2013-2014

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TAX LAWS AMENDMENT (2014 MEASURES No. 1) BILL 2014

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Treasurer, Hon J. B. Hockey MP)
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### Glossary

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

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>AAT</td>
<td>Administrative Appeals Tribunal</td>
</tr>
<tr>
<td>ADI</td>
<td>authorised deposit-taking institutions</td>
</tr>
<tr>
<td>APRA</td>
<td>Australian Prudential Regulation Authority</td>
</tr>
<tr>
<td>ASIC</td>
<td>Australian Securities and Investment Commission</td>
</tr>
<tr>
<td>Banking Act</td>
<td><em>Banking Act 1959</em></td>
</tr>
<tr>
<td>Commissioner</td>
<td>Commissioner of Taxation</td>
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<tr>
<td>FMD</td>
<td>Farm Management Deposit</td>
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<tr>
<td>GST Act</td>
<td><em>A New Tax System (Goods and Services Tax) Act 1999</em></td>
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<tr>
<td>ITAA 1997</td>
<td><em>Income Tax Assessment Act 1997</em></td>
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<tr>
<td>Naidoo</td>
<td><em>Naidoo v Commissioner of Taxation</em> [2013] AATA 443</td>
</tr>
<tr>
<td>NRAC</td>
<td>National Rural Advisory Council</td>
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<tr>
<td>Sportsbet</td>
<td><em>International All Sports v Commissioner of Taxation</em> [2011] FCA 824 (Sportsbet)</td>
</tr>
<tr>
<td>TAA 1953</td>
<td><em>Taxation Administration Act 1953</em></td>
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General outline and financial impact

Improvements to the Farm Management Deposit Scheme

Schedule 1 to this Bill amends the *Income Tax Assessment Act 1997* (ITAA 1997) and the *Banking Act 1959* (Banking Act) to improve the operation of the Farm Management Deposit (FMD) Scheme by:

- allowing taxpayers to consolidate multiple FMDs that they might hold with different providers;
- raising the non-primary production income threshold; and
- limiting the rules in the Banking Act for unclaimed moneys to prevent them applying to FMDs.

**Date of effect:** The increase in the non-primary income threshold and the changes to allow taxpayer to consolidate FMDs apply to income years commencing on or after 1 July 2014.

The amendments to the Banking Act exempting FMDs deposits from becoming unclaimed moneys under the Banking Act apply from the day after Royal Assent.

**Proposal announced:** The amendments to allow consolidation and increase the non-primary production income threshold were announced on 27 April 2013 by the former government. In the Treasurer and Assistant Treasurer’s Media Release titled ‘Restoring integrity in the Australian tax system’ of 6 November 2013, the Government announced it would proceed with this measure.

The amendments to the Banking Act were announced in the Assistant Treasurer’s Media Release titled ‘Amendments to the Farm Management Deposits Scheme’ of 12 February 2014.

**Financial impact:** The elements of the measure that increase the non-primary production income threshold and allow consolidation of FMDs are estimated to reduce revenue by a total of $13 million over the forward estimates period, comprising:

<table>
<thead>
<tr>
<th></th>
<th>2013-14</th>
<th>2014-15</th>
<th>2015-16</th>
<th>2016-17</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nil</td>
<td>Nil</td>
<td>–$7.0m</td>
<td>–$6.0m</td>
<td></td>
</tr>
</tbody>
</table>
The amendments exempting FMDs deposits from becoming unclaimed moneys under the Banking Act are expected to result in an unquantifiable, but expected to be small, cost to the budget over the forward estimates period.

**Human rights implications:** This Schedule does not raise any human rights issue. See *Statement of Compatibility with Human Rights* — Chapter 1, paragraphs 1.68 to 1.75.

**Compliance cost impact:** These amendments result in a small reduction in compliance costs for individuals and business by eliminating restrictions on consolidating FMDs and by exempting FMDs from the reporting and payment regimes for unclaimed moneys under the Banking Act.

### Refunding excess GST

Schedule 2 to this Bill amends the *A New Tax System (Goods and Services Tax) Act 1999* and the *Taxation Administration Act 1953* to ensure that overpaid GST is refundable only in certain circumstances. The amendments allow taxpayers to determine their entitlement to a refund of excess GST rather than having to rely on the Commissioner of Taxation exercising a discretion to refund an overpaid amount of GST.

**Date of effect:** These amendments in Schedule 2 apply generally in working out the net amount for a tax period starting on or after the day following Royal Assent.

**Proposal announced:** The Treasurer and the Assistant Treasurer announced that the Government would proceed with this measure in a joint Media Release titled ‘Restoring integrity in the Australian tax system’ of 6 November 2013.

**Financial impact:** This measure has the following revenue implications:

<table>
<thead>
<tr>
<th></th>
<th>2013-14</th>
<th>2014-15</th>
<th>2015-16</th>
<th>2016-17</th>
</tr>
</thead>
<tbody>
<tr>
<td>Income tax</td>
<td>–</td>
<td>..</td>
<td>– $2m</td>
<td>– $2m</td>
</tr>
</tbody>
</table>

- nil 
- .. not zero, but rounded to zero

This revenue impact does not include the following estimated increase in GST collections:

<table>
<thead>
<tr>
<th></th>
<th>2013-14</th>
<th>2014-15</th>
<th>2015-16</th>
<th>2016-17</th>
</tr>
</thead>
<tbody>
<tr>
<td>GST</td>
<td>–</td>
<td>$6m</td>
<td>$6m</td>
<td>$6m</td>
</tr>
</tbody>
</table>
**General outline and financial impact**

**Human rights implications:** This Schedule does not raise any human rights issues. See Statement of Compatibility with Human Rights — paragraphs 2.101 to 2.104.

**Compliance cost impact:** The amendments are expected to impose low implementation costs on the affected group of taxpayers (for example, in relation to learning and education about the changes), but result in a medium decrease in ongoing compliance costs for these taxpayers by allowing them to determine their entitlement to a GST refund by reference to objective criteria.
Improvements to the Farm Management Deposit Scheme

Outline of chapter

1.1 Schedule 1 to this Bill amends the *Income Tax Assessment Act 1997* (ITAA 1997) and the *Banking Act 1959* (Banking Act) to improve the operation of the Farm Management Deposit (FMD) Scheme by:

- allowing taxpayers to consolidate multiple FMDs that they might hold with different banking service providers;

- raising the non-primary production income threshold; and

- limiting the rules in the Banking Act for unclaimed moneys to prevent them applying to FMDs.

Context of amendments

Farm management deposits

1.2 The FMD Scheme is a financial risk management tool that, by smoothing tax liabilities, assists individuals who are carrying on a primary production business to deal effectively with fluctuations in cash flows resulting from climate and market variability. The rules are contained in Division 393 of the ITAA 1997.

1.3 Under section 393-5 of the ITAA 1997, individuals carrying on a primary production business (with a break of no more than 120 days) may deduct any FMD they make from their assessable income in the income year the deposit is made, provided:

- the FMD is not withdrawn within 12 months (the 12-month requirement — see section 393-40 of the ITAA 1997);

- the individual’s taxable non-primary production income for the income year does not exceed $65,000 (the non-primary production income threshold) (paragraph 393-5(1)(d) of the ITAA 1997);
• the individual does not die or become bankrupt during the income year (paragraph 393-5(1)(e) of the ITAA 1997); and

• the amount of the deposit does not cause the individual to exceed the cap on total FMD of $400,000 (item 10 of the table in section 393-35 of the ITAA 1997).

1.4 However, an individual’s deductions for FMDs in an income year may not exceed the individual’s taxable primary production income for that year (section 393-5 of the ITAA 1997).

1.5 Withdrawals from FMDs are included in the FMD owner’s assessable income in the year they are repaid and taxed at the owner’s marginal tax rate (see section 393-10 of the ITAA 1997).

1.6 However, this will not apply to the extent that the withdrawn amount did not receive a deduction under section 393-5 of the ITAA 1997 when the deposit was made (that is, does not form part of the amount of the unrecouped FMD deduction — see subsection 393-10(2) of the ITAA 1997). Generally, an amount can be included in an FMD without the individual receiving a deduction under section 393-5 of the ITAA 1997 where the amount an individual deposited in FMDs in a year was later found to exceed the individual’s taxable primary production income in that income year.

Consolidating FMDs

1.7 Since 1 July 2012, FMD owners may hold FMDs with more than one FMD provider. This change was intended to allow FMD owners freedom to choose where to establish new FMDs in order to allow them to negotiate competitive interest rates.

1.8 However, it has contributed to individuals holding multiple FMDs across a number of providers.

1.9 Division 393 of the ITAA 1997 contains special rules to prevent tax consequences arising where a FMD holder extends an existing FMD, reinvests it with the same provider or transfers it to a new provider (see section 393-15 of the ITAA 1997).

1.10 In these cases:

• repayments from an FMD do not result in amounts being included in individuals’ assessable income (paragraph 393-15(2)(a) of the ITAA 1997);
Improvements to the Farm Management Deposit Scheme

• deposits into an FMD do not give rise to a deduction (paragraph 393-15(2)(b) of the ITAA 1997); and

• the requirement that FMDs not be withdrawn within 12 months does not apply (paragraph 393-15(2)(c) of the ITAA 1997).

1.11 When applying the 12-month requirement to a new FMD created as a result of these transactions, the requirement applies as if the new deposit was made on the day the original FMD was made.

1.12 Broadly, these rules ensure most transactions that do not in substance change the status of amounts held in an FMD do not result in tax consequences. However, these rules do not assist in consolidating multiple FMDs into a single FMD.

FMDs and unclaimed moneys

1.13 Section 69 of the Banking Act requires all authorised deposit-taking institutions (ADI) to provide a report to Australian Securities and Investments Commission (ASIC) detailing any amounts the ADIs hold that have become lost and unclaimed (including amounts held in FMDs) and to pay these amounts to the Commonwealth.

1.14 The legislation sets out various circumstances in which amounts may become unclaimed. In the case of bank accounts, the general requirement is that a period of three years must have passed since a transaction occurred.

1.15 Before 31 December 2012, the Australian Prudential Regulation Authority (APRA) had annually exercised its powers under section 11 of the Banking Act to prevent FMDs from becoming unclaimed moneys (see, for example, Banking exemption No. 5 of 2011).

1.16 However, on 31 December 2012, this exemption was allowed to lapse and instead subsection 69(1A) of the Banking Act has applied.

1.17 This subsection provides that an FMD will become unclaimed moneys if:

• no deposit into or withdrawal from the account has occurred for three years (or such other time as the regulations may provide); and

• after this time, the ADI has not been able to contact the owner of the FMD despite making reasonable efforts.
1.18 Amounts held by the Commonwealth as unclaimed moneys will be repaid if the Treasurer or an authorised officer is satisfied that the individual was entitled to that amount when it was held by the ADI. In this case, the amount (together with any applicable interest) will be repaid to the relevant ADI (or the ADI that has obtained their banking business if the former ADI has ceased to operate), which then must pay the amount to the individual.

