 153 and 156</td>
</tr>
<tr>
<td>Miscellaneous amendments</td>
<td>119</td>
</tr>
</tbody>
</table>

### Table 1.10: Summary of consequential amendments relating to the GIC

| Item no. in Schedule 2 | 2, 3, 69 to 71 |

### Table 1.11: Summary of consequential amendments to Chapter 6 (the Dictionary) of the ITAA 1997

<table>
<thead>
<tr>
<th>Type of consequential amendment</th>
<th>Item no. in Schedule 5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Repeals a definition and substitutes a new one</td>
<td>1, 4 and 14</td>
</tr>
<tr>
<td>Inserts a new definition</td>
<td>2, 3, 5, 10 to 13, 15 and 16</td>
</tr>
</tbody>
</table>
Chapter 2
Provision of BAS services by people other than registered tax agents

Outline of Chapter

2.1 This Chapter explains the amendments made by Schedule 2 to this Bill to section 251L of the ITAA 1936. The amendments will:

- clarify the type of tax agent services that can be undertaken only by a registered tax agent for a fee;
- provide an exclusion to allow a barrister or solicitor to provide certain tax agent services;
- provide an exclusion to allow certain other persons to provide tax agent services relating to the BAS; and
- outline the treatment of refunds of ‘BAS amounts’.

Context of Reform

2.2 Section 251L of the ITAA 1936 currently restricts a person from demanding or receiving a fee for the preparation of an income tax return or objection or the transaction of any business in income tax matters on behalf of a taxpayer, unless the person is a registered tax agent. A parallel restriction applies to FBT work under section 119 of the FBTAA 1986. As the BAS contains information about income tax and FBT matters, these restrictions mean that only registered tax agents would be allowed to prepare and lodge a BAS on behalf of taxpayers.

2.3 The Commissioner is concerned about the ability of tax agents to meet the demand for this work and the consequences for small businesses of not having an agent to assist in meeting their obligations. This could lead to taxpayers falling outside of the new tax system. These concerns have been supported by statements made by tax practitioners and reports in the press.

2.4 These measures will address those concerns by allowing either members of a recognised professional association, or bookkeepers working under the supervision of registered tax agents, to provide BAS services on behalf of taxpayers. Entities that provide payroll bureau services to employers will also be able to provide BAS services in relation to PAYG withholding matters.

Date of effect

2.5 This measure will apply from 1 July 2000.
Detailed explanation of new law

2.6 Subsection 251L(1) of the ITAA 1936 is being amended to clarify the type of work that can be undertaken only by registered tax agents. Previously, this provision only related to income tax. It is being amended to become a generic provision that will apply to all taxation laws. A taxation law is defined to have the same meaning as in the tax dictionary, subsection 995-1(1) of the ITAA 1997. That is, a taxation law is any Act for which the Commissioner has the general power of administration, and any regulation under such an Act. [Schedule 2, item 33, section 251A]

2.7 A person must be a registered tax agent to be able to charge or receive a fee for the provision of tax agent services. It will be an offence for a person to provide these services for a fee without being registered. Tax agent services include:

- preparing and lodging returns and other documents;
- giving legal advice about taxation laws;
- preparing and lodging objections, and applying for reviews on objection decisions; and
- transacting any business with the Commissioner on behalf of a taxpayer.

[Schedule 2, item 34, subsection 251L(1)]

2.8 There will be 2 exclusions to the restriction on who can provide tax agent services. First, legal practitioners will be able to:

- give legal advice about taxation laws;
- prepare and lodge objections and apply for reviews on objection decisions; and
- in their capacity as a trustee:
  - prepare and lodge returns and other documents; and
  - transact any business with the Commissioner on behalf of a taxpayer.

[Schedule 2, item 35, subsection 251L(8)]

2.9 Legal practitioners are currently allowed to undertake certain tax services without having to be registered as tax agents. This amendment clarifies the type of tax agent services they can undertake for a fee without being registered as tax agents.

2.10 The second exclusion will allow certain people other than registered tax agents to provide limited tax agent services for a fee in relation to obligations under the new tax system. This work is limited to the provision of a ‘BAS service’ which includes:

- preparing or lodging an approved form about a taxpayer’s obligations under a BAS provision;
- giving advice about a BAS provision; and
Provision of BAS services by people other than registered tax agents

• transacting any business with the Commissioner on behalf of a taxpayer in relation to a BAS provision.

[Schedule 2, items 31, 32 and 35, subsection 251L(7)]

2.11 The only people allowed to provide a BAS service, other than registered tax agents and legal practitioners, to the extent permitted by new subsection 251L(8) are:

• members of a recognised professional association;

• bookkeepers working under the direction of a registered tax agent; and

• entities that provide payroll services to employers.

