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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TAX AND SUPERANNUATION LAWS AMENDMENT (2016 MEASURES NO. 2) BILL 2016

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Minister for Small Business and Assistant Treasurer, the Hon Kelly O'Dwyer MP)

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Glossary

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

Abbreviation	***Definition***
AIA	*Acts Interpretation Act 1901*
APRA	Australian Prudential Regulation Authority
APS	Australian Public Service
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
CDEP	Community Development Employment Projects
CGC Act	*Commonwealth Grants Commission Act 1973*
Commissioner	Commissioner of Taxation
DGR	deductible gift recipient
ETA 1921	*Excise Tariff Act 1921*
GST	Goods and Services Tax
GST Act	*A New Tax System (Goods and Services Tax) Act 1999*
Income tax averaging	Averaging rules under Division 392 of the *Income Tax Assessment Act 1997*
ITAA 1936	*Income Tax Assessment Act 1936*
ITAA 1997	*Income Tax Assessment Act 1997*
Item 7	Item 7 of Schedule 4 to the *Customs Tariff Act 1995*
LA	*Legislation Act 2003*
LCT	luxury car tax
LCT Act	*A New Tax System (Luxury Car Tax) Act 1999*
Primary producer	Taxpayers who carry on a 'primary production business' as defined in section 995-1 of the *Income Tax Assessment Act 1997*

Abbreviation	***Definition***
RIS	Regulation Impact Statement
SSA	*Social Security Act 1991*
SSLA Bill	*Social Security Legislation Amendment (Community Development Program) Bill 2015*
TAA 1953	*Taxation Administration Act 1953*
TFN	Tax File Number

General outline and financial impact

Commissioner's Remedial Power

Schedule 1 to this Bill establishes a Remedial Power for the Commissioner of Taxation (Commissioner) to allow for a more timely resolution of certain unforeseen or unintended outcomes in the taxation and superannuation laws.

The power allows the Commissioner to make, by disallowable legislative instrument, one or more modifications to the operation of a taxation law to ensure the law can be administered to achieve its intended purpose or object. The power can only be validly exercised where:

- the modification is not inconsistent with the intended purpose or object of the provision;
- the Commissioner considers the modification to be reasonable, having regard to both the intended purpose or object of the relevant provision and whether the costs of complying with the provision are disproportionate to achieving the intended purpose or object; and
- the Department of the Treasury or the Department of Finance advises the Commissioner that any impact on the Commonwealth budget would be negligible.

Before exercising the power, the Commissioner must be satisfied that any appropriate and reasonably practicable consultation has been undertaken. This is consistent with section 17 of the *Legislation Act 2003*. This allows an opportunity to identify and consider all implications from the exercise of the power and to ensure that the exercise of the power is appropriate in the circumstances. This is consistent with the approach to amendments of primary legislation, which are subject to public consultation. In addition, the Commissioner will consult with a technical advisory group (which will include private sector experts) and the Board of Taxation prior to any exercise of the power.

The power is limited in its application and an entity (the first entity) must treat a modification made under the power as not applying to it and any other entity if the modification would produce a less favourable result for the first entity.

Date of effect: This measure commences on the day after Royal Assent. This allows the Commissioner to make legislative instruments from that date to modify the operation of a taxation law.

Proposal announced: This measure was announced by the then Assistant Treasurer in a Media Release titled 'Providing more certainty and better outcomes for taxpayers' on 1 May 2015 and on 12 May 2015 as part of the 2015–16 Budget.

Financial impact: This measure has no impact on revenue over the forward estimates period.

Human rights implications: This Schedule does not raise any human rights issues. See *Statement of Compatibility with Human Rights* — Chapter 1, paragraphs 1.79 to 1.87.

Compliance cost impact: Low. It is anticipated that the Remedial Power may be used to reduce compliance costs where the compliance cost imposed by a taxation law is disproportionate to achieving the purpose or object of the law. However, entities will need to refer to legislative instruments made under the Remedial Power to understand any modification made to the operation of a taxation law.

The compliance cost impact associated with individual uses of the Remedial Power will be considered as part of the process of developing any legislative instruments made under this Power.

Regulation impact on business

Impact: Small. The Remedial Power will benefit entities by delivering an alternative option for the resolution of unintended outcomes, providing greater certainty, reducing risks for entities and promoting confidence in the taxation system.

Main points: The Remedial Power will provide a timelier and more efficient mechanism for resolving smaller unintended outcomes in the taxation laws that are expected to deliver net benefits for entities when it is used. The instruments made under the Remedial Power, not the power itself, will generate benefits for entities. The precise benefits delivered by the power will depend on the frequency and circumstances of its use.