1.19 An amount that is paid to the Commonwealth as unclaimed moneys does not regain its status as an FMD once it is repaid.

Consideration by the National Rural Advisory Council

1.20 The treatment of FMDs was recently considered by the National Rural Advisory Council (NRAC) in its Report on the Effectiveness of the Farm Management Deposit Scheme. NRAC noted that holding multiple FMDs may create an administrative burden for FMD owners and prevent them accessing to higher interest rates. NRAC recommended that the Government amend the legislation governing the FMD Scheme to allow FMD owners to consolidate FMDs that they have held for at least 12 months into a single FMD without triggering any tax consequences.

1.21 NRAC also considered the current non-primary production income threshold. Noting concerns around the increasing diversification of activities by farmers, NRAC recommended an increase in the threshold from $65,000 to $100,000.

Summary of new law

1.22 The Government will amend the provisions of the ITAA 1997 relating to FMDs to:

- allow individuals with a number of FMDs to consolidate these deposits into a single deposit without facing adverse tax consequences; and

- increase the amount of taxable non-primary production income that an individual may earn in an income year before being prevented from accessing the FMD tax concessions.

1.23 The Government will also amend the Banking Act to ensure that, going forward, amounts held in FMDs do not become unclaimed moneys.
Comparison of key features of new law and current law

<table>
<thead>
<tr>
<th>New law</th>
<th>Current law</th>
</tr>
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<tbody>
<tr>
<td>Withdrawing and immediately re-depositing amounts for the purpose of consolidating FMDs does not give rise to income tax consequences and re-deposits are not subject to the normal restrictions on making FMDs provided all of the amounts are from FMDs more than 12 months old and gave rise to deductions when they were initially deposited.</td>
<td>The tax consequences under the rules for withdrawals and deposits from FMDs as well as the restrictions on making FMDs apply to transactions for the purpose of consolidating FMDs.</td>
</tr>
<tr>
<td>Taxpayers may not deduct the amount of a FMD they make in an income year if their taxable non-primary production income for the year exceeds $100,000.</td>
<td>Taxpayers may not deduct the amount of a FMD they make in an income year if their taxable non-primary production income for the year exceeds $65,000.</td>
</tr>
<tr>
<td>A FMD cannot become unclaimed moneys under the Banking Act.</td>
<td>FMDs can become unclaimed moneys under the Banking Act.</td>
</tr>
</tbody>
</table>

Detailed explanation of new law

1.24 Schedule 1 to this Bill makes three principal amendments in relation to FMDs.

Consolidating farm management deposits

1.25 First, Schedule 1 amends the ITAA 1997 to allow multiple FMDs of an individual, subject to the limitations and conditions specified below to be consolidated in a single account with one provider.

1.26 To facilitate consolidation, the normal income tax consequences of these transactions will not apply. [Schedule 1, item 10, section 393-16]

1.27 As a result, where two or more FMDs are withdrawn and immediately redeposited in a new FMD (the consolidated FMD), amounts will not be included in an individual’s assessable income for that income year as a result of the withdrawals.

1.28 Likewise the immediate redeposit of the withdrawn amount into the consolidated FMD will not result in the amount being deductible from the individual’s income. [Schedule 1, item 10, subsections 393-16(1) and (2)]
1.29 The amount redeposited will also not be subject to the restrictions on when individuals can make FMDs nor count towards the cap on the amount that can be deposited in FMDs in a year. [Schedule 1, item 10, subsections 393-16(1) and (2)]

**Limitations on consolidation**

1.30 Only amounts that were part of an FMD (including a consolidated FMD) immediately prior to consolidation may be included in a consolidated FMD. The inclusion of any other amount in an FMD means that the new FMD is not a consolidated FMD and the normal tax rules for withdrawing and depositing FMD amounts applies. [Schedule 1, item 10, subsection 393-16(1)]

1.31 In addition, certain amounts from FMDs may not be included in a consolidated FMD. If these amounts are included, the new FMD will not receive the concessional tax treatment for consolidated FMD. These excluded amounts are:

- amounts from FMDs that are less than 12 months old; and
- amounts that, while included in an FMD, did not give rise to an FMD deduction when the amount was deposited.

[Schedule 1, item 10, paragraphs 393-16(1)(a) and (c)]

1.32 In both these cases allowing these amounts to be included would significantly increase complexity without being necessary to achieve the policy objective.

1.33 FMDs that are less than 12 months old are subject to special rules (see section 393-40 of the ITAA 1997). In particular, if an amount is withdrawn from an FMD within the initial 12-month period, the amount withdrawn is treated as if it had never been part of an FMD.

1.34 In the context of consolidated FMDs, applying this rule would require tracking all of the deductions relating to amounts included in the FMD as well as additional special rules around how these deductions are affected by withdrawals. Instead, amounts from FMDs less than 12 months old may not be included in a consolidated FMD. Individuals may later consolidate these amounts after the 12-month period has passed. [Schedule 1, item 10, paragraph 393-16(1)(c)]

1.35 Amounts can be included in FMDs without giving rise to deductions where the amount of an individual’s contributions to FMDs in an income year exceeds their taxable primary production income for that year (sections 393-10 and 393-35 of the ITAA 1997). As these excess amounts have not given rise to a deduction, they also do not result in an
amount being included in the FMD holder’s assessable income when they are withdrawn (section 393-10 of the ITAA 1997).

1.36 While these amounts are held in an FMD account, they are not in substance an FMD; instead the legislation allows them to be held in an FMD account for convenience. Once the account is closed, this consideration no longer applies and there is no reason to allow these amounts to be redeposited into the consolidated FMD.

Special rules for consolidated FMDs

1.37 For most purposes a consolidated FMD will be treated in the same way as other FMDs.

1.38 However, consolidated FMDs are not treated as being made on the day the consolidation occurred. Instead they are considered to be the same age as the youngest of the FMDs from which amounts were consolidated. This ensures that the consolidated FMDs are not subject to the special rules that treat amounts withdrawn in the first 12 months after an FMD is established as having never been part of an FMD. [Schedule 1, item 10, subsection 393-16(4)]

1.39 Further, the unrecovered FMD deduction of a consolidated FMD is determined in a different way.

1.40 For FMDs generally, the unrecovered FMD deduction is equal to the amount of the deduction received under section 393-5 of the ITAA 1997 when the deposit was made until such time as any amount is withdrawn from the FMD. Once an amount has been withdrawn, the amount of the unrecovered FMD deduction is the amount of the unrecovered FMD deduction immediately prior to the withdrawal, reduced by any amount included in the owner’s assessable income as a result of the withdrawal.

1.41 The unrecovered FMD deduction is the key mechanism by which FMDs achieve tax deferral. It ensures that the amount included in the individual’s assessable income as a result of withdrawals will always be equal to the initial deduction that the individual received when the FMD was made.

1.42 However, a consolidated FMD specifically does not give rise to deduction when the FMD is created.

1.43 If the general rule applied, this would result in the inappropriate outcome that consolidated amounts could be withdrawn without resulting in the inclusion of amounts in assessable income, making the tax deferral indefinite.
Instead, the special rule provides that the unrecouped FMD deduction of a consolidated FMD is equal to the sum of the unrecouped FMD deduction of the accounts that have been consolidated immediately prior to consolidation until an amount is withdrawn. As amounts may only be consolidated where the amount of the FMD is equal to the amount of the unrecouped FMD in respect of that deposit, the value of the unrecouped FMD of the consolidated account will be the same as the value of the consolidated FMD. As a result, all amounts withdrawn from an FMD will result in an amount being included in taxpayer’s assessable income. [Schedule 1, item 10, subsection 393-16(3)]

Example 1.1: Consolidating FMDs

Ms Bourne has owned and operated a farm in Western Australia since 2009. Over this time she has made 4 farm management deposits — a $5,000 deposit made on 27 September 2010, a $7,500 deposit made on 1 July 2011, a $3,000 deposit made on 17 August 2012 and a $10,000 deposit made on 30 November 2013.

For all of these deposits except the 1 July 2011 deposit, Ms Bourne was able to deduct the full amount of the deposit from her assessable income in the relevant income year. For these three deposits, the unrecouped FMD deduction is equal to the amount of the deposit. However, in 2011-12, Ms Bourne’s primary production income was only $5,000 so she was only able to deduct $5,000 of the FMD she made in that year. As a result, for this deposit, the amount of the unrecouped FMD deduction is $5,000.

On 20 July 2014, Ms Bourne wishes to consolidate all FMDs into a single FMD account.

This is not possible for two of Ms Bourne’s deposits. The 1 July 2011 deposit has an unrecouped FMD deduction of less than the amount of the deposit, while the 30 November 2013 deposit may not be consolidated as it is less than 12 months old.

To allow the 1 July 2011 deposit to be consolidated, Ms Bourne withdraws $2,500 — the amount of the initial deposit for which she did not receive a deduction. As the amount remaining in the deposit ($5,000) is then equal to the unrecouped FMD deduction in respect of the deposit ($5,000), the deposit may then be consolidated.

Ms Bourne chooses to consolidate the 27 September 2010, 1 July 2011 and 17 August 2012 deposits, withdrawing the deposits and immediately reinvesting them to create a new consolidated deposit of $13,000.

The consolidated deposit is taken to have been made on 17 August 2012 and so is not subject to the special rules restricting
Improvements to the Farm Management Deposit Scheme

withdrawals from new FMDs. It has an unrecouped FMD deduction of $13,000.

On 30 November 2014, Ms Bourne’s 30 November 2013 deposit is 12 months old. From this day forward, she may choose to further consolidate this deposit with her existing consolidated deposit.

Minor amendments

1.45 Minor changes have been made to a definition and guide material found in number of the provisions in Division 393 to reflect the new provisions and amendments. These changes do not affect the operation of the law. [Schedule 1, items 6, 8, 9 and 11, notes 1 to subsections 393-5(1) and 393-10(1), note 1A to subsection 393-10(2) and the definition of ‘unrecouped FMD deduction’ in subsection 995-1(1)]

Increasing the non-primary production income threshold

1.46 Secondly, Schedule 1 also amends the ITAA 1997 to increase the amount of taxable non-primary production income an individual can earn before being excluded from making FMDs from $65,000 to $100,000. [Schedule 1, item 7, paragraph 393-5(1)(d)]

1.47 This addresses the concerns identified by NRAC that the existing threshold was limiting the availability of the concession as a result of the increasing diversification of the income generating activities of farmers and other primary producers.