[Schedule 2, item 10, section 119 of the FBTAA 1986; item 35, subsection 251L(6) of the ITAA 1936]

2.12 Payroll service providers can only provide a BAS service for PAYG withholding obligations. This includes, for example, the preparation and lodgment of a notification of a PAYG withholding amount and PAYG payment summaries in respect of those amounts. However, payroll service providers can provide other BAS services where they provide bookkeeping services to clients, under the direction of a registered tax agent, or where a member of a recognised professional association carries on the payroll service business.

2.13 A recognised professional association is an organisation that represents accountants and tax practitioners. To qualify as a recognised professional association an organisation must satisfy 9 criteria concerning professional standards, education requirements, disciplinary procedures, size and not-for-profit character. [Schedule 2, item 36, section 251LA]

2.14 Members of recognised professional associations will be able to provide BAS services through a partnership or company. This will allow a company to offer BAS services where a director or employee of the company is a member of a recognised professional association. Where a member operates through the entity, the member is the person responsible for the provision of the BAS services. [Schedule 2, item 35, subsection 251L(9)]

2.15 Bookkeepers do not have to be employees of a registered tax agent to provide BAS services. Working under the direction of a registered tax agent would require the tax agent to have procedures and systems in place to ensure that the work undertaken by the bookkeeper is reviewed for accuracy and completeness.

Offence

2.16 It will be an offence for a person to knowingly or recklessly charge a fee for the provision of taxation services if they are not a registered tax agent or a person excluded from the requirement. The penalty is a maximum of 200 penalty units. [Schedule 2, item 34, subsection 251L(1), item 35, subsection 251L(10)]

2.17 The current subsections 251L(2) and (3) allow unregistered persons, with the approval of the Tax Agents’ Boards, to derive up to
$40 per year from providing tax agent services. This *de minimis* provision is being repealed.

**Refunds of BAS amounts**

2.18 One of the risks in the new tax system is the possibility of fraudulent claims for refunds of GST input tax credits. Under the refund provisions in Division 3A of Part IIB of the TAA 1953, all refunds of BAS amounts must be paid into an account at a financial institution nominated by the entity. The account must be maintained at a branch or an office of the institution that is in Australia. This allows an entity to request a refund to be paid into the account of any other person.

2.19 The risk of fraudulent claims needs to be reduced by restricting the accounts into which the entity can request a refund to be paid. Subsection 8AAZLH(2) of the TAA 1953 is supported by an amendment which will restrict the nominated account to an account held by:

- the entity, or a joint account of the entity;
- the entity’s registered tax agent; or
- a legal practitioner acting in the capacity of trustee or executor of the entity.

*[Schedule 2, item 76, subsection 8AAZLH(2A)]*

2.20 A taxpayer who uses a person authorised under section 251L to provide BAS services will remain vicariously liable for any penalty on a shortfall amount or scheme shortfall amount arising from the actions of that person.

**Proposed tax agents’ legislation**

2.21 In the 1998 Budget, the Government announced a proposed new regulatory regime for tax agent services. At the request of representatives of the tax profession the proposal was deferred because of the significant amount of preparatory work necessary for the new tax system. Consultations on the tax agent proposals will resume with a view to having an exposure draft of the legislation released later this year.

2.22 There are a number of matters which will have an impact on the BAS service measures and will be considered as part of this review. These include:

- the concept of giving clients of registered tax agents a safe harbour from shortfall penalties where the taxpayer satisfies a reasonable care test;
- the role of tax advisers. Tax agent services include giving legal advice about taxation laws. This could cover advice given about taxation laws by different people, for example, advice provided by financial planners;
- the meaning of a recognised professional association; and
- the supervisory standards expected of tax agents.
Chapter 3
Miscellaneous – technical amendments

Outline of Chapter

3.1 Schedules 2 to 5 to this Bill will make a number of technical amendments in relation to the RBA, GIC and PAYG withholding provisions.

3.2 The PAYG amendments are necessary so that the law accurately reflects the Government’s PAYG policy. The more significant amendments concern:

- the obligation to withhold from payments where a supplier does not quote its ABN; and
- the requirement of payment summaries for certain payments covered by the PAYG withholding rules.

3.3 The RBA and GIC amendments are necessary to support the new tax system. The more significant amendments will allow:

- the truncation of amounts notified in approved forms;
- the rounding down to the nearest multiple of 5 cents of all penalties and liabilities assessed by the Commissioner; and
- the Commissioner to defer the due date for notification of BAS liabilities (discussed at paragraphs 1.166 to 1.168).

3.4 References in this Chapter to the existing law are to the TAA 1953 including Schedule 1 to that Act, unless otherwise specified.