Where the Remedial Power is used to resolve an unintended outcome, entities will be spared from seeking clarification or advice on the operation of the law. Further, use of the power (rather than legislative change) will avoid any risks associated with uncertain tax outcomes that can arise from announced changes that do not eventuate.

The Remedial Power will also deliver regulatory costs, including small costs for entities and advisers to familiarise themselves with the power and instruments made under it.

Primary producer income averaging

Schedule 2 to this Bill amends the *Income Tax Assessment Act 1997* (ITAA 1997) to allow primary producers to access income tax averaging 10 income years after choosing to opt out, instead of that choice being permanent.

This assists primary producers as averaging only recommences when it is to their benefit (they receive a tax offset) and they can still opt out if averaging no longer suits their circumstances.

Date of effect: This change applies to the 2016-17 income year and later income years.

Proposal announced: This measure was announced as part of the Government's *Agricultural Competitiveness White Paper* by the former Prime Minister and the Minister for Agriculture on 4 July 2015.

Financial impact: This measure has the following revenue impact:

2015-16	***2016-17***	***2017-18***	***2018-19***
-	-	*	*

Human rights implications: This Schedule does not raise any human rights issues. See *Statement of Compatibility with Human Rights* — paragraphs 2.23 to 2.27.

Compliance cost impact: The annual compliance burden has been costed at around $1196 (total impact on individuals).

Cars for display by public institutions

Schedule 3 to this Bill amends the *A New Tax System (Luxury Car Tax) Act 1999* to provide relief from luxury car tax to certain public institutions that import or acquire luxury cars for the sole purpose of public display. The changes apply to public museums, galleries, and libraries that are registered for goods and services tax and that have been endorsed as deductible gift recipients.

Date of effect: These amendments apply to luxury cars that are imported or acquired from the day after the Bill receives Royal Assent.

Proposal announced: This measure was announced on 12 May 2015 as part of the 2015-16 Budget.

Financial impact: The measure is estimated to have the following impact on revenue over the forward estimates period:

2014-15	***2015-16***	***2016-17***	***2017-18***	***2018-19***
Nil	-$0.5m	-$0.1m	-$0.1m	-$0.1m

Human rights implications: This Schedule does not raise any human rights issue. See *Statement of Compatibility with Human Rights* — paragraphs 3.72 to 3.76.

Compliance cost impact: This measure is expected to result in a negligible change to compliance costs as its operation is relatively straightforward

Miscellaneous amendments

Schedule 4 to this Bill makes a number of miscellaneous amendments to the taxation, superannuation and other laws. These amendments are part of the Government's commitment to the care and maintenance of the taxation and superannuation systems.

These amendments include style and formatting changes, the repeal of redundant provisions, the correction of anomalous outcomes and corrections to previous amending Acts.

Date of effect: These amendments have various commencement and application dates. Most amendments commence from the first quarter beginning on or after the day this Bill receives Royal Assent. This explanatory memorandum details the commencement and application dates of amendments that commence or apply from a different time. Where amendments have retrospective application, the effect of that retrospectivity is also explained.

Proposal announced: These amendments have not been previously announced.

Financial impact: These amendments have a nil revenue impact.

Human rights implications: This Schedule does not raise any human rights issues. See *Statement of Compatibility with Human Rights* — Chapter 4, paragraphs 4.93 to 4.97.

Compliance cost impact: Negligible.

Chapter 1
Commissioner's Remedial Power

Outline of chapter

1.1 Schedule 1 to this Bill establishes a Remedial Power for the Commissioner to allow for a more timely resolution of certain unforeseen or unintended outcomes in the taxation and superannuation laws (collectively referred to below as 'taxation laws').

1.2 The power allows the Commissioner to make, by disallowable legislative instrument, one or more modifications to the operation of a taxation law to ensure the law can be administered to achieve its intended purpose or object. The power can only be validly exercised where:

- the modification is not inconsistent with the intended purpose or object of the provision;
- the Commissioner considers the modification to be reasonable, having regard to both the intended purpose or object of the relevant provision and whether the costs of complying with the provision are disproportionate to achieving the intended purpose or object; and
- the Department of the Treasury or the Department of Finance advises the Commissioner that any impact on the Commonwealth budget would be negligible.

1.3 All references to legislative provisions in this Chapter are references to the *Taxation Administration Act 1953* (TAA), unless otherwise stated.

Context of amendments

1.4 The Government announced on 1 May 2015 (and on 12 May 2015 as part of the 2015–16 Budget) that it would provide more certainty and better outcomes for entities and reduce the regulatory burden on individuals, business and community organisations by providing the Commissioner with a Remedial Power.