Amending the application of unclaimed moneys rules

1.48 Finally, Schedule 1 also amends the Banking Act to exclude an FMD from becoming unclaimed moneys under the Banking Act. [Schedule 1, items 1 and 2, subsections 69(1A) and (1E) of the Banking Act]

1.49 Due to their special tax treatment, FMDs are subject to a number of special conditions and restrictions. These include requirements that FMDs may not be transferred between owners and must immediately be repaid if the owner dies, becomes bankrupt or ceases to carry on a primary production business in Australia for more than 120 consecutive days.

1.50 The special requirements complicate the application of the unclaimed moneys rules. The unclaimed moneys rules operate on the basis that where there have been no transactions on an account within a certain period (broadly, three years), then the account holder has lost the account.
1.51 However, the conditions on FMDs mean that the owner and financial institution must remain in contact in order to be aware that the amount remains an FMD.

1.52 Further, the restrictions on deposits and tax consequences of withdrawal mean that there may be good reason why an individual does not undertake any transactions in relation to an account that is an FMD for a significant period.

1.53 Overall, the consequence is the application of unclaimed money rules to FMDs resulted in additional compliance costs with limited benefits.

1.54 Given this, the Government considered FMDs should be excluded from the unclaimed moneys rules under the Banking Act to reduce the regulatory burden placed on individuals and financial institutions.

1.55 However, these amendments will not prevent amounts that have ceased to be an FMD (for example, because the owner has ceased to be engaged in a primary production business) from subsequently becoming unclaimed moneys.

Consequential and technical amendments

1.56 Schedule 1 also makes a minor technical amendment to remove a reference to FMDs in the rules for deductions of a company following a change in ownership set out in Subdivision 165-A of the ITAA 1997. 

[Schedule 1, items 3 to 5, paragraphs 165-55(5)(f) and 165-55(5)(j)]

1.57 This technical amendment was made as the reference no longer has any effect. Only individuals may have an FMD or receive a deduction for making a contribution to an FMD. As a result there are no circumstances in which a company can have a deduction for a FMD in an income year to which the reference can apply.

Application and transitional provisions

Application

1.58 The amendments to allow consolidated FMDs and the increase to the non-primary production income threshold apply to assessments in income years commencing on or after 1 July 2014. [Schedule 1, item 13]
Improvements to the Farm Management Deposit Scheme

1.59 Following this date, individuals may consolidate their FMDs, subject to the limitations and conditions outlined above, even where the FMDs may have been created in prior income years. Similarly, individuals with no more than $100,000 of taxable income from sources other than primary production in an income year, may make FMDs in that year (provided they satisfy the other eligibility criteria).

1.60 The amendments exempting FMDs from becoming unclaimed moneys under the Banking Act are not subject to a special application rule. They apply from the day of Royal Assent. From this time, FMDs cannot become unclaimed moneys under the Banking Act. [Schedule 1, item 13]

1.61 However, this will not affect the status of amounts that have already become unclaimed moneys, even if the amount was held as an FMD before being paid to the Government.

Transitional rules

1.62 These amendments also include a special transitional rule in the Income Tax (Transitional Provisions) Act 1997 to clarify the tax treatment of amounts that were a FMD but have been paid to the Government as unclaimed moneys.

1.63 Generally, amounts withdrawn from FMDs are included in the owner’s assessable income at the time they are withdrawn. However, the provisions do not specifically address cases where there is an involuntary transfer of the amount to the Government. As a result there is some ambiguity about when tax may arise.

1.64 The rule specifies that the repayment of the deposit will be considered to occur when the unclaimed moneys that was a FMD is repaid by the Commonwealth. The rule applies from 1 January 2013 (the first day on which FMDs can have become unclaimed moneys under the Banking Act). [Schedule 1, item 12, section 393-30 of the Income Tax (Transitional Provisions) Act 1997]

1.65 This position is consistent with the current administration of the law. It ensures that there is no uncertainty that that either the FMD is not be considered to be withdrawn when the FMD is paid to the Government as unclaimed moneys, which would require the amount be included in an individual’s assessable income when they are unlikely to know about the matter. It also ensures that there is no uncertainty that an FMD becoming unclaimed moneys does not indefinitely defer the inclusion of the repaid amount in the individual’s assessable income.
1.66 This transitional rule applies from 1 January 2013, the first date on which FMDs could become unclaimed moneys under the Banking Act. Prior to this day, FMDs were excluded under a series of exemptions issued by APRA (see, for example, Banking exemption No.5 of 2011).

1.67 This provision applies retrospectively in this way to avoid any ambiguity that might arise in respect of the interpretation of the provisions before the clarification. Otherwise, it might be argued that, contrary to the intention of this amendment, the fact this amendment was made supported a view that the law worked differently prior to the clarification.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Improvements to the Farm Management Deposit Scheme

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

Overview

1.69 Farm management deposits (FMDs) are a financial risk management tool that, by smoothing tax liabilities, assists individuals who are carrying on a primary production business to deal effectively with fluctuations in cash flows resulting from climate and market variability.

1.70 This Schedule amends the Income Tax Assessment Act 1997 (ITAA 1997) and the Banking Act 1959 (Banking Act) to improve the operation of the FMD Scheme. In particular it:

- allows taxpayers to consolidate multiple FMDs that they might hold with different banking service providers;
- raises the amount of non-primary production income a taxpayer can receive in a year before being unable to contribute farm management deposits; and
- limits the rules in the Banking Act for unclaimed moneys to prevent them applying to FMDs.
1.71 The Schedule also puts in place a transitional rule to clarify the tax treatment of FMDs that become unclaimed money. This rule applies retrospectively, from 1 January 2013 (the first day FMDs could become unclaimed moneys).

**Human rights implications**

1.72 This Schedule does not engage any of the applicable rights or freedoms.

1.73 It makes minor amendments to improve the flexibility of a special concession to gives financial assistance to a specific type of business.

1.74 The transitional rule clarifying the tax treatment of FMDs that become unclaimed moneys under the Banking Act applies retrospectively. However, this change is a clarification and does not alter the law or the administration of the law. As such, even though it is retrospective, it can have no implications for taxpayer’s rights or freedoms.

**Conclusion**

1.75 This Schedule is compatible with human rights as it does not raise any human rights issues.
Refunding excess GST

Outline of chapter

2.1 Schedule 2 to this Bill amends the A New Tax System (Goods and Services Tax) Act 1999 (GST Act) and the Taxation Administration Act 1953 (TAA 1953) to ensure that excess goods and services tax (GST) paid is only refundable in certain circumstances.

2.2 The amendments apply where a taxpayer’s assessed net amount for a tax period takes into account an amount of GST exceeding that which is payable as a result of:

- mischaracterising a supply or arrangement;
- miscalculating the GST payable; or
- for any other reason;

if the excess GST has been passed on to the recipient of the supply or arrangement that was treated as a supply.

2.3 In most cases, the amendments allow taxpayers to determine if they are entitled to a refund of amounts of excess GST. The Commissioner of Taxation (Commissioner) also has a discretion to refund the excess GST in exceptional circumstances where the application of these provisions to deny a refund would be inappropriate.

2.4 Schedule 2 also amends the TAA 1953 to allow taxpayers to seek merits review of the Commissioner’s decision under section 105-65 of Schedule 1 to the TAA 1953. This amendment addresses the decision in Naidoo v Commissioner of Taxation [2013] AATA 443 (Naidoo) where the Administrative Appeals Tribunal (AAT) found that a decision made by the Commissioner under section 105-65 was not part of the assessment process and as such did not qualify for merits review under Part IVC of the TAA 1953.

2.5 All references in this chapter to section 105-65 are to that section in Schedule 1 to the TAA 1953. All other legislative references are to the GST Act unless otherwise specified.
Context of amendments

Scheme of the GST Act

2.6 The GST Act is based on the following principles (see Chapter 1 of the executive summary in the explanatory memorandum to the *A New Tax System (Goods and Services Tax) Bill 1998)*:

- GST is remitted by suppliers who make supplies in carrying on their enterprise. Suppliers do not bear the GST because the tax is included in the price of what they supply;
- GST is effectively borne by private consumers when they acquire anything that is subject to GST; and
- to ensure that GST is effectively borne by private consumers, registered entities are generally entitled to an input tax credit for the GST on what they acquire or import for the purpose of their enterprise.

2.7 The GST Act envisages that the supplier ‘passes-on’ the GST to the recipient of the supply. If GST is passed on but there is a refund of the GST to the supplier, the supplier will have a windfall gain unless it reimburses the recipient of the supply. Accordingly, a provision to restrict refunds of excess GST is appropriate to prevent windfall gains and provide an incentive for the supplier to reimburse their customer.

Overpayments of GST

2.8 A taxpayer may overpay an amount of GST by incorrectly treating a supply (or arrangement) it makes as a taxable supply, where that supply (or arrangement) is not a taxable supply to any extent. This includes incorrectly apportioning the taxable and non-taxable components of a mixed supply.

2.9 In a typical transaction the taxpayer will include an amount of GST in the price of the supply, state that amount of GST on the tax invoice issued to the recipient of the supply, and remit that amount of GST to the Commissioner. This depends on the specific facts and circumstances of each case.
2.10 A taxpayer may also overpay an amount of GST as a result of a miscalculation, for example, errors made in calculating:

- the GST amount under the margin scheme, under Division 75; or
- the ‘global GST amount’ under Division 126.

**Restriction on refunds under section 105-65**

2.11 Currently, section 105-65 operates to ensure that taxpayers do not obtain a windfall gain by restricting the circumstances in which the Commissioner may be required to refund an overpaid amount of GST.

2.12 The provision applies to amounts of GST that have been overpaid by a taxpayer in certain circumstances, either as a result of taxpayers remitting more than they are legally required to pay under section 33-3 or 33-5, or because an amount under section 35-5 has not been refunded or applied under Division 3 of Part IIB of the TAA 1953 (subsection 105-65(2)).

2.13 Section 105-65 provides that the Commissioner is not required to refund an overpayment that would otherwise be refundable if either:

- the taxpayer does not reimburse a corresponding amount to the recipient of the supply (subparagraph 105-65(1)(c)(i)); or
- the recipient of the supply is registered or required to be registered for GST (subparagraph 105-65(1)(c)(ii)).

2.14 A number of deficiencies and uncertainties in the operation of section 105-65 have been raised by tax practitioners or highlighted by Court and AAT decisions. Some of these are discussed below.

**Concerns with section 105-65**

*Nature of the Commissioner’s discretion to refund*

2.15 The provision states that the Commissioner ‘need not’ pay a refund in particular circumstances. This language has caused some uncertainty about whether this is a discretion to refund, or a discretion not to refund. The Commissioner has maintained the view that the provision provides a residual discretion to refund, rather than a discretion not to refund.
The uncertainty surrounding the nature of the provision was identified by the Board of Taxation in its *Review of the Legal Framework for the Administration of the Goods and Services Tax*. Accordingly, recommendation 45 of the Board's report stated that the law should be amended to clarify that the Commissioner has a discretion to refund the GST where appropriate.