Summary of amendments

3.5 The amendments in Schedule 3 will:

- ensure that the obligation to withhold from a payment to a labour hire worker applies to arrangements made by a chain of labour hire firms [Schedule 3, item 1, subsection 12-60(1)];
- clarify the requirement to withhold from a payment for a supply of goods or services where the supplier does not quote its ABN [Schedule 3, items 3, 6 and 7, section 12-190];
- require a payer that is withholding from a payment, because a supplier has not quoted its ABN, to issue a separate payment summary when making the payment (or as soon as practicable afterwards) [Schedule 3, items 11 to 15, section 16-167];
- allow the Commissioner to relieve a particular payer or group of payers from issuing payment summaries if the
circumstances warrant that relief [Schedule 3, item 16, section 16-180]; and

- allow the Commissioner’s withholding schedules to take into account financial supplement debts arising under the Student Financial Supplement Scheme [Schedule 3, item 10, subsection 15-25(1)].

3.6 The amendments in Schedule 4 update references in the Corporations Law to reflect the PAYG withholding system.

3.7 Amendments in Schedules 3 and 5 ensure that the definitions of ‘PAYE earner’ and ‘PAYE earnings’ in the ITAA 1997 apply up to 30 June 2000.

3.8 Furthermore, Schedule 2 contains an amendment to allow the Commissioner to require information or evidence to be given on affirmation as well as on oath when exercising information-gathering powers.

**Date of effect**

3.9 The amendments to the PAYG withholding arrangements will apply to payments made on or after 1 July 2000.

3.10 The amendments made to the RBA and GIC provisions will apply from 1 July 2000.

**Context of Reform**

3.11 The provisions for the PAYG withholding system are located in Part 2-5 in Schedule 1 to the TAA 1953.

3.12 In the PAYG withholding system, there is a new withholding event when a supplier of goods or services does not quote its ABN. Section 12-190, the no ABN withholding provision, provides for a number of exceptions where the payer does not need to withhold from payments even though the payee has not quoted its ABN.

3.13 One of the exceptions in paragraph 12-190(4)(a) is when the payer makes a payment that is of a private or domestic nature. This paragraph is being amended because it is narrower than the intended exception. The amended exception will rectify this problem by exempting a payer from a withholding obligation for a supply that is not in the course or furtherance of the payer carrying on an enterprise in Australia.

3.14 Another proposed amendment to the no ABN withholding event is to recognise the quoting of an agent’s ABN if a supplier has made a supply through that agent.

3.15 The description of the no ABN withholding threshold is also being amended so that it excludes any GST component. The threshold was intended to be the same as the threshold for tax invoices under the GST law, which excludes any GST component.
3.16 Under the current no ABN withholding rules, a payer is generally required to issue annual or part-year payment summaries. This is inappropriate for no ABN withholding, particularly for parties dealing on a one-off basis. The proposed amendment will require the payer to issue a separate payment summary for amounts withheld under no ABN withholding when it makes the payment or as soon as practicable afterwards.

3.17 Another significant amendment to the PAYG withholding provisions is to provide the Commissioner with the power to relieve a particular payer or class of payers from the obligation to give a payment summary. The absence of this power could impose an unnecessary compliance burden on some payers.

3.18 In addition, a small number of technical amendments are needed to other PAYG withholding provisions to clarify their intended operation.

**Detailed explanation of the new law**

**PAYG withholding from payments under a labour hire arrangement – chains of entities**

3.19 Subsection 12-60(1) requires a labour hire firm to withhold from payments it makes to an individual who performs work or services *directly* for a client of the firm.

3.20 Consequently, the subsection does not require withholding from payments made where there are chains of labour hire firms involved. This is illustrated by Example 3.1.

**Example 3.1**

Labour hire firm 1 (LHF1) agrees to provide a certain number of workers to a client, but is unable to find enough suitable people on its records. LHF1 goes to another labour hire firm (LHF2) and hires some workers to fulfil its agreement with LHF1’s client.

Under existing subsection 12-60(1), LHF2 would not be required to withhold from payments it makes to the workers supplied to LHF1. This is because the workers will not be performing work or services directly for a client of LHF2 – rather the worker is performing work for a client of LHF1.

3.21 The amendment will overcome this problem by requiring LHF2 to withhold from the payments it makes to the workers that it supplies to LHF1. The amendment is intended to cover payments to an individual in a situation of on-hiring of labour to an end-user. It will not cover payments by a contractor to a sub-contractor. *[Schedule 3, item 1, subsection 12-60(1)]*

**No ABN withholding – agents**

3.22 The no ABN withholding requirement will be amended to recognise an agent quoting its ABN where a supplier has made a supply through that agent.
3.23 **Item 3 of Schedule 3** will ensure that where a supply is made through an agent, the payer need not withhold from the payment under the no ABN withholding requirements if:

- the agent has given the payer an invoice that relates to the supply and quoted the agent’s ABN; or
- the payer has some other document relating to the supply on which the agent’s ABN is quoted.