1.5 The announcement followed a targeted consultation process with representatives from the Department of the Treasury, the Australian Taxation Office (ATO), the Australian Government Solicitor and key industry and professional associations. The purpose of the consultation was to consider the feasibility of a Remedial Power and what factors would be relevant to the operation of such a power. This consultation has informed the framework of the Remedial Power provided to the Commissioner by Schedule 1 to this Bill.

1.6 The Australian taxation laws are complex and operate in the context of rapidly changing business practices as a result of the dynamic and transforming economy. This increasingly leads to unintended or unforeseen outcomes in the application of the taxation laws. These outcomes can create significant uncertainty and compliance cost impacts for entities.

1.7 Consistent with section 15AA of the *Acts Interpretation Act 1901* (AIA), the Commissioner applies purposive principles to the interpretation of the taxation laws to give effect to the purpose or object of the law. However, sometimes this approach is unable to remedy unintended consequences in the application of the taxation laws. For example, this can occur when dealing with new scenarios which were not known or contemplated when the provisions were drafted.

1.8 The Remedial Power allows the Commissioner to make a disallowable legislative instrument to modify the operation of a taxation law to ensure the law can be administered to achieve its intended purpose or object. There are similar legislative instrument making powers in Commonwealth law currently granted to the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC). However, the APRA and ASIC powers can be exercised for a particular entity and are generally limited in terms of the provisions of the law which can be modified.

Summary of new law

1.9 Schedule 1 to this Bill establishes a Remedial Power for the Commissioner to allow for a more timely resolution of certain unforeseen or unintended outcomes in the taxation laws.

1.10 The power allows the Commissioner to make, by disallowable legislative instrument, one or more modifications to the operation of a

taxation law to ensure the law can be administered to achieve its intended purpose or object. The power can only be validly exercised where:

- the modification is not inconsistent with the intended purpose or object of the provision;
- the Commissioner considers the modification to be reasonable, having regard to both the intended purpose or object of the relevant provision and whether the costs of complying with the provision are disproportionate to achieving the intended purpose or object; and
- the Department of the Treasury or the Department of Finance advises the Commissioner that any impact on the Commonwealth budget would be negligible.

1.11 The power is limited in its application and an entity (the first entity) must treat a modification made under the power as not applying to it and any other entity if the modification would produce a less favourable result for the first entity.

1.12 Before exercising the power, the Commissioner must be satisfied that any appropriate and reasonably practicable consultation has been undertaken. This is consistent with section 17 of the *Legislation Act 2003* (LA). This allows an opportunity to identify and consider all implications from the exercise of the power and to ensure that the exercise of the power is appropriate in the circumstances. This is consistent with the approach to amendments of primary legislation, which are subject to public consultation. In addition, the Commissioner will consult with a technical advisory group (which will include private sector experts) and the Board of Taxation prior to any exercise of the power.

1.13 The Remedial Power does not change the requirement for the Commissioner to pursue an interpretation of the law which can achieve the purpose or object of the law in the first instance or to seek to use his or her general powers of administration. The Remedial Power is to be exercised as a power of last resort where the other options available to the Commissioner (such as applying purposive principles to the interpretation of the relevant taxation law or using the general powers of administration) have been considered and found not to provide a suitable solution. In some cases, it may be more appropriate for the Commissioner to seek a Parliamentary amendment to the primary legislation, rather than to use the Remedial Power.

Comparison of key features of new law and current law

New law	***Current law***
Schedule 1 to this Bill provides the Commissioner with a Remedial Power which allows the Commissioner to modify the operation of a taxation law where: • the modification is not inconsistent with the intended purpose or object of the provision; • the Commissioner considers the modification to be reasonable, having regard to both the intended purpose or object of the relevant provision and whether the costs of complying with the provision are disproportionate to achieving the intended purpose or object; and • the Department of the Treasury or the Department of Finance advises the Commissioner that any impact on the Commonwealth budget would be negligible.	No equivalent.

Detailed explanation of new law

1.14 Schedule 1 to this Bill:

- establishes a Remedial Power for the Commissioner
- outlines the limitations for exercising the power
- provides application rules for legislative instruments made under the power; and
- sets out when legislative instruments commence and how legislative instruments may be repealed.

Establishment of the Commissioner's Remedial Power

Commissioner's Remedial Power

1.15 Schedule 1 of the Bill establishes a Remedial Power for the Commissioner. This allows the Commissioner to determine one or more modifications to the operation of a provision of a taxation law by a disallowable legislative instrument in accordance with certain limitations. A single legislative instrument made under the Remedial Power could contain multiple modifications. ***[Schedule 1, item 3, subsection 370–5(1)]***

1.16 A provision of a taxation law operates with any modifications made by the Commissioner using the Remedial Power ***[Schedule 1, item 3, subsection 370–5(2)].*** The Remedial Power does not allow the Commissioner to make a textual amendment to the relevant taxation law, or to alter the purpose or object of the law. It only allows the Commissioner to modify the operation of a provision of the taxation law where that modification satisfies the limitations prescribed in subsection 370–5(1).