**Mischaracterisations and miscalculations**

Prior to the Federal Court of Australia’s decision in *Sportsbet*1 (handed down on 26 July 2011), the Commissioner considered that section 105-65 applied to miscalculations (as well as mischaracterisations) of the GST payable.

The effect of the *Sportsbet* decision is that the restriction in section 105-65 does not apply where the supply is always correctly characterised and treated by the supplier, but an overpayment of GST arises from a miscalculation of the GST payable. This includes situations where a taxpayer miscalculates the amount of GST in applying the GST margin scheme.

The decision in *Sportsbet* gives rise to the potential for windfall gains for taxpayers remitting GST if an overpayment arises as a result of a miscalculation and the full amount of GST paid is passed on. This is inconsistent with the policy intent that taxpayers should not obtain a windfall gain from an overpayment irrespective of how the overpayment arises.

**Objections to decisions made by the Commissioner under section 105-65**

In *Naidoo* the AAT found that it did not have jurisdiction to conduct merits review of the Commissioner's decision under section 105-65.

Prior to the decision in *Naidoo* the Commissioner considered the application of section 105-65 to be a necessary step in determining a taxpayer's GST liability and should be taken into account in assessing a taxpayer's net amount for each of the relevant tax periods. Where excess amounts were not refunded, the Commissioner’s practice was to make assessments in which the net amount was treated as including amounts not refunded because of the operation of section 105-65. Taxpayers that were dissatisfied with the Commissioner’s decision under section 105-65 could

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1 *International All Sports v Commissioner of Taxation* [2011] FCA 824 (*Sportsbet*)
then challenge the decision by objecting to the assessment in the manner provided for under Part IVC of the TAA 1953.

2.22 In Naidoo the AAT noted\(^2\) that, the net amount in subsection 17-5(1) is worked out using the formula ‘GST - input tax credits’ where, GST is defined as ‘the sum of all of the GST for which you are liable on the taxable supplies that are attributable to the tax period’. The net amount calculation does not include amounts of overpaid GST.

2.23 Therefore, having concluded that section 105-65 does not alter the determination of a taxpayer’s net amount under the GST Act, and noting that section 105-65 does not contain any express provision allowing a taxpayer to object, the AAT found that it did not have jurisdiction to review the Commissioner’s decision under section 105-65.

2.24 Accordingly, taxpayers are currently unable to challenge the application of section 105-65 under Part IVC of the TAA 1953. Where the taxpayer seeks a refund of overpaid GST but the Commissioner refuses to exercise the discretion under section 105-65 to pay a refund, taxpayers are not able to seek merits review of this decision.

**Summary of new law**

2.25 Schedule 2 amends the GST law to allow taxpayers to determine whether they are entitled to a refund by reference to objective conditions, rather than having to rely on the Commissioner to exercise the discretion to refund an excess amount of GST.

2.26 A refund of overpaid GST can be claimed by a taxpayer if it has not been passed on to another entity. Alternatively, if the excess GST has been passed on to another entity then a refund can be claimed following reimbursement of that amount.

2.27 The Commissioner’s discretion is retained for exceptional circumstances where the Commissioner considers that treating GST as payable would be inappropriate, having regard to the principle that excess GST is not to be refunded if it would give an entity a windfall gain.

2.28 The amendments also address the impact of the Federal Court's decision in Sportsbet by ensuring that overpayments of GST resulting

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\(^2\) Paragraph 92 of AATA 443
from a miscalculation of the GST payable are subject to the restriction on refunding excess GST.

2.29 Because the amendments in Schedule 2 impact on the assessed net amount, taxpayers are able to challenge the application of the amendments as part of an objection to their assessment under Part IVC of the TAA 1953. Specific review rights are introduced where the Commissioner refuses to exercise the discretion in the provision.

2.30 For those decisions made under section 105-65, this Schedule amends the TAA 1953 so that taxpayers who have not previously sought or purported to seek review of that decision can now seek merits review.

### Comparison of key features of new law and current law

<table>
<thead>
<tr>
<th>New law</th>
<th>Current law</th>
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<tbody>
<tr>
<td><strong>Scope of restrictions on refunds</strong></td>
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</table>
| The restriction applies to excess GST arising for any reason, including as a result of incorrectly:  
  • treating a supply as fully or partly taxable; or  
  • calculating the amount of GST payable on a supply.  
  However, the restriction on GST refunds does not apply unless the excess GST is also passed on to another entity. Where the restriction does not apply the excess GST is refundable. | The restriction only applies where the overpayment is a result of the taxpayer incorrectly treating a supply or arrangement as taxable to any extent.  
  The restriction does not apply where the overpayment is a result of the taxpayer miscalculating an amount of GST payable.  
  Taxpayers cannot self-assess their entitlement to a refund. |
| **GST always payable** | |
| An amount of excess GST is taken to have always been payable and on a taxable supply if it has been passed on to another entity. It does not matter if the assessed net amount that includes the excess GST has been paid (positive net amounts) or refunded (negative net amounts).  
  There is no restriction on refunding excess GST where the overpayment has not been passed on to another entity. | A taxpayer is not entitled to a refund of an overpaid amount of GST if:  
  • the taxpayer has not reimbursed the recipient of the supply; or  
  • the recipient is registered or required to be registered for GST. |
Refunding excess GST

<table>
<thead>
<tr>
<th>New law</th>
<th>Current law</th>
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<tbody>
<tr>
<td>Excess GST does not include an amount that is correctly payable but</td>
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<td>covered by a decreasing adjustment attributable to a later tax period,</td>
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<td>or is correctly attributable to a different tax period.</td>
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<table>
<thead>
<tr>
<th>When amount of GST is refundable</th>
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<tr>
<td>If the taxpayer has not passed on the amount of excess GST to the</td>
<td>An amount of overpaid GST is only refundable if the recipient is not</td>
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<td>recipient, excess GST is not taken to have always been payable, and</td>
<td>registered or required to be registered for GST and the taxpayer has</td>
</tr>
<tr>
<td>is therefore refundable.</td>
<td>reimbursed the recipient.</td>
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<tr>
<td>An amount of excess GST that has been passed on is taken to have</td>
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<td>always been payable, until the recipient of the supply has been</td>
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<tr>
<td>reimbursed.</td>
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<thead>
<tr>
<th>Commissioner’s discretion to refund</th>
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<tbody>
<tr>
<td>Taxpayers determine their entitlement to a refund of excess GST under</td>
<td>The Commissioner may exercise a discretion to refund an amount, even if</td>
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<tr>
<td>specified conditions. If these conditions are not satisfied, taxpayers</td>
<td>the conditions under which the Commissioner need not pay a GST refund in</td>
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<td>are not entitled to a refund of the excess GST.</td>
<td>section 105-65 are met.</td>
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<tr>
<td>However, the Commissioner retains a discretion to refund an amount if</td>
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<td>refunding the amount would not give an entity a windfall gain.</td>
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<thead>
<tr>
<th>Where the recipient is reimbursed</th>
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<tbody>
<tr>
<td>Where a taxpayer reimburses excess GST to the recipient, the provision</td>
<td>Where a taxpayer reimburses overcharged GST to an unregistered</td>
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<tr>
<td>stops deeming the excess GST to be payable. This is accounted for as an</td>
<td>recipient, section 105-65 does not prevent a refund.</td>
</tr>
<tr>
<td>adjustment event for the supplier. If the recipient is registered, there</td>
<td>If the recipient is registered or required to be registered, then the</td>
</tr>
<tr>
<td>may also be an adjustment event for the recipient.</td>
<td>Commissioner need not refund the supplier even if the overcharged GST is</td>
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<tr>
<td></td>
<td>reimbursed.</td>
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</table>
### Tax Laws Amendment (2014 Measures No. 1) Bill 2014

<table>
<thead>
<tr>
<th>New law</th>
<th>Current law</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Restriction on refunds for cancelled supplies</strong></td>
<td>No current law.</td>
</tr>
<tr>
<td>Where the adjustment event effectively cancels a supply, the supplier is only entitled to a decreasing adjustment to the extent that they have reimbursed the corresponding GST to the recipient. There is a corresponding rule for increasing adjustments for recipients.</td>
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<tr>
<th><strong>Interaction with assessment provisions</strong></th>
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<tbody>
<tr>
<td>Excess GST is taken to be GST payable on a taxable supply, which forms part of the net amount, and may be included in the assessment of a net amount.</td>
<td>An amount of overpaid GST not refunded is not included in working out the net amount, and therefore cannot be included in the assessment of a net amount.</td>
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<tr>
<th><strong>Review of Commissioner’s decision</strong></th>
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<tr>
<td>For tax periods starting on or prior to Royal Assent, taxpayers may seek merits review of the Commissioner’s decisions made under section 105-65. For tax periods starting on and after the day following Royal Assent, taxpayers may seek merits review under Part IVC of the TAA 1953 of any assessment of a net amount which includes an amount of excess GST under the amendments. Merits review is also available in relation to a decision by the Commissioner not to exercise the discretion to refund the excess GST in circumstances where passing on has occurred but no windfall gain would arise.</td>
<td>Where a taxpayer seeks a refund of overpaid GST but the Commissioner refuses to exercise the discretion under section 105-65 to pay a refund, taxpayers are not able to seek a review of this decision under Part IVC of the TAA 1953. The taxpayer's review rights are limited to judicial review.</td>
</tr>
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### Detailed explanation of new law

2.31 Schedule 2 replaces existing section 105-65 with a new Division in the GST Act to ensure that where the taxpayer’s assessed net amount for a tax period takes into account an amount of GST exceeding that which is payable, the excess GST is only refundable in certain circumstances. [Schedule 2, item 10, section 142-1 of the GST Act, item 27, section 105-65 in Schedule 1 to the TAA 1953]
Excess GST

2.32 Excess GST is an amount of GST that has been taken into account in an assessed net amount, but is not in fact payable. [Schedule 2, item 10, subsection 142-5(1) of the GST Act]

2.33 It does not matter how the excess arose — whether, for example, by a mischaracterisation of a transaction as a taxable supply, a miscalculation of the amount of GST payable, or an accounting or reporting error.

2.34 In practice, excess GST can arise as a result of a range of circumstances including:

- incorrectly treating a GST-free or input taxed supply as a taxable supply (including incorrectly apportioning the taxable and non-taxable components of a mixed supply);

- incorrectly treating a transaction or arrangement which is not a supply as a taxable supply;

- miscalculating a GST liability under the GST law, for example, under the margin scheme or on gambling supplies; or

- incorrectly reporting an amount of GST on a GST return.