3.24 Subsection 12-190(3A) will also be inserted to ensure that a payer is not required to withhold where an ABN is quoted by an agent that does not in fact have an ABN, but the payer has no grounds to believe that the ABN quoted is invalid. [*Schedule 3, item 6, subsection 12-190(3A)*]

**No ABN withholding – exception for payers not carrying on an enterprise**

3.25 Suppliers of goods and services that do not provide their ABN on their invoices will be subject to withholding at the top marginal rate plus Medicare levy (currently 48.5%).

3.26 A number of exceptions to this event are provided in section 12-190. An important exception in paragraph 12-190(4)(a) is where the payment is for the payer of a private or domestic nature. This exception is too narrow because the policy intention was to apply no ABN withholding to ‘enterprise-to-enterprise’ transactions.

3.27 The proposed amendment specifies that withholding is not required under the no ABN withholding event where the payer makes the payment for a supply that is not in the course or furtherance of the payer carrying on an enterprise. [*Schedule 3, item 7, paragraph 12-190(4)(a)*]

3.28 This paragraph excludes payments that are wholly of a private or domestic nature for the payer. It also excludes payment made by an employee or a labour hire worker relating to their work in that capacity.

**No ABN withholding – description of threshold amount**

3.29 Under paragraph 12-190(4)(b) of the current no ABN withholding provisions, payers need not withhold an amount if the payment does not exceed $50 (or such higher amount as is specified in the tax invoice regulations made under the GST law).

3.30 Under subsection 29-80(1) of the GST Act, a supplier does not have to issue tax invoices for a ‘taxable supply’ the ‘value’ of which does not exceed $50, or such higher amount as the regulations specify. The value of a taxable supply is defined in section 9-75 of the GST Act to be 10/11 of the price. Thus, the tax invoice threshold of $50 for GST purposes effectively excludes the GST component.

3.31 The threshold amount for the no ABN withholding arrangements was intended to be the same as that for the GST tax invoice requirements.
3.32 Item 8 of Schedule 3 will bring the no ABN withholding threshold in paragraph 12-190(4)(b) in line with the GST tax invoice threshold by ensuring the threshold excludes any GST component.

3.33 It also clarifies that in working out whether a payment is under the threshold, it is necessary to take into account all the payments relating to the supply. Thus the withholding obligation will not be able to be avoided by breaking consideration for a supply into a series of small payments.

The Commissioner’s power to make withholding schedules

3.34 Item 10 of Schedule 3 amends subsection 15-25(1) to enable the Commissioner to make withholding schedules and procedures for collecting financial supplement debts arising under the Student Financial Supplement Scheme, as well as the matters currently listed in that subsection. This completes the amendments to enable the collection of these debts through the PAYG withholding arrangements. Other amendments allowing for this are contained in Schedule 4 of the A New Tax System (Tax Administration) Act (No. 1) 2000.

Payment summaries for no ABN event

3.35 Sections 16-155 and 16-160 specify that a payer in the PAYG withholding system has to issue annual or part-year payment summaries (except for eligible termination payments).

3.36 Thus the current PAYG withholding legislation requires a payer to issue annual or part-year payment summaries for amounts withheld under the no ABN withholding event in section 12-190. However, this is not an appropriate procedure for many businesses, especially those dealing on a ‘one-off’ basis. Paragraphs 16-155(1)(a) and 16-160(1)(a) are being amended to ensure these types of payment summaries need not be given for amounts withheld under section 12-190. [Schedule 3, items 11 and 12, paragraphs 16-155(1)(a) and 16-160(1)(a)]

3.37 However, if a payer makes a payment caught by the no ABN withholding event, the amendment at item 13 of Schedule 3 will require the payer to issue a separate payment summary for all such withholding payments. The payer must issue the payment summary (and a copy of it) to the recipient when the withholding payment is made or as soon as practicable afterwards.

Payment summaries – the Commissioner’s discretion to relieve obligation to issue

3.38 Under the payment summary provisions in sections 16-153 to 16-175, the Commissioner does not have the power to relieve a payer of the obligation to give a payment summary. Under the PAYE system (which broadly will not apply to payments after 30 June 2000), subsection 221F(7) in the ITAA 1936 gives the Commissioner the power to vary any of the requirements relating to group certificates.

3.39 The amendment in item 16 will allow the Commissioner to relieve a particular payer or class of payers from the obligations under
sections 16-153 to 16-175 to give payment summaries. The Commissioner will exercise this discretion having regard to the circumstances of the case or class of cases. In some cases where a nil amount is withheld by a payer, it may be appropriate for the payer not to issue a payment summary.

3.40 If the Commissioner decides that a payment summary is not required from a certain payer, he must notify them in writing. For a class of payer, the Commissioner must give each payer a written notice or publish a copy in the Gazette of the Commonwealth of Australia.

Repeal of definitions of ‘PAYE earner’ and ‘PAYE earnings’

3.41 The definitions of ‘PAYE earner’ and ‘PAYE earnings’ in subsection 995-1(1) of the ITAA 1997 were repealed by items 26 and 27 of Schedule 18 to the A New Tax System (Tax Administration) Act 1999 from the date of Royal Assent, 22 December 1999.