1.17 The Remedial Power is discretionary, so the Commissioner can choose whether or not to exercise the power. The Commissioner cannot be compelled to exercise the power.

1.18 Consultation and governance arrangements will be established by the Commissioner to assist him or her in managing consideration of issues that may potentially be addressed with the power. The governance arrangements will establish the administrative processes that the Commissioner will follow in exercising the Remedial Power and outline how a member of the public may raise an issue for consideration by the Commissioner. It is expected that the public would be able to raise issues for consideration with the ATO via a central area. It is anticipated that the consultation and governance arrangements would be published by the Commissioner in the interests of transparency and accountability.

1.19 The making of a modification under Schedule 1 to this Bill is an exercise of a legislative power. As with any legislative power, it is subject to jurisdictional limits and persons with standing may challenge the exercise of the power in court in particular circumstances.

The need for the Commissioner's Remedial Power

1.20 Consistent with section 15AA of the AIA, the Commissioner applies purposive principles to the interpretation of the taxation laws to give effect to the purpose or object of the law. However, sometimes this approach is unable to remedy unintended consequences in the application of the taxation laws. For example, this can occur when dealing with new scenarios which were not known or contemplated when the provisions were drafted.

1.21 While ascertaining the purpose or object of a provision is a critical part of the interpretive process, there are limitations on the manner in which a provision can be interpreted. These limitations can result in an application of the law that may seem inconsistent with the intended purpose or object of a provision when considered in its broader context. Where this happens, there are often calls for the law to be amended. However, amending taxation legislation can often be a lengthy process and delays can lead to uncertainty for entities and increased compliance costs.

1.22 The Remedial Power is intended to increase certainty in the administration of taxation laws by reducing the regulatory burden on entities that arise from unforeseen or unintended consequences in the application of taxation laws which cannot otherwise be addressed by the Commissioner exercising his or her general powers of administration or through statutory interpretation. The Remedial Power also ensures the Commissioner can administer the law consistently with its intended purpose or object. It is anticipated that this power will reduce the time it takes to give effect to some minor legislative corrections. It may also, where appropriate, allow for some minor technical corrections to be addressed (through a modification to the operation of a provision of the taxation law) where, due to their relatively low priority, this may not otherwise occur.

1.23 The exercise of the Remedial Power will be subject to certain limitations and, importantly, any legislative instrument created in exercise of the Remedial Power will be subject to full Parliamentary scrutiny and disallowance (see paragraphs 1.70 to 1.71).

Meaning of a 'taxation law'

1.24 Schedule 1 to this Bill allows the Commissioner to modify the operation of a provision of a 'taxation law'. The TAA defines a taxation law by reference to the *Income Tax Assessment Act 1997* (ITAA 1997). The ITAA 1997 defines a taxation law in subsection 995–1(1) to include an Act or parts of an Act of which the Commissioner has the general administration and legislative instruments made under such Acts. A taxation law therefore could include superannuation laws or other laws dealing with matters other than taxation, provided that the Commissioner has the general administration of the relevant Act or parts of the relevant Act. ***[Schedule 1, item 3, subsection 370–5(1)]***

1.25 Where the Commissioner shares the general administration of an Act with another agency, it is expected that the Commissioner will consult with them as appropriate before making a decision about using the Remedial Power.

Limitations on exercising the Remedial Power

1.26 The Remedial Power can only be validly exercised where:

- the modification is not inconsistent with the intended purpose or object of the provision,
- the Commissioner considers the modification to be reasonable, having regard to both the intended purpose or object of the relevant provision and whether the costs of complying with the provision are disproportionate to achieving the intended purpose or object; and
- the Secretary of the Department of the Treasury, Secretary of the Department of Finance or an authorised APS employee of either department advises the Commissioner that any impact on the Commonwealth budget would be negligible.

[Schedule 1, item 3, subsection 370–5(1)]

The modification must not be inconsistent with the intended purpose or object of the provision

1.27 A modification to the operation of a provision of a taxation law made by the Commissioner will only be valid where the modification in question is not inconsistent with the intended purpose or object of the provision which is sought to be modified ***[Schedule 1, item 3, paragraph 370–5(1)(a)].*** This means that if the Commissioner were to make a modification which was inconsistent with the intended purpose or object of the provision, the modification would be invalid because it would be beyond the scope of the Commissioner's Remedial Power.