2.35 Excess GST can be refunded without restriction under the provisions if it has not been passed on to another entity. It can also be refunded if it has been passed on, but the other entity has been reimbursed for the overpayment. If, for example, the overpayment simply occurs as a result of an error in the preparation of a GST return, it will be clear that the excess GST has not been passed on. In these circumstances, refunding the excess GST would not result in a windfall gain. [Schedule 2, item 10, section 142-10 of the GST Act]

2.36 The provisions ensure that the excess GST is treated as always payable and in relation to a taxable supply where that excess has been passed on to another entity. Because an amount is considered as always payable, no refund arises as the GST is taken to have been correctly payable and included in the taxpayer’s assessed net amount.

2.37 If an amount of excess GST that has been passed on is later reimbursed, the excess amount stops being treated as payable on a taxable supply. The reimbursement is an adjustment event because it has the effect of changing the consideration for a supply and in some cases because the supply is no longer treated as a taxable supply. [Schedule 2, item 10, section 142-10 of the GST Act]
2.38 Alternatively, if an amount of excess GST has not been passed on then no restriction on refunding the excess GST applies and a refund may be claimed (subject to relevant time limits for amending assessments). [Schedule 2, item 10, section 142-10 of the GST Act]

2.39 Excess GST may also arise where the excess is included in an amendment to an assessment of a net amount. Section 155-80 in Schedule 1 to the TAA 1953 provides that an amended assessment is an assessment for the purposes of any taxation law.

**Example 2.1: Amount paid under Division 33**

James is registered for GST. On 28 April 2015, James lodged his quarterly GST return for the tax period ending 31 March 2015. His assessed net amount for that tax period is $3,500. James pays this amount to the Commissioner under section 33-3.

On 16 September 2015, James realises that because of a transcription error he incorrectly included an additional amount of GST of $100 in his net amount for the tax period ending 31 March 2015. As his assessed net amount for that tax period has taken into account the $100, the additional GST of $100 exceeds what is payable. Therefore, the $100 is an amount of excess GST. However, the provisions do not apply because the amount has not been passed on. Therefore, James is entitled to a refund.

**Example 2.2: Amount applied under running balance account**

Retro Robynne Co is registered for GST. On 21 October 2015, Retro Robynne Co lodges its monthly GST return for the tax period ending 30 September 2015. Retro Robynne Co’s assessed net amount for that tax period is a refund of $4,000. The Commissioner applies this amount against an outstanding tax debt of $1,500 on Retro Robynne Co’s running balance account and refunds the balance of $2,500 to Retro Robynne.

On 2 July 2016 Retro Robynne Co realises that it incorrectly included an amount of $2,000 as GST payable on its GST return (as a result of double counting in a particular taxable supply). Had it correctly reported the GST payable on its return, its assessed net amount would have resulted in a refund of $6,000. As Retro Robynne Co’s assessed net amount for that tax period takes into account the $2,000, the additional GST of $2,000 exceeds what is payable. The $2,000 is an amount of excess GST.

The excess amount has not been passed on because only one amount of GST was passed on for the particular taxable supply, not two. Therefore Retro Robynne Co is entitled to a refund of the excess GST.
2.40 The application of these amendments does not depend on whether a taxpayer has paid (under Division 33), or has been refunded (under Division 35), the assessed net amount. Rather, it depends on whether the taxpayer has included an amount of excess GST in their assessed net amount. For instance, if an amount of excess GST has been included in the taxpayer’s assessed net amount but that amount was not passed on to another entity then that amount is considered to have never been payable under the amendments. Therefore the taxpayer may request an amendment to their assessment to remove the excess GST from their assessed net amount. This is the case regardless of whether this excess is discovered before, or after, it has been paid to the Commissioner.

**Excess GST unrelated to adjustments**

2.41 In working out the amount of excess GST, the following amounts are disregarded:

- an amount of GST that is correctly payable and attributable to the tax period, but which later becomes the subject of a decreasing adjustment; and

- an amount of GST that is payable, but is correctly attributable to a different tax period.

*[Schedule 2, item 10, subsection 142-5(2) of the GST Act]*

**GST related to decreasing adjustments**

2.42 The concept of ‘excess GST’ is intended to apply to amounts that were treated as GST in a GST return, but were never payable. Where an amount was correctly payable as GST, but the liability for GST was later changed because of an adjustment event, the change in GST payable is accounted for by way of an adjustment to the net amount. Adjustments can arise because of adjustment events such as cancelling a supply, changing the consideration for a supply or causing a supply to stop being a taxable supply.

2.43 An adjustment that arises due to a change in consideration does not generally give rise to a windfall gain as the change in GST payable would be proportionate to the change in consideration.

2.44 Where an adjustment event in a later tax period results in a decreasing adjustment for the supplier that is attributable to that later tax period, the amount of the decreasing adjustment is disregarded. Thus, the provisions do not prevent the claiming of a decreasing adjustment.

*[Schedule 2, item 10, paragraph 142-5(2)(a) of the GST Act]*
Example 2.3: Decreasing adjustment, not excess GST

In June 2015, GCorp pays $330,000 to JCorp for services provided in that quarter.

On 28 July 2015, JCorp lodges its quarterly GST return for the tax period ending 30 June 2015. JCorp’s assessed net amount for that tax period takes into account the $30,000 GST payable on the services supplied to GCorp.

In August 2015, GCorp complains to JCorp about the cost of the services and gets a refund of $44,000 from JCorp. The change in consideration for the supply is an adjustment event. JCorp has a decreasing adjustment of $4,000 (that is, 1/11th of $44,000). JCorp issues an adjustment note to reflect the change to the consideration for the supply.

The excess GST for the June 2015 tax period is zero (the $4,000 which is subject to a decreasing adjustment, is disregarded when working out whether there is any excess GST). JCorp instead attributes the decreasing adjustment of $4,000 to the September 2015 quarterly tax period.

GST attributable to another tax period

2.45 An amount of GST that is correctly payable but has been attributed to an incorrect tax period does not give rise to any excess GST in that incorrect tax period. This could occur in an audit situation where the taxpayer has attributed an amount in a particular tax period but the Commissioner assesses the amount as being correctly attributable to a different tax period. [Schedule 2, item 10, paragraph 142-5(2)(b) of the GST Act]

Example 2.4: Amount attributable to another tax period

Pete Enterprises is registered for GST. On 1 April 2015, Pete Enterprises makes a taxable supply to Alan for $66,000 and issues him with a tax invoice that includes an amount of GST of $6,000.

On 21 April 2015, Pete Enterprises lodges its monthly GST return for the tax period ending 31 March 2015, which incorrectly includes the GST of $6,000 relating to the taxable supply made to Alan.

On 3 September 2015, the Commissioner conducts an audit and determines that Pete Enterprises has incorrectly attributed the GST of $6,000 to the March tax period instead of the April tax period. The Commissioner amends the assessments for the monthly tax periods ending March 2015 and April 2015. The overpaid GST in the March tax period does not give rise to an amount of excess GST as it is correctly attributable to a different tax period (that is, April).
Refunding excess GST

2.46 So much of the ‘excess GST’ which has been passed on to another entity is taken to have always been payable and always on a taxable supply, until such time as the taxpayer reimburses the other entity for the passed-on GST. [Schedule 2, item 10, section 142-10 of the GST Act]

2.47 Only in exceptional circumstances do taxpayers need to ask the Commissioner to exercise the discretion to refund an amount that has been overpaid. Instead, taxpayers determine their entitlement to a refund of excess GST by reference to the following:

- where all or part of the excess GST has not been passed on, the taxpayer is entitled to a refund of the excess GST not passed on; and

- where all or part of the excess GST has been passed on by the taxpayer, the taxpayer is entitled to a refund to the extent that they have reimbursed the other entity for the amount of the excess GST.

[Schedule 2, item 10, section 142-10 of the GST Act]

2.48 If the taxpayer can establish that either of the above conditions is satisfied, they are entitled to a refund of the excess GST. If a refund arises because the GST has not been passed on, the taxpayer may seek a refund from the Commissioner by applying for an amendment of the relevant assessment or objecting to the relevant assessment (subject to applicable time limits). Section 155-75 of Schedule 1 to the TAA 1953 provides that any amount of overpaid tax that arises as a result of an amendment is to be applied in accordance with Divisions 3 and 3A of Part IIB of the TAA 1953.

2.49 If a refund arises because the taxpayer reimburses the passed-on GST, they will generally have a decreasing adjustment and the other entity may have an increasing adjustment. [Schedule 2, item 10, note 1 in section 142-10 of the GST Act]

2.50 Where GST has been paid in respect of a supply and then reimbursed, there is an adjustment event under one or more of the paragraphs in subsection 19-10(1). The reimbursement has the effect of changing the consideration for a supply. In some cases there is an adjustment event because upon reimbursement, the supply or transaction ceases to be treated as a taxable supply. [Schedule 2, item 10, section 142-10 of the GST Act]

2.51 In determining the amount of the adjustment, the previously attributed GST amount includes an amount of GST that was treated as
payable by operation of these amendments. This is compared to the ‘corrected GST amount’, which is the correct GST payable once the excess GST stops being deemed as payable on a taxable supply.

2.52 In some cases a taxpayer may treat an arrangement as giving rise to a taxable supply, where there is no actual supply. In such cases, if the taxpayer subsequently discovers the mistake and reimburses the excess GST to the other entity, then that amount is treated as never having been payable or made in relation to a taxable supply. The taxpayer may seek a refund from the Commissioner by applying for an amendment of the relevant assessment or objecting to the relevant assessment. There is no adjustment event in these circumstances, because there is no supply to which Division 19 can apply. [Schedule 2, item 10, subsection 142-15(3) of the GST Act]

Example 2.5: Excess GST not passed on

Melissa leases an office tower to Bank Ezy. The lease requires $120,000 rent including GST to be paid monthly. Bank Ezy pays the correct amount but Melissa incorrectly records the transaction as $220,000 in her records and pays GST of $20,000.

Six months later Melissa realises her accounting error. As the excess GST (on the additional $100,000) has not been passed on Melissa may request that the Commissioner amend her assessment for the period in which she included the excess GST.

Example 2.6: Excess GST not passed on

Company B, a large retailing entity, introduces a new product which is GST-free. It calculates the selling price on this basis, noting that other retailers are also selling the product on a GST-free basis, and sells the product to a large number of customers. However, due to a coding error in the company’s computer systems, the product is shown as taxable on invoices issued to customers and GST is included in the company’s GST returns.

After a few months, Company B discovers its error and changes its system so that the product is now correctly shown as GST-free. The selling price of the product does not change.

Company B considers that it did not factor any GST into the price of the product and that the computer error has led to the company effectively bearing the cost of the excess GST. Company B therefore considers that the excess GST has not been passed on and may request that the Commissioner amend its assessments for the tax periods in which it included the excess GST.
Example 2.7: Excess GST reimbursed

John buys a set of spectacles from Joe’s Optics and pays GST on the total price of the spectacles. Joe’s Optics had passed the GST to John. The proprietor of Joe’s Optics is advised by the Commissioner following an audit that the lenses are GST-free and that Joe’s Optics had overpaid GST.