3.42 The 2 definitions need to apply up to 30 June 2000, for example, in the rules that extend the operation of the substantiation rules to certain people who are not common law employees. The proposed amendment will ensure this result. [Schedule 3, subclause 3(3), items 17 and 18; Schedule 5, items 8 and 9]

No ABN withholding – adding asterisks to the definition of ‘supply’

3.43 In the ITAA 1997, defined terms are generally asterisked the first time they appear in a subsection. Items 2, 5 and 9 of Schedule 3 insert asterisks for the term ‘supply’ in section 12-190, the no ABN withholding provisions.

The Commissioner’s powers to obtain information and evidence

3.44 The Commissioner has the power in subsection 353-10(2) to require information or evidence relating to the PAYG system (and other matters in Schedule 1 to the TAA 1953) to be provided on oath, and either orally or in writing.

3.45 The amendment will allow the Commissioner to require information or evidence to be given on affirmation as well as on oath when exercising the information gathering powers. [Schedule 2, item 118, subsection 353-10(2)]

Consequential amendments to the Corporations Law

3.46 Amendments to the Corporations Law are necessary to ensure its correct operation in relation to the new PAYG withholding arrangements, which will commence from 1 July 2000. [Schedule 4, items 1 to 4]

Amendments to RBA, GIC and other PAYG provisions

Truncation of amounts in approved forms

3.47 These 3 amendments to the FBTAA 1986, the ITAA 1936 and the TAA 1953 allow taxpayers or entities to truncate to the nearest dollar
any amount in an approved form which is required by the form to be expressed in whole dollars. *[Schedule 2, items 8, 24 and 143, section 388-85]*

3.48 The amendment will apply to any approved form which has to be given to the Commissioner, including an income tax return or BAS, and will provide legislative support for the Commissioner’s practice of not having cents returned by taxpayers or entities.

3.49 The Commissioner generally disregards cents when making an assessment of a taxpayer’s liabilities. For example, section 170B of the ITAA 1936 eliminates cents in assessing taxable income, and taxpayers currently do not show cents when returning components of assessable income and deductions on their income tax returns. A similar practice exists with FBT returns, where employers do not show cents when returning the value of taxable benefits.

3.50 Subsection 101(4) of the FBTAA 1986 currently provides for FBT instalments to be rounded to the nearest dollar.

3.51 As a result of this amendment, truncation will extend to all BAS amounts. That is, entities will round down to the nearest dollar all tax debts and credits notified to the Commissioner in returns and in the BAS.

**Rounding of small amounts**

3.52 An amendment to section 16B of the TAA 1953 will ensure that the Commissioner will reduce a tax liability to the nearest multiple of 5 cents only in relation to penalties or amounts that are assessed by the Commissioner under a taxation law. *[Schedule 2, item 81, section 16B]*

3.53 Section 16B of the TAA 1953 currently allows the Commissioner to round down any tax liability to the nearest multiple of 5 cents. From 1 July 2000, this provision would result in the unintended situation of entities rounding down each GST transaction to the nearest multiple of 5 cents.

3.54 This amendment has the effect of narrowing the meaning of ‘tax liability’ in section 16B so that it applies only to amounts assessed by the Commissioner, or imposed as a penalty. A GST liability is effectively excluded from the operation of section 16B because it is not assessed by the Commissioner.

3.55 The GIC and RBA deficit amounts in Parts IIA and IIB respectively of the TAA 1953 are excluded from operation of this section because they are debts which change daily.

3.56 Taken together, these amendments provide 2 generic rounding provisions in the taxation law;

- a provision that allows taxpayers to truncate tax-related liabilities and credits notified in returns, in the BAS and in other approved forms to the nearest dollar; and
- a provision that allows the Commissioner to reduce assessed tax liabilities and penalties imposed by the taxation law to the nearest multiple of 5 cents.
Refund of overpaid amounts and credits

3.57 These 3 amendments apply the provisions of Part IIB of the TAA 1953 to the following sections:

- refund of overpaid income tax paid to a non-resident beneficiary [Schedule 2, item 15, subsection 98A(2)];
- overpayment of tax following an amendment to reduce an income tax liability [Schedule 2, item 25, paragraph 172(1)(b)]; and
- credits arising under T(IOEP)A 1983 [Schedule 2, item 121, section 13].

3.58 Divisions 3 and 3A of Part IIB of the TAA 1953 contain the general refund provisions for refunding overpaid tax and credits. The effect of these amendments is that these refunds or credits may be applied against any tax debts owed by the entity.