1.28 The requirement that the modification must not be inconsistent with the intended purpose or object of the provision is intended to be an objective test. Should an entity consider that the Commissioner's exercise of the Remedial Power extends beyond the limitations of the power provided in Schedule 1 to this Bill, they may be able to challenge the exercise of the power in court in particular circumstances if they have standing. The courts will ultimately determine whether any modification is inconsistent with the intended purpose or object of the provision. In administering the provisions establishing the Remedial Power, the Commissioner will also need to consider whether the modification would be not inconsistent with the intended purpose or object of the provision in deciding whether the power is available for the modification which he or she is seeking to make.

1.29 The expression 'not inconsistent with the intended purpose or object' is broader than the expression 'consistent with the intended purpose or object'. The former expression is intended to ensure the Remedial Power can be used to cater for circumstances where it is reasonably clear that particular circumstances, arrangements or transactions may not have been contemplated at the time the law was drafted. It is inevitable that there will be a range of such circumstances, arrangements or transactions that were not known to exist, or did not exist, at the time of drafting. However, it may be reasonably ascertained that, had the circumstances, arrangement or transaction been considered at the time the law was drafted, the law would have been drafted differently. In those circumstances, applying the law in a modified way would not be inconsistent with the intended purpose or object of the law.

1.30 The expression 'intended purpose or object' differs from the concept of a provision's 'purpose or object' as used in section 15AA of the AIA and understood through common law principles of statutory interpretation. The purpose or object of an Act for the latter purposes is considered in order to ascertain the preferred meaning of a provision of

the Act. The process of determining purpose or object in a statutory interpretation context may give weight to the text of the provision. In the context of the Remedial Power, however, the focus is on ascertaining the intended purpose or object of the provision (when considered in its broader context), and, unlike in statutory interpretation, does not require weight to be given to the text of the provision. ***[Schedule 1, item 3, note to paragraph 370–10(c)]***

1.31 In ascertaining the intended purpose or object of the provision which is sought to be modified:

- consideration must be given to any documents that may be considered under subsection 15AB(2) of the AIA (or that subsection as applied by section 13 of the *Legislation Act 2003* (LA)) in relation to the provision;

- consideration may be given to any other material that would assist in ascertaining the intended purpose or object of the provision, whether that material forms part of the provisions in question or not; and

- primacy does not need to be given to the text of the provision.

[Schedule 1, item 3, section 370–10]

1.32 For the Remedial Power, the materials referred to in subsection 15AB(2) of the AIA must be considered to ascertain the intended purpose or object of the provision (rather than to confirm the ordinary meaning of the provision or to determine the meaning where it is ambiguous or obscure or when the ordinary meaning leads to a result that is manifestly absurd or unreasonable, which is the context in which those materials are used in section 15AB of the AIA).

Example 1.1

The Commissioner is considering using the Remedial Power to modify the operation of a provision of a taxation law. In determining the intended purpose or object of the relevant provision to work out whether the power is available to the Commissioner, the Commissioner may consider a variety of materials that would assist in ascertaining the intended purpose or object of the provisions. However, the Commissioner must consider any documents referred to in subsection 15AB(2) of the AIA. This includes the Explanatory Memorandum for the Bill which introduced the provision into the taxation law and the Second Reading Speech when the Bill was

> introduced to Parliament. Consideration of other relevant material including relevant Government announcements and the Explanatory Statement for some relevant Regulations may also be capable of assisting in ascertaining the intended purpose or object of the provision and the Commissioner may have regard to these.

1.33 While there is a requirement to consider certain materials, consideration may be given to any material that would assist in ascertaining the intended purpose or object of the provision. While the material considered may include the text of the relevant provisions, primacy, or a greater weight, need not be given to the text of the provisions in ascertaining intended purpose or object. ***[Schedule 1, item 3, paragraph 370–10(c)]***

1.34 This means that the intended purpose or object ascertained for the Remedial Power may differ from the purpose or object ascertained through statutory interpretation. This is because the Remedial Power is a power of last resort for the Commissioner, and where the Commissioner seeks to use it, he or she will have already sought to interpret the provision and will have established that purposive interpretation could not adequately resolve the issue. Where a purposive interpretation cannot adequately resolve the issue, it may be appropriate for the Commissioner to modify the operation of a provision. This will result in a modification that is not inconsistent with the intended purpose or object of the provision and may be described as 'better achieving' the intended purpose or object of the provision (when considered in its broader context).

1.35 In relevant cases, it will be important to take into account the full legislative history associated with a particular provision when determining the intended purpose or object, not just the most recent amendment to that provision.

1.36 The material available to objectively determine the intended purpose or object of a provision will vary from provision to provision and from taxation law to taxation law. In particular, it might be the case that more material is available in relation to more recently drafted provisions. This will not prevent the Remedial Power from being validly exercised in relation to any provision in a taxation law, provided that the available material is considered and the relevant limitations of the power are satisfied.