The excess GST is taken to have always been payable under the amendments until Joe’s Optics reimburses John for the passed-on GST.

When John returned for his annual sight check-up he was advised of the error and was reimbursed for the excess GST. As John has been reimbursed for the passed-on GST, the excess GST is no longer taken to be payable.

Joe’s Optics would account for the reimbursement to John as a decreasing adjustment, attributable in accordance with section 29-20.

Joe’s Optics would not be entitled to amend the assessments for the original tax period to remove the excess GST from its net amount. This is because these amendments treat the excess GST as payable until the time it is reimbursed.

Example 2.8: Excess GST reimbursed — business to business transaction

In the quarter ending 30 September 2015, Bron Co provides debt collection services to Rob Co at a GST-inclusive price of $22,000. Rob Co uses those services in its business of making financial supplies, and is entitled to claim a reduced input tax credit of 75 per cent in relation to those acquisitions.

Due to a systems error, Bron Co inadvertently charges $3,000 GST when it invoices Rob Co for the supply. Rob Co pays a total of $23,000 to Bron Co and calculates its entitlement to an input tax credit as 75 per cent of $3,000. Bron Co’s assessed net amount for the tax period takes into account the $3,000 GST it charged to Rob Co.

Bron Co later discovers the error and advises Rob Co. Rob Co wishes to obtain a refund of the overcharged amount and Bron Co duly reimburses the sum of $1,000 to Rob Co. Accordingly, the amendments cease to apply and the excess GST is no longer taken to be payable.

Bron Co would account for the reimbursement to Rob Co as a decreasing adjustment, and Rob Co would account for its receipt of the reimbursed amount as an increasing adjustment. Rob Co and Bron Co would not amend their GST returns for the period in which the GST and input tax credits were originally attributable. This is because these amendments treat the GST as payable until the time of reimbursement.
Example 2.9: Excess GST partially reimbursed

Croft Enterprises is registered for GST. On 25 May 2015, Croft Enterprises makes a supply to Christine which they believe to be taxable. They charge Christine the amount of $2,200, including GST of $200. Christine pays the amount of $2,200 to Croft Enterprises. Christine is neither registered nor required to be registered.

In its quarterly GST return lodged on 28 July 2015, Croft Enterprises includes GST payable of $200 for the supply to Christine. The $200 is taken into account in Croft Enterprise’s net amount for the tax period ending 30 June 2015.

On 20 September 2015, Croft Enterprises realises that the supply was not a taxable supply and therefore the $200 is excess GST. The $200 is taken to have always been payable until Croft Enterprises reimburses Christine. However, Croft Enterprises only reimburses $150 of the GST paid to Christine. Therefore, the remaining $50 (being the difference between the excess GST and what has been reimbursed) is taken to have been always payable under the amendments. Croft Enterprises is entitled to a decreasing adjustment of $150 in the tax period ending 30 September 2015.

Example 2.10: Treating excess GST as GST payable

Shawn is registered for GST and has monthly tax periods. During the tax period ending 31 July 2015, Shawn makes a number of supplies. He treats these as taxable supplies and includes GST on these supplies in his GST return lodged on 21 August 2015. His assessed net amount is $4,000.

On 9 December 2016, Shawn discovers that some of the supplies he treated as being taxable supplies are not taxable supplies, and as a result, he has overpaid $1,000 of GST to the Commissioner. The $1,000 is excess GST.

If Shawn has passed on the excess GST and not reimbursed the recipient/s, the excess GST is taken to have always been payable and no refund entitlement arises.

Amended assessments

2.53 Circumstances may arise where an assessed net amount is amended (whether on application by the taxpayer, or following an audit by the Commissioner) to include an amount of GST not originally treated as payable. If the amendment is incorrect, but the taxpayer has not passed on the excess GST, then this measure allows the taxpayer to claim a refund of the excess. This means that if it is later determined that GST was not payable on that supply, the taxpayer’s assessed net amount could be further amended to reflect this outcome.
Example 2.11: Amended assessment and GST not passed on

Jenny treats a particular supply as GST-free and this is reflected in the price she charges customers. Her assessed net amount for the tax period reflects the GST-free treatment of that supply (she does not report any GST for that supply).

Later, she is audited by the Commissioner, who determines that the supply she treated as GST-free was a taxable supply. The Commissioner amends her assessment for that tax period (first amended assessment).

Jenny objects to the amended assessment on the basis that she considers that the supply is not taxable.

Subsequently, the Commissioner allows her objection in full. However, in giving effect to the favourable decision, the Commissioner must consider the application of these amendments.

The amendments apply as Jenny’s assessed net amount for the tax period (the first amended assessment) takes into account an amount of GST exceeding that which is payable. In applying the amendments, it does not matter how much, if any, of the assessed net amount Jenny has actually paid.

As Jenny is able to demonstrate that the price she charged does not include GST, the Commissioner accepts that she has not passed on the GST and that the amendments do not apply. Accordingly the Commissioner further amends Jenny’s assessed net amount (second amended assessment) to reflect the favourable objection decision.

2.54 If an amendment of the assessment results in the taxpayer’s liability being reduced, the amount by which the liability is reduced is treated as though it was never payable and the Commissioner must apply that amount in accordance with the running balance account rules under Divisions 3 and 3A of Part IIB of the TAA 1953 (section 155-75 of Schedule 1 to the TAA 1953).

Exceptions to refunding excess GST

Commissioner’s discretion

2.55 The Commissioner has a discretion to allow a refund of excess GST despite passing on having occurred and no reimbursement having been made. The discretion can only be exercised on application by the supplier in an approved form. The discretion should only be exercised where the Commissioner is satisfied that a refund of the excess GST would not provide an entity with a windfall gain. [Schedule 2, item 10, subsection 142-15(1) of the GST Act]
2.56 Ordinarily, where GST has been passed on by a supplier to a recipient, a refund to the supplier would result in the supplier having a windfall gain. Although less common, there could also be cases where a refund could lead to a windfall gain for another entity — for example, a recipient that has claimed input tax credits is effectively compensated for the GST they overpaid, and for whatever reason is able to retain the input tax credits they claimed.

2.57 In most cases the provisions are self-executing and there is no need for taxpayers to make an application to the Commissioner. If GST has not been passed on a refund of excess GST can be claimed. If a taxpayer and the Commissioner disagree about whether GST has been passed on the taxpayer may object to the relevant assessment in accordance with Part IVC of the TAA 1953. The discretion is not intended to apply in these circumstances. If GST has been passed on, and is not reimbursed, then a refund of the GST would ordinarily lead to a windfall to the supplier. In these cases, the application of the amendments is consistent with the principle that excess GST is not to be refunded if this would give an entity a windfall gain and hence there is no cause for the exercise of the discretion.

2.58 However, there are more unusual cases where denying a refund may result in unintended consequences. One of these is illustrated in Example 2.12 below where strictly the entity has passed on and overpaid GST, but nevertheless the relevant individuals concerned would be out-of-pocket if the entity were not entitled to a refund of the GST overpaid. The discretion is intended to provide the Commissioner with the flexibility to deal with these sorts of circumstances.

2.59 The Commissioner must notify taxpayers in writing of the decision to refund in full or in part, or to deny a refund of excess GST. This requirement applies from the day following Royal Assent. 

[Schedule 2, item 10, subsection 142-15(2) of the GST Act]

**Merits review of Commissioner’s decision**

2.60 The Commissioner’s decision to refuse to exercise the discretion to allow a refund of excess GST despite passing on having occurred and no reimbursement having been made is a separate reviewable GST decision under section 110-50. Accordingly, merits review is available under Part IVC of the TAA 1953. This is different to objecting against the assessment of the net amount that includes the excess GST.
Example 2.12: Commissioner’s discretion and wrong entity

Entities Lintoned and Benwell own a commercial property as tenants in common. Each carries on a separate enterprise and is registered for GST.

Entities Lintoned and Benwell each sell their 50 per cent interest in the property (with vacant possession) to Neville Co for a price of $50,000 plus $5,000 GST each. Entities Lintoned and Benwell each remit GST of $5,000.

Neville Co is registered for GST and claims two input tax credits of $5,000 each.

The Commissioner reviews the transaction and decides that Entities Lintoned and Benwell are operating an enterprise as a tax law partnership. The tax law partnership is a separate entity for GST purposes. The Commissioner therefore assesses the partnership for underpaid GST of $10,000. The partnership duly pays the $10,000.

Entities Lintoned and Benwell have each overpaid GST of $5,000 and they have each passed on that excess GST to Neville Co. However, in effect, Lintoned and Benwell have remitted the passed-on GST twice, once through remitting the GST in their own names, and once through remitting it in the name of the tax law partnership.

In these circumstances it is appropriate for the Commissioner to exercise the discretion where the Commissioner is satisfied that the refund of excess GST to Lintoned and Benwell will not result in a windfall gain for either entity.

Example 2.13: Commissioner’s discretion

Supermarket A introduces a new product which it classifies as subject to GST, but which is correctly GST-free. From the outset, it includes GST in the price of the product, which it sells to a large number of customers. The product is also marketed by other supermarkets that are correctly classifying the product as GST-free and charging a lower price as a result.

After a few months Supermarket A discovers that the product is GST-free and stops including GST in the price, lowering the price to match other supermarkets.

Supermarket A considers that it has passed on the excess GST, but that it is not cost-effective to try to locate customers to provide a reimbursement of the overcharged GST. (If Supermarket A were in doubt as to whether it had passed on the excess GST, it could ask the Commissioner for a private ruling about the matter).
Supermarket A makes a request in the approved form for the Commissioner to exercise the discretion under subsection 142-15(1) to pay a refund of the excess GST, on the grounds that it was disadvantaged in the marketplace by its mistake, and has lost sales and profitability as a result.

In order to exercise the discretion, the Commissioner needs to be satisfied that applying section 142-10 would be inconsistent with the principle that a refund of excess GST should not give an entity a windfall gain.

The Commissioner forms the view that a windfall gain would result if Supermarket A were paid a refund. Accordingly, the Commissioner decides not to exercise the discretion under subsection 142-15(1).

GST relating to cancelled supplies

2.61 Where there is an adjustment event as a result of a supply being cancelled and this results in a decreasing adjustment for the supplier, the adjustment is reduced to the extent that GST has been passed on to the recipient of the supply but has not been reimbursed. [Schedule 2, item 10, section 142-20 of the GST Act]

2.62 Having regard to the decision in Qantas, in many cases there is still a supply where money is paid for goods and services that are ultimately not provided. However, there might be cases where money is paid with a mere expectation of a future supply, which does not eventuate. If this is the case, there could be a decreasing adjustment even if there is no reimbursement of the consideration paid for the supply that was cancelled. If the intending supplier has passed on GST to its customer and not reimbursed the customer, such a decreasing adjustment would provide it with a windfall gain. This provision prevents such an outcome by reducing the decreasing adjustment of the supplier to the extent the GST has been passed on and not reimbursed. The provision also limits increasing adjustments for registered recipients. [Schedule 2, item 10, subsection 142-20(2) of the GST Act]

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3 Commissioner of Taxation v Qantas Airways Ltd [2012] HCA 41
Example 2.14: Decreasing adjustment, cancelled supply

In September 2015 Bams Co makes a taxable supply of goods to FT Co for $55,000 and issues a tax invoice, which includes GST of $5,000.