General interest charge on estimates

3.59 This amendment to the ITAA 1936 clarifies that, for the purpose of the GIC, an estimate made under Division 8 of Part VI of the ITAA 1936 is due to be paid on the due date for payment of the underlying liability. [Schedule 2, item 27, paragraph 222AJA(3)(a)]

3.60 Subsection 222AJA(3) of the ITAA 1936 makes a person liable to pay GIC on estimates made under Division 8 of Part VI of the ITAA 1936. The interest period is calculated from the beginning of the day on which the estimate was due to be paid. The day on which the estimate is due to be paid is the same day that the underlying liability is due for payment.

3.61 The effect of the amendment is that the GIC is calculated from the beginning of the day on which the underlying liability is due for payment.

Amendment of the Commissioner’s GIC remission discretion

3.62 This amendment to the TAA 1953 allows the Commissioner to remit the GIC in a wide range of circumstances. [Schedule 2, item 72, subsection 8AAG(5)]

3.63 The effect of the amendment is to give the Commissioner a broader discretion to remit the GIC than under the current provision.

Registering a government entity as a PAYG withholding branch

3.64 This amendment to Schedule 1 to the TAA 1953 allows the Commissioner to register a branch or a non-profit sub-entity of a government entity as a PAYG withholding branch. [Schedule 2, item 88, subsection 16-142(2); Schedule 5, items 6 and 7]

3.65 Under the PAYG system, entities with a PAYG withholding liability are required to register with the Commissioner. A branch of a registered entity which has an ABN (or has applied for one) may also be registered as a PAYG withholding branch.
3.66 The effect of this amendment is that a branch or a non-profit sub-entity of a government entity (e.g. schools, hospitals, or divisions of departments) may also be registered as a PAYG withholding branch.

3.67 The amendment is consistent with the ABN and GST laws, which enable branches of government entities to register for ABN and GST purposes.

### Review of penalty remission decisions

3.68 These 3 amendments to the TAA 1953 are consequential upon the introduction of subsection 298-20(3) into Schedule 1 to the TAA 1953. [Schedule 2, items 98 to 100, section 20-80]

3.69 Current items 15 and 20 in the table in section 20-80 in Schedule 1 to the TAA 1953 provide review rights for an entity dissatisfied with the Commissioner’s decision in relation to the remission of penalties imposed under the PAYG withholding system. These review rights are now provided in the machinery provisions for administrative penalties, at subsection 298-20(3) of Schedule 1 to the TAA 1953.

3.70 The amendments remove items 15 and 20 from the table, as they are no longer required, and provide a signpost to the review rights provisions.

### General interest charge on underestimates of PAYG instalments

3.71 This amendment to the TAA 1953 permits the GIC on underestimates of PAYG instalments to be calculated on the underestimation up to the due date for payment of the tax assessed. [Schedule 2, items 102 to 105, paragraphs 45-230(3)(b), 45-232(4)(b), 45-233(5)(b) and 45-235(4)(b)]

3.72 Currently the period for calculating the GIC on underestimates of PAYG instalments ends on the earlier of the day the assessed tax is paid or the due day for payment. Under this provision it is possible for the GIC to be calculated beyond the due date for payment. The effect of the amendment is to limit the period during which the GIC is calculated to the due date for payment.

3.73 If payments of assessed tax are made earlier than the due date for payment, the GIC in respect of the period from the day when the early payment is made until the due date for payment will be remitted.

### Transitional provision to apply to special priority credits

3.74 This transitional provision ensures that the Commissioner gives priority to a HECS or an FS assessment debt under Part IIB of the TAA 1953 for the 1999-2000 year and earlier years of income. [Schedule 2, item 129]

3.75 The general refund provisions of Part IIB of the TAA 1953 currently allow credits to be first applied against HECS and FS assessment debts, before being applied against other non-RBA debts.

3.76 Following the implementation of the PAYG system, the current provisions will no longer apply after 30 June 2000. From 1 July 2000,
PAYG credits will be applied to HECS and FS assessment debts in priority to other non-RBA debts under section 8AAZLD of the TAA 1953.

3.77 This transitional provision is necessary because the Commissioner will continue to make assessments after 30 June 2000 for the 1999-2000 year and earlier years of income.
Chapter 4

Regulation impact statement

Policy objective

4.1 The objective of the proposed change to the law is to introduce a new uniform, simple and equitable penalty regime to apply to all laws for which the Commissioner has administrative responsibility. This new penalty regime will support compliance under the new tax system.

4.2 The introduction of uniform rules is an essential adjunct to the introduction of the BAS, the means by which a range of existing and new taxes will be reported on a single statement. Uniform penalties are necessary in order that the penalty regime be consistent with the self reporting nature of the new taxes. The new regime will also rectify a number of deficiencies that are evident in the current penalty system.

4.3 The objective of the proposed change to allow people other than registered tax agents to prepare and lodge the BAS is to overcome the reported incapacity of tax agents to supply BAS services to all their business clients.