Example 1.2

The taxation law allows a tax offset for particular credits issued to Australian resident investors of small mineral exploration companies. Although investors who are corporate tax entities are not entitled to these credits, special rules apply to investors that are life insurance companies. The special rules (as explained in the Explanatory Memorandum to the Bill that introduced these provisions) allows life insurance companies to obtain a tax offset for the portion of credits they received in respect of investments they hold on behalf of policy holders. This approach is intended because it is consistent with how the imputation system and the income tax law more generally apply to life insurance companies. There is nothing contrary in the other materials listed in subsection 15AB(2) of the AIA.

An incorrect reference in the relevant provision meant that the credit would not be available in respect of all assets life insurance companies held on behalf of policy holders. A modification to the operation of the relevant provision to ensure life insurance companies obtain a tax offset for the portion of credits they received in respect of investments they hold on behalf of policy holders would not be inconsistent with the intended purpose or object of the provision. Therefore, the Remedial Power could be used, provided the Commissioner considers it reasonable and has received advice that any budget impact would be negligible.

Example 1.3

Companies are able to deduct losses from earlier years if they have continuity of ownership or carry on the same business. Establishing continuity of ownership is very difficult for widely held companies with large numbers of small shareholdings. Recognising this difficulty, the taxation law provides an alternative simpler test to allow a widely-held company to aggregate all small shareholdings and treat them as if owned by a single notional person. This simpler test does not work if there is a restructure to interpose a new holding company because, due to the operation of other rules, that single notional person holding is now treated as being owned by the new holding company. This constitutes a change in ownership which means that the company may not be able to claim losses from earlier years even though there is no actual change in its underlying ownership. There is nothing in the other materials listed in subsection 15AB(2) of the AIA which is inconsistent with the view that companies should be able to deduct losses if they have continuity of ownership. Accordingly, a modification to this effect would not be inconsistent with the intended purpose or object of the provisions. Therefore the Remedial Power could be used, provided the Commissioner considers it reasonable and has received advice that any budget impact would be negligible.

Example 1.4

The *Fringe Benefits Tax Assessment Act 1986* provides for the taxation of various fringe benefits. Residual fringe benefits are those benefits that do not fit into other more specific fringe benefit rules. In-house residual fringe benefits can arise when an employer, their associates or a third party provides their employee with something the employer produces and sells to others in the course of their business.

There was an error in the way the in-house residual fringe benefit provision was worded in relation to particular benefits, meaning the benefit provided to an employee must be property. The intention was that goods or services could be an in-house residual fringe benefit, not just property. Indeed, prior Explanatory Memoranda indicated in house residual fringe benefits would include goods or services.

A modification to the operation of the relevant provision to allow entities to treat benefits broadly, rather than just property, as in-house residual fringe benefits would not have been inconsistent with the intended purpose or object of the provision. This would have allowed concessional in-house residual fringe benefit valuation rules to apply to the benefit. Therefore the Remedial Power could have been used to address this issue, provided the Commissioner considered it reasonable and had received advice that any budget impact would be negligible.

Commissioner must be satisfied the modification is reasonable

1.37 Before exercising the Remedial Power, the Commissioner must be satisfied that the modification would be reasonable, having regard to both the intended purpose or object of the provision which is sought to be modified and to whether the cost of complying with the provision is disproportionate to achieving that intended purpose or object ***[Schedule 1, item 3, subparagraphs 370–5(1)(b)(i) and (ii)].*** This requires the Commissioner to turn his or her mind to both factors in considering whether a modification would be reasonable. However, in some cases, one of the factors may be a more relevant consideration than the other. For example, whether compliance costs are disproportionate may not be a relevant factor for a particular modification if the provision which is sought to be modified does not impose compliance costs which are disproportionate to achieving that intended purpose or object.

1.38 These considerations enable the Commissioner to modify the operation of a provision of a taxation law so he or she can:

- administer the law in accordance with its intended purpose or object, where the outcome provided by the unmodified law is inconsistent with its intended purpose or object; or

- provide an outcome that reduces compliance costs where the outcome provided by the unmodified law is consistent with the intended purpose or object of the law, but in achieving that outcome, the application of the law imposes compliance costs that are disproportionate to achieving its intended purpose or object.