On 21 October 2015, Bams Co lodges its monthly GST return for the September 2015 tax period. Its assessed net amount takes into account the GST payable of $5,000 for the supply made to FT Co.

In November 2015, FT Co returns all of the goods because they are defective and seeks a refund. Bams Co refunds $55,000. The return of goods and associated refund cancels the supply. This is an adjustment event. Bams Co has a decreasing adjustment of $5,000 attributable to the November 2015 tax period as a result of cancelling the supply, while FT Co has an increasing adjustment of $5,000.

Since Bams Co has reimbursed all of the passed-on GST of $5,000 its decreasing adjustment is not reduced to any extent. Similarly, FT Co’s increasing adjustment is not reduced by any extent.

Input tax credits

2.63 A recipient who is registered for GST would ordinarily have claimed input tax credits on the acquisition of the thing supplied (subject to the normal GST rules).

2.64 Such a recipient can continue to treat the excess GST in the same way that they treat the GST payable on the transaction for the purpose of working out the amount of its input tax credits under Division 11. This is achieved by treating the excess GST as having always been payable and always on a taxable supply. This is designed to preserve the GST outcomes of the original treatment, despite including excess GST and to clarify that the recipient can claim an input tax credit in relation to the acquisition. However, the recipient may have an increasing adjustment where the excess GST is reimbursed to it. [Schedule 2, item 10, section 142-10 of the GST Act]

2.65 The provisions guard against the potential for parties to contrive arrangements that may enable additional input tax credits to be claimed where there would otherwise be no entitlement. For instance, where the corresponding GST is not paid to the Commissioner. This is achieved as the provisions do not apply where the other entity knows or could reasonably be expected to have known that the supplier has not paid the excess GST to the Commissioner. [Schedule 2, item 10, subsection 142-15(5) of the GST Act]
**Supplier’s creditable purpose**

2.66 A supplier who makes input taxed supplies cannot treat those supplies as taxable supplies in order to claim input tax credits on their business inputs. Whilst the provisions treat excess GST that has been passed on as GST payable on a taxable supply, this deeming approach does not affect the supplier’s creditable purpose. Accordingly, acquisitions by a supplier making input taxed supplies remain acquisitions that are not made for a creditable purpose under subsection 11-15(2). [Schedule 2, item 10, subsection 142-15(4) of the GST Act]

**Working out whether and when excess GST has been passed on**

2.67 Whether GST has been passed on is a question of fact and must be determined on a case by case basis taking into account the particular circumstances of each case. [Schedule 2, item 11, section 195-1 of the GST Act]

2.68 A tax invoice issued to or by another entity, that contains enough information to allow the amount of GST payable in relation to the supply to be clearly ascertained, is prima facie evidence of the excess GST having been passed on (although in cases where the taxpayer must pay an assessed net amount, the invoice is only prima facie evidence if the amount has been paid). This reflects that tax invoices are issued for taxable supplies recognising that suppliers will have a liability for GST and would in most circumstances pass the cost of GST onto their customers. [Schedule 2, item 10, section 142-25(2) of the GST Act]

2.69 GST may have been passed on even though a tax invoice has not been issued, or does not specifically or separately identify the GST component or is not a valid tax invoice for the purposes of the GST Act. [Schedule 2, item 10, subsection 142-25(1) of the GST Act]

2.70 For example, information contained in a document purporting to be a tax invoice, but that does not:

- satisfy the requirements under subsection 29-70(1); or
- result in the Commissioner treating the document as a tax invoice under subsection 29-70(1B);

may be sufficient to demonstrate that the excess GST has been included in the price of a supply and therefore passed on.

2.71 The presumption that GST has been passed on may be rebutted in a number of ways. For example, despite the supplier having issued a tax invoice to the recipient, and having paid the excess GST to the Commissioner, they may be able to demonstrate that the recipient of the
supply has not yet paid the amount shown on the invoice. This is sufficient to show that the excess GST has not yet been passed on, such that the amendments would not apply.

2.72 Whether the recipient has actually paid the supplier for the supply (whether or not an invoice has been issued) is therefore an important consideration in deciding whether GST has been passed on. [Schedule 2, item 10, paragraph 142-25(2)(c) of the GST Act]

2.73 Some further guidance on the question of ‘passing-on’ can be obtained from the decision of the High Court in Avon⁴, which concerned the former sales tax regime. In Avon, the High Court noted that a central feature of the sales tax regime was that ‘the economic burden of the impost is generally not intended to be borne by the person liable to remit it; it is passed on’.

2.74 The GST regime is similar to the former sales tax regime in that the entity liable to remit the tax is not intended to be the entity that actually bears the cost of the tax. As such, a number of judicial observations can be readily adapted to a GST context:

- in an economy geared to making a profit, GST is expected to be passed on;
- businesses set prices to cover foreseeable costs;
- GST will be passed on in the usual course of doing business;
- it is inherent in an indirect system that GST will be passed on; and
- it is for the taxpayer to establish a circumstance out of the ordinary, namely that the amount of the overpayment has not been passed on.

2.75 Whether an indirect tax has been passed on can be a relatively complex inquiry. This is because prices may be set with reference to a wide range of factors (including considerations of cost of production, competitive advantage, operational cash flow and customer goodwill). However, the seller’s pricing policy and practice are the starting point of that inquiry.

⁴ Avon Products Pty Ltd v Commissioner of Taxation [2006] HCA 29 (Avon)
2.76 The seller’s pricing policy and practice is based upon its actual knowledge at the relevant time. That knowledge includes the belief that the component of tax which later proves to have been an overcharge is a real cost of doing business.

2.77 Determining if passing on has occurred is relevant both in transactions in which the supplier is liable for GST and also where a reverse charge applies and the GST is payable by the recipient of the supply. Whether passing on has occurred will depend on the facts and circumstances of the relevant supply or transaction.

**Margin scheme**

2.78 The margin scheme represents another method by which GST can be calculated for certain supplies of real property. The GST, as calculated either under the general rules or under the margin scheme, is a foreseeable cost that would normally be taken into consideration in the costing and pricing structures of a business. In this regard, margin scheme cases need to be considered in the same way as other cases where the recipient is overcharged. Each case must be considered on its own facts based on whether the excess GST has been passed on.

2.79 An assertion that GST was not a factor in setting the price is not, of itself, sufficient to establish that the excess GST has not been passed on. Instead, a wide range of factors may be relevant to the question of passing-on in any particular case. In the case of taxable sales of real property, some of those factors may include the market in which the taxpayer operates and the contracts under which sales are made.

2.80 However, it is also necessary to consider the seller’s pricing policy and practice, with reference to the actual conduct of the seller in setting prices based upon its actual knowledge at the relevant time. As such, that knowledge includes the belief that the component of tax which later proves to have been an overcharge is a real cost of doing business.

**Example 2.15: Where GST has been passed on**

Leslie’s Developments Co (LD) is a property development company and is registered for GST. LD makes a taxable supply of real property to Phe Co (Phe), another developer.

LD and Phe agree in writing on a GST-exclusive price and that an amount for GST can be charged using the margin scheme in calculating the GST liability on the supply.

LD provides Phe with a contract of sale that confirms the GST-exclusive price and that the margin scheme is to apply to the sale. This indicates that some amount of GST is included in the total
purchase price, which is subsequently paid by Phe to LD. Notwithstanding that no tax invoice is issued in respect of the supply, the contract of sale is sufficient to show that an amount of GST has been passed on to Phe.

Example 2.16: Where GST may have been passed on

State Co is a State Government entity which supplies both commercial and new residential premises. It conducts a detailed feasibility study on a new development project, and this includes estimates of its GST liability as part of its overall cost recovery and pricing structure. State Co owned the land before 1 July 2000 and, in calculating its likely GST liability under the margin scheme, uses a valuation day of 1 July 2000. State Co proceeds with the development of the project in 2015 and pays GST under the margin scheme.

Two years later, State Co discovers that it was entitled to use item 4 in the table in subsection 75-10(3) — that is, it was entitled to make a valuation as at the day the taxable supply took place (a higher figure than the valuation as at 1 July 2000). State Co’s margin on each sale is therefore lower and, as a result, it has overpaid GST.

In considering whether State Co is entitled to a refund, it is necessary to consider whether State Co had passed on the excess GST. Under its detailed feasibility study, State Co had estimated its GST liability before the sales using the lower valuation (and thus higher GST) which it took into account in determining its cost recovery and pricing structure. The GST component was eventually paid by its customers. These circumstances tend to indicate that State Co has passed on the excess GST.

Example 2.17: Where GST may not have been passed on

Toni’s Development Co (TD) is a property development company and is registered for GST. TD undertook a development of 10 residential apartments.

Each apartment is marketed at a price of $500,000 on the understanding the purchaser agrees in writing to the vendor’s use of the margin scheme. In working out its pricing structure, TD calculated a GST component of $11,000 on each apartment.

Within three months of the completion of the development, TD sold nine of the apartments at the marketed price. In the ensuing months, TD had difficulty selling the last apartment. In order to sell it and move on to another development, TD dropped the price of the last apartment to $450,000 and sold it at that price.

In completing its GST return for the tax period in which the sale was made, TD included in its net amount $11,000 of GST in relation to the last apartment. TD has overpaid GST. A range of factors including
TD’s approach to pricing, the reduction in price and the application of the margin scheme indicate that TD has passed on an amount of GST of less than $11,000 on the sale of the last apartment and has not passed on the excess GST.

**Example 2.18: Seeking the Commissioner’s discretion**

Developer AB carries out multi-staged residential developments supplying new residential housing in sub-divisions. It acquires land from another entity under the margin scheme and, as part of its detailed budget for a new project, considers the pricing structure for the supply of new houses on that land. AB estimates that the GST component under the margin scheme would be $11,000 on each of the residences.

AB builds and sells the residences to unregistered individuals who acquire the property solely for private purposes. AB then remits GST calculated under the margin scheme.

Due to an audit by the Commissioner, AB is required to change the basis on which the costs of its original purchase of the land are allocated between sales of completed sub-divisions (the margin scheme cost base is changed). This has the effect that AB has underpaid its GST liability on the sale of some residences and overpaid GST on other sales.