Background

4.4 Currently there are rules for the imposition of various penalties in a number of Acts administered by the Commissioner. These Acts include:

- A New Tax System (Goods and Services Tax) Act 1999;
- Diesel and Alternative Fuels Grants Scheme Act 1999;
- Fringe Benefits Tax Assessment Act 1986;
- Income Tax Assessment Act 1936;
- Income Tax Assessment Act 1997;
- Petroleum Resource Rent Tax Act 1987;
- Superannuation Contributions Tax (Assessment and Collection) Act 1997;
- Superannuation Guarantee (Administration) Act 1992;
- Taxation Administration Act 1953;
- Taxation (Interest on Overpayments and Early Payments) Act 1983;
- Tobacco Charges Assessment Act 1955; and
• Wool Tax Administration Act 1964.

4.5 The current systems of penalties in these Acts may be generally described as falling within one of the following categories:

• penalties relating to false or misleading statements which may lead to a shortfall in tax paid;

• penalties for failing to comply with a particular requirement such as failing to do something as required by a taxation law; and

• penalties for failing to pay the correct amount of tax when it became due and payable.

False and misleading statement penalties

4.6 A false or misleading statement can result in a tax shortfall which can form the basis upon which a penalty is imposed. Currently this penalty can range from 8% for failure to notify the Commissioner of a withholding liability to 200% for failure to notify the Commissioner of the correct amount of GST, FBT and superannuation guarantee.

Failure to comply penalties

4.7 In the laws currently administered by the Commissioner there are many penalties for failure to do particular things. These are administrative penalties where there can be no doubt as to whether an entity has complied with a requirement of the taxation law such as failure to lodge a tax return, failure to pay electronically and failure to keep records. The penalties for failure to lodge range from $10 per week (to a maximum of $200) for income tax returns of self assessed taxpayers to 200% of tax payable for FBT returns.

Failure to pay tax on time

4.8 The GIC is an interest rate that is used to calculate the interest that is charged on outstanding tax debts including penalties that are not paid by the due date. It effectively compensates the Commonwealth for the time value of the revenue due but not paid.

4.9 The GIC rate is based on the 13 week Treasury Note rate (the Government’s borrowing rate) plus an uplift factor of 8%.

4.10 In addition to the inconsistent penalty rates in the current laws, a number of other problems have been identified with the existing penalty regimes. These include:

• inadequate penalties for late lodgment of reconciliation statements and income tax returns by self assessed taxpayers;

• problems with the structure of penalties for late lodgment of income tax returns by individuals;

• no administrative penalties for taxpayers who overclaim credits in their income tax returns;
• no administrative penalties for taxpayers who refuse to lodge income tax returns, thereby forcing the Commissioner to raise default assessments; and
• difficulties with the administration of GIC penalties which don’t relate to late payment, such as understatement and underestimation penalties.

BAS service providers

4.11 Currently, the law generally restricts the provision of any service relating to an income tax or a FBT matter to registered tax agents. These arrangements would preclude any other person from preparing and lodging a BAS.

Implementation options

Penalties

4.12 Only one approach has been identified as being appropriate for modifying the penalty regime to meet the requirements of the new tax system and the goals of uniformity, simplicity and equity. This approach involves the rationalisation of the penalty systems by standardising rules in the existing penalty regimes across the various taxes and charges.

4.13 The existing penalty regimes will be standardised into 4 categories:
• false or misleading statements;
• failure to lodge documents;
• late payment; and
• other administrative penalties.

4.14 The penalties for false or misleading statements will adopt the model that currently applies to tax shortfalls under the income tax law. The Commissioner will be required to make an assessment of the amount. The assessment decision will be reviewable under Part IVC of the TAA 1953.

4.15 The penalties for failing to lodge documents on time will be replaced with a single administrative penalty ranging from one to 5 penalty units per 28 days, or part thereof, depending on the size of the taxpayer. This more effective penalty will allow the ATO to develop remission policies that reflect required compliance outcomes by tailoring the penalty to the lodgment history, the circumstances of the taxpayer and perceived future compliance behaviour.

4.16 The penalty for failing to pay tax on time has recently been amended with the introduction of the GIC. This type of penalty is not to be changed. Consequential amendments will be made as a result of changes to the other penalties.
4.17 The other category of penalties being amended is administrative penalties. This category of penalties and offence provisions apply where taxpayers fail to meet a statutory requirement to do something. This change will give the Commissioner greater flexibility in applying these compliance rules as administrative penalties will be introduced to situations where the current penalty requires a prosecution in response to an offence.

BAS service providers

4.18 The approach taken is to amend the registered tax agent provisions in the income tax and FBT laws to allow the following people to provide BAS services on behalf of taxpayers:

- any member of a recognised professional association that represents accountants and tax practitioners;
- bookkeepers working under the direction of registered tax agents; and
- entities that provide payroll bureau services to employers.