1.39 In deciding whether it would be reasonable to exercise the Remedial Power and make a modification, the Commissioner may consider a range of matters. Although Schedule 1 to this Bill provides limitations on the exercise and operation of the power, the Remedial Power is a discretionary power and the Commissioner may choose to take into account other matters in addition to the limitations when determining whether it is appropriate to exercise the power. The power does not prescribe other matters the Commissioner may take into account, which is consistent with similar delegated legislative powers in Commonwealth law granted to APRA and ASIC. Where the Commissioner makes a determination, the explanatory statement accompanying the legislative instrument will refer to the matters the Commissioner has taken into account. Other matters that it is anticipated the Commissioner may take into account, and weigh up against each other, before deciding to exercise the power include:

- the extent to which the modification is favourable to entities

- the extent to which the modification has any adverse direct impact on the tax liability of a third party

- the impacts on any current judicial interpretation of the relevant law; and

- any other relevant matters.

1.40 The extent to which a modification to the operation of a taxation law would be favourable to entities is a matter the Commissioner may consider in deciding whether the proposed modification is reasonable. For example, if a proposed modification would not be favourable to any entities, it would not be reasonable to use the Remedial Power as the modification to the operation of the relevant provision would have no application (see paragraphs 1.56 to 1.64).

1.41 In addition, the Commissioner may decide it is not reasonable to use the power where it would lead to asymmetrical outcomes. That is, due to the operation of the application rule, the modification could apply to an entity on one side of a transaction but not an entity on the other side of the same transaction, resulting in an inappropriate asymmetrical tax outcome (see paragraphs 1.56 to 1.64).

1.42 Where the proposed modification would have adverse direct impacts on the rights or obligations under a taxation law for many third parties, the Commissioner may decide that it is not reasonable to use the Remedial Power. As explained below, a particular entity (the first entity) must treat a modification made under the power as not applying to it and any other entity if the modification would produce a less favourable result for the first entity (see paragraphs 1.56 to 1.64).

1.43 The Commissioner may consider that an issue highlights systemic issues with the law and it may not be appropriate to use the power to resolve the issue. In some cases, systemic issues may be more appropriately addressed through a review of the law and broader legislative amendment by the Parliament.

1.44 In addition, the Commissioner may not consider it reasonable to use the Remedial Power where there are differing views (which may be evidenced through consultation with external experts) on how an issue may be resolved. In such cases, the issue might be better addressed through legislative amendment by the Parliament.

1.45 Once the Commissioner decides that it is reasonable to use the power, the Commissioner will need to consider whether it is appropriate for the modification to operate prospectively or retrospectively. Although it is generally expected that the legislative instruments made under the Remedial Power will operate prospectively, there may be circumstances where it is appropriate and reasonable for the legislative instrument to apply retrospectively. However, as any modification under the Remedial Power would be by legislative instrument, it must comply with the requirements under the LA. Subsection 12(2) of the LA provides that a provision of a legislative instrument may not apply in relation to a person

if that person's rights would be affected or liabilities would be imposed on that person. Consistent with the requirements of the LA, the application rule for the Remedial Power provides that an entity (the first entity) must treat a modification made under the power as not applying to it and any other entity if the modification would produce a less favourable result for the first entity (see paragraphs 1.56 to 1.64). Although an instrument may apply retrospectively, it can only commence after the disallowance period for Parliament has expired (see paragraphs 1.70 to 1.71).

The Department of the Treasury or the Department of Finance advises the Commissioner that any impact on the Commonwealth budget would be negligible

1.46 Before making a legislative instrument under the Remedial Power, the Commissioner must receive advice from the Secretary of the Treasury, the Secretary of the Department of Finance or an authorised APS employee of either department that any impact on the Commonwealth budget would be negligible. ***[Schedule 1, item 3, paragraph 370–5(1)(c)]***

1.47 Impacts on the Commonwealth budget will be determined through ordinary processes and budget rules. The Guidelines issued under the Charter of Budget Honesty by the Secretaries to the Treasury and the Department of Finance provide further information on the considerations used when undertaking costings.

Commissioner will undertake public consultation

1.48 The ordinary rules about consultation for legislative instruments set out in the LA apply to the exercise of the Remedial Power. This means that before exercising the power, the Commissioner must be satisfied that any appropriate and reasonably practicable consultation has been undertaken (see section 17 of the LA). If consultation is not appropriate or reasonably practicable, it does not need to be undertaken under section 17 of the LA.

1.49 It is anticipated that the Commissioner will undertake public consultation and also consult with a technical advisory group (comprising private sector experts, the Department of the Treasury and the ATO), before any exercise of the power. The technical advisory group would consider the matter in consultation with the public including any targeted consultation with relevant stakeholders. Where the power is to be used in relation to a law which is jointly administered with another government agency, the Commissioner will consult with that other agency as

appropriate (for example, APRA). The Board of Taxation would also be informed of the relevant issues that are before the technical advisory group. This process allows an opportunity to identify and consider all implications from the exercise of the power and to ensure that the exercise of the power is appropriate in the circumstances.