In this case, Developer AB had factored approximately $11,000 GST into its cost recovery and pricing structure for each residence. The total amount of GST payable on the whole development has not changed — it is the total sales prices less the total margin scheme cost base — but the amount of GST payable on individual sales and, in turn, the timing of when the GST is payable may change — more GST may be payable in one tax period and less in another.

Developer AB considers that the amendments apply to restrict the refund of the excess GST and that its circumstances warrant seeking the Commissioner’s discretion to refund the excess GST.

Having regard to the facts and circumstances of Developer AB’s situation, and given that there are corresponding overpayments and underpayments arising from the change to the margin scheme cost base, the Commissioner considers that it would be inappropriate to prevent refunds of GST in those tax periods where the GST liability was overpaid because such refunds would not result in a windfall gain to any entity. AB needs to remit the additional GST liability in tax periods where more GST was payable.

**Review rights**

2.81 By deeming excess GST to have always been payable and on a taxable supply, the excess GST is included in a taxpayer’s net amount for
Refunding excess GST

taxpayers and therefore the assessment of that net amount. Accordingly, taxpayers may challenge a decision by the Commissioner not to refund excess GST by objecting to the relevant assessment and if dissatisfied with the objection decision, through review or appeal in the AAT or Federal Court.

2.82 A separate review right has also been introduced for taxpayers dissatisfied with a decision by the Commissioner to refuse to exercise the discretion under these amendments. [Schedule 2, item 15, table item 53A in subsection 110-50(2) in Schedule 1 of the TAA 1953]

Review of Commissioner’s decisions made under section 105-65

2.83 This Schedule also amends the TAA 1953 to ensure taxpayers can seek merits review of the Commissioner’s decisions made under section 105-65. This follows the decision in Naidoo, see paragraph 2.20 above. [Schedule 2, item 20, subsection 105-65(4) in Schedule 1 of the TAA 1953]

2.84 An objection to a section 105-65 decision must be lodged within 60 days after the taxpayer is notified of the decision, or four years after the end of the tax period to which the decision relates. This is consistent with the time period available to object to other decisions made by the Commissioner. [Schedule 2, item 17, paragraph 14ZW(1)(bh) of the TAA 1953]

2.85 This time limit to object is repealed from 1 July 2018 in line with the repeal of section 105-65 from this date. The repeal from this date reflects that section 105-65 ceases to apply to tax periods starting the day following Royal Assent and accordingly all rights to object to a decision under section 105-65 will in most cases have expired by 1 July 2018. [Schedule 2, items 18 and 25 to 27, paragraph 14ZW(1)(bh) and the note in subsection 14ZW(1) of the TAA 1953 and section 105-65]

2.86 However, there are, limited circumstances in which the Commissioner may need to make decisions under section 105-65 after 1 July 2018 (usually where a taxpayer has lodged a valid notification of entitlement under section 105-55 of Schedule 1 to the TAA 1953 and because of the circumstances it takes some time to determine if a refund should be made). Accordingly, a transitional provision has been included to ensure that section 105-65 and the time period for objecting to decisions continues to apply after 1 July 2018 in those limited circumstances. [Schedule 2, item 28]

2.87 The Commissioner is required to notify taxpayers in writing of any decision made under section 105-65 to refund or not to refund in whole or part an overpayment of GST. This requirement applies to refund decisions made from the day following Royal Assent. The Commissioner’s administrative practice is to provide a written notice to
taxpayers in such cases. Accordingly, the effect of the provision is to confirm that the Commissioner’s current administrative practice continues to apply. [Schedule 2, item 20, subsection 105-65(3) in Schedule 1 of the TAA 1953]

Validating objections, decisions of the Commissioner and AAT

2.88 To preserve review rights for taxpayers where they previously sought review by the Commissioner, and the Commissioner purported to review such a decision, this Schedule also validates:

- any objections made by taxpayers before the decision in *Naidoo* on 28 June 2013 to a decision of the Commissioner made under section 105-65;
- a decision of the Commissioner or the AAT made before Royal Assent of this Bill concerning such an objection; or
- other actions undertaken under or in connection with the legislative framework for reviews and appeals of taxation decisions concerning such an objection or decision of the Commissioner in relation to such an objection.

to the extent that the objection, decision or action would otherwise be invalid. [Schedule 2, item 21 and subitems 22(1) and (2)]

2.89 No additional right to object against a decision of the Commissioner under section 105-65 is created if an objection to a section 105-65 decision was made before the decision in *Naidoo* on 28 June 2013 that is validated by this Schedule. [Schedule 2, subitem 22(3)]

2.90 The amendments also ensure that taxpayers that did not lodge an objection to a decision of the Commissioner under section 105-65 are able to lodge a valid objection despite the decision in *Naidoo*.

2.91 Taxpayers that had not lodged an objection and were not out of time to lodge an objection under section 14ZW of the TAA 1953 on 28 June 2013 (the date of the *Naidoo* decision) can object to the Commissioner’s decision under section 105-65 until the later of the following times:

- Sixty days after receiving notice of the Commissioner’s decision under section 105-65;
- Four years after the end of the tax period to which the Commissioner’s decision under section 105-65 relates; or
- Sixty days after Royal Assent of this Bill. [Schedule 2, item 23]
2.92 This ensures that taxpayers that decided not to object to the Commissioner’s decision under section 105-65 because of the finding of the AAT in Naidoo that section 105-65 decisions are not reviewable decisions, have at least 60 days after Royal Assent of the Bill to object.

2.93 The retrospective application of the provisions concerning taxpayers’ objections and decisions made by the Commissioner and the AAT are beneficial for taxpayers as they restore the validity of objections made under section 105-65. They also validate taxpayers’ rights concerning decisions made by the Commissioner and the AAT under section 105-65 and provide a right of review of these decisions that would not otherwise exist following the decision in Naidoo.

Example 2.19: Objection rights restored

In May 2013, Ralph discovers that some supplies on which he remitted GST for the January 2010 tax period were actually GST-free. He applies to the Commissioner for a refund of the overpaid GST but the Commissioner refuses to exercise the discretion under section 105-65 to pay the refund. Ralph is considering whether to object against the refund decision when he learns of the AAT decision in Naidoo on 28 June 2013. Ralph is advised that he cannot object under Part IVC of the TAA against the Commissioner’s decision to refuse a refund. He decides not to pursue the matter further.

The amendments effectively restore Ralph’s right to lodge an objection against the Commissioner’s refund decision under section 105-65. In Ralph’s case, it is more than 4 years after the end of the tax period to which the refund decision relates, and more than 60 days after he was given notice of the refund decision. Ralph has an extension of time until 60 days after the commencement of the amendments to lodge an objection.

2.94 A taxpayer can apply the legislative framework for reviews and appeals of taxation decisions and the Administrative Appeals Tribunal Act 1975 on the basis that the time available to pursue an action under section 105-65 does not expire until 60 days from the date of Royal Assent of the Bill if:

- the taxpayer lodged an objection to the Commissioner’s decision under section 105-65 before 28 June 2013;
- the period for the taxpayer to take further action under the legislative framework for reviews and appeals expired after 28 June 2013, but prior to the expiry of the review right the taxpayer decided not to pursue the action; and
• the period of time within which to pursue the action expired before Royal Assent of this Bill.

[Schedule 2, item 24]

2.95 This ensures that a taxpayer that had commenced review proceedings prior to the Naidoo decision and would, but for that decision, have been able to continue those proceedings, may now resume those proceedings.

Example 2.20: Review rights restored

In March 2013, Chris lodged a purported objection against a decision of the Commissioner under section 105-65 refusing to pay a refund, for the tax period ending January 2011. On 1 June 2013, the Commissioner disallowed the objection. Chris is considering lodging an application for review with the AAT when he learns of the Naidoo decision on 28 June 2013. Chris is advised that he could not proceed with an application to the AAT as it would lack jurisdiction to consider the matter.

Normally, Chris would have until 60 days after being notified of the Commissioner’s objection decision to file an application for review to the AAT (or an appeal to the Federal Court), pursuant to Part IVC of the TAA 1953.

However, Chris now has until 60 days after the amendments receive Royal Assent to lodge an application for review to the AAT or appeal to the Federal Court.

Application and transitional provisions

2.96 The provisions in Parts 1 and 2 of Schedule 2 that introduce a new framework for determining if excess GST should be refunded, apply in working out the net amount for tax periods starting on or after the day following Royal Assent. [Schedule 2, item 16]

2.97 Section 105-65 continues to apply in relation to net amounts for tax periods commencing on or prior to Royal Assent of the Bill. [Schedule 2, item 19, subsection 105-65(2)]

Example 2.21: Tax period commencing on or prior to Royal Assent

Harry Enterprises is registered for GST. On 1 September 2013, Harry Enterprises makes a supply to Christopher for $5,500 and issues him with a tax invoice that includes an amount of GST of $500. Christopher is not registered for GST.

On 3 October 2013, Harry Enterprises treats the supply as a taxable supply in its GST return for the tax period ending 30 September 2013.
On 17 December 2015 (after Royal Assent), Harry Enterprises discovers that the supply is a GST-free supply, and as a result, it has incorrectly included GST of $500 in his net amount for the tax period ending 30 September 2013. In determining whether Harry Enterprises is entitled to a refund of the overpaid amount, section 105-65 applies, because the refund claim relates to the net amount for a tax period starting on or prior to Royal Assent.

2.98 The requirement for the Commissioner to notify taxpayers in writing of any decision made under section 105-65 applies from the day following Royal Assent. This reflects that the Commissioner’s longstanding administrative practice is to provide a written notice to taxpayers of a decision made under section 105-65. Accordingly, the effect of the provision is to require that the Commissioner’s current administrative practice continues to apply. [Schedule 2, item 20, subsection 105-65(3) in Schedule 1 of the TAA 1953]

2.99 Section 105-65 is repealed from 1 July 2018, however this section may still apply after this date concerning tax periods commencing on or prior to Royal Assent of the Bill in certain circumstances. For instance, this will allow the Commissioner to make decisions where a taxpayer has lodged a valid section 105-55 notice and it has taken some time to determine the refund claim. [Schedule 2, items 27 and 28]

Consequential amendments

2.100 Schedule 2 also makes a number of consequential amendments to headings, notes and other provisions that need to be repealed or revised due to the repeal of section 105-65 and the inclusion of the refunding excess GST framework. [Schedule 2, items 1 to 9 and 12 to 14]

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Refunding excess GST

2.101 Schedule 2 to this Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

5 Schedule 1 of the TAA 1953.
Overview

2.102 Schedule 2 to this Bill amends the A New Tax System (Goods and Services Tax) Act 1999 (GST Act) and the Taxation Administration Act 1953 (TAA 1953) to ensure that excess goods and services tax (GST) is only refundable in certain circumstances. The amendments apply to overpayments of GST, if the overpayment has been passed on.

Human rights implications

2.103 This Schedule does not engage any of the applicable rights or freedoms.

Conclusion

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