4.19 Payroll bureaus will also be able to provide BAS services in relation to PAYG withholding obligations of employers.

4.20 A BAS service would include preparing and lodging a BAS, providing advice in relation to a BAS obligation and dealing with the Commissioner on BAS matters.

Assessment of impacts

Impact groups – penalties proposal

4.21 The impact groups affected by the new penalty regime are as follows:

- taxpayers – the new penalty regime will apply only to those taxpayers who do not meet their obligations under the various laws administered by the Commissioner. The new provisions represent a significant improvement and simplification of the law, and they reduce complexity. Under the existing law there are different penalty rules, with different bases for calculation of the penalty amount. Under the proposed new law one set of standardised provisions would apply to all circumstances where taxpayers have failed to meet their obligations;

- tax agents and other professional advisers – the single set of standardised penalty provisions will make it simpler and easier for tax advisers to:
  - work out how the law applies to any unpaid tax liabilities or unfulfilled obligations of their clients; and
  - train their staff in legislation and procedures to improve compliance with the new regime;
• the ATO – the standardisation of the penalty rules across all laws administered by the Commissioner will simplify administration of the law by the ATO. The introduction of standardised rules will also reduce staff training costs; and

• the Government – having a more reasonable penalty regime should improve compliance. This could result in an increase in Government revenue.

Impact groups – BAS preparer proposal

4.22 The impact groups affected by the BAS preparer proposals are as follows:

• taxpayers – there will be a wider choice of people taxpayers can go to for provision of BAS services. This will assist to reduce the cost to business in meeting the requirement to lodge a monthly or quarterly BAS. These taxpayers will be mainly small businesses;

• tax agents and other professional advisers – registered tax agents will face competition for these services. As BAS preparation is largely a bookkeeping function, it is expected that most tax agents will focus on providing services to their better organised clients. Businesses with poor record keeping procedures, the shoe box client, will probably need to seek the assistance of a BAS service provider. The measure will enable professional tax advisers, such as former sales tax consultants, to provide advice on the new taxes such as the GST;

• the ATO – will benefit from having a greater number of businesses being assisted in meeting their obligations under the new tax system; and

• the Government – having more businesses meeting their obligations under the new tax system will result in an increase in Government revenue.

Assessment of costs

Compliance costs for business

4.23 The compliance costs to business of the new penalty regime are unquantifiable, but are expected to be individually small. They will consist primarily of costs associated with businesses and tax practitioners familiarising themselves with the new rules. This familiarisation process is expected to be relatively straightforward, such as 30 minutes of reading, as the new rules are largely a standardisation of existing rules.

4.24 There are no compliance costs in the BAS service provider proposal.
Government revenue

4.25 There is expected to be a small positive impact on Government revenue. This will arise from an improvement in compliance and therefore collection of amounts payable, offset by a small reduction in collections from some penalties which will be reduced. The BAS service provider proposals could also have a small positive impact on Government revenue.

Administrative costs

4.26 The standardisation of the penalties across the laws administered by the Commissioner is expected to result in a general reduction in administrative costs. This standardisation should also lead to a reduction in ongoing staff training costs as staff will only need to be trained in one standard set of provisions. However, there is expected to be a small initial cost involved in training ATO staff about the new penalty system. The administrative costs of introducing BAS service providers is negligible within the general systems environment already established.

Assessment of benefits

4.27 The new penalty regime will provide a simplified and robust system of sanctions for failure to comply with various obligations under taxation and other laws administered by the Commissioner. The standardised penalty regime will compliment the standardised administrative arrangements introduced as part of the new tax system, particularly the single BAS, as well as rectifying a number of deficiencies in the existing penalty system.

4.28 Taxpayers and their representatives will benefit from the standardisation of the rules. They will only have to refer to a single set of standardised rules to determine the penalties for non-compliance. This is consistent with the more general standardisation of rules in the new tax system and will reduce in compliance costs, particularly for business taxpayers.

4.29 The additional number of BAS service providers will assist taxpayers to comply with their obligations under the new tax system and help businesses to improve their records through periodic reporting and greater computerisation of accounts. BAS service providers will open the market and provide business opportunities to people interested in providing these services. This will assist to reduce the cost to businesses in meeting the requirement to lodge a monthly or quarterly BAS.

Consultation

4.30 The ATO has consulted with tax practitioners and representatives of professional associations, and has been responsive to the suggestions of these groups. They are supportive of the change.
Conclusion

4.31 The standardisation of penalties across the Acts administered by the Commissioner is expected to provide benefits to the ATO and the Government by assisting in compliance improvement. The proposal will benefit taxpayers and tax practitioners by reducing the complexity of the law and the actual amount of penalties in some instances. There will be a small but unquantifiable initial cost to taxpayers and tax practitioners in familiarising themselves with the new rules.

4.32 Having more BAS service providers will benefit the community by assisting taxpayers to comply with their obligations under the new tax system.
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