1.50 Public consultation is consistent with the approach to amendments to the primary legislation which are generally subject to a period of public consultation. While it is expected that public consultation will occur prior to the exercise of the Remedial Power, failure to consult will not affect the validity or enforceability of a legislative instrument (see section 19 of the LA).

Commissioner will report on use of the Remedial Power

1.51 The ATO Annual Report must include information on the exercise of the Commissioner's Remedial Power during the relevant year ***[Schedule 1, item 2, paragraph 3B(1AA)(e)]***. It is expected that this would include information regarding the process for deciding that particular matters that were the subject of an exercise of the Remedial Power and those matters that were not, as well as the consultation undertaken prior to exercising the Remedial Power (see paragraph 1.18).

Review of the use of the Remedial Power

1.52 The Minister may seek a review of the operation of the Remedial Power provisions within three to five years of the provisions commencing ***[Schedule 1, item 4, subitem (1)]***. A review of the operation of the provisions might include a review of the consultation undertaken prior to exercising the power, how issues were raised with the Commissioner and how long it took to resolve issues using the power. The person conducting the review must give the Minister a written report ***[Schedule 1, item 4, subitem (2)].*** The Minister must table the report before each House of Parliament within 15 sitting days of receiving the report ***[Schedule 1, item 4, subitem (3)].***

Application of legislative instruments made under the Remedial Power

Scope of determinations generally

1.53 A legislative instrument made by the Commissioner under the Remedial Power applies in relation to all entities, or, if stated in the determination, to a specified class of entities or in specified circumstances. This is consistent with subsection 13(3) of the LA which allows a person granted a legislative instrument making power to exercise it in relation to a class. ***[Schedule 1, item 3, paragraph 370–5(3)(a)]***

1.54 The Remedial Power cannot be used to modify the operation of a taxation law for a particular entity. This includes exercising the power in relation to a class that is so narrowly defined that it could practically only consist of a particular entity. This can be distinguished from a class that may be capable of consisting of many entities but actually only applies at any given time to one particular entity.

1.55 Having the Remedial Power apply broadly to entities and circumstances ensures that the power properly relates to taxation and helps prevent it from being exercised in an arbitrary way. This ensures that its use is consistent with the requirements of the Constitution.

No application where less favourable result

1.56 To ensure particular entities are not adversely impacted by a modification, an entity (the first entity) must treat a modification made under the power as not applying to it and any other entity if the modification would produce a result for the first entity that is less favourable than would have been the case had the relevant provision not been modified ***[Schedule 1, item 3, subsection 370–5(4)]***. This means that the particular modification will have no effect for an entity if it would produce a less favourable result.

1.57 Given the Remedial Power is available to the Commissioner to modify the operation of a taxation law, 'favourable' is understood in the context of the taxation laws and could mean either that a tax liability is reduced or that the costs of complying with the taxation law are reduced or that, overall, taking into account changes in liabilities and compliances costs, the modification is favourable. In some cases, it might mean that the tax liability is reduced but compliance costs are increased, or that the tax liability may be slightly increased, or remain unchanged, but compliance costs are significantly reduced.

1.58 In the self-assessment regime, an entity will need to self-assess whether a modification is less favourable to it, and whether it must therefore treat the modification as not applying to itself and to any other entity. If an entity is required to treat a modification as not applying, then the Commissioner must also treat the modification as not affecting the entity.

1.59 This application rule ensures that a modification which is less favourable to one or more entities can still be valid and apply to entities who do not have a less favourable outcome from the modification. Having an application rule as opposed to a 'favourable only' limitation for the Remedial Power prevents a modification from being found invalid should that modification be less favourable to even one entity in the class. Where this occurs, the effect of the application rule is that the modification would not apply to that particular entity, but the legislative instrument making the modification would be valid and would be capable of applying to other entities.

1.60 The principle that a legislative instrument is treated as not applying where it produces a less favourable result has been adopted, as opposed to the positive expression that a legislative instrument only applies where it produces a favourable result. This ensures it caters for neutral outcomes. For example, the Commissioner could modify the operation of a provision which, for a particular entity, has no impact on their tax liability or costs of complying with the provision. In such a case, the modified outcome cannot be said to be favourable for the entity. However, the modified outcome would apply because the outcome is not less favourable.

Example 1.5

Gordon falls within a class of entities for which the Commissioner has exercised the Remedial Power and modified the operation of a provision in the income tax law. To work out whether the determination applies to him, Gordon considers whether the modification would be less favourable for him than the existing taxation law had the operation of the law not been modified. Gordon works out that although his tax liability for the relevant income year will not change, his compliance costs will be reduced. Therefore, although the determination results in a neutral outcome for Gordon in the sense that his tax liability will not change, the impact of the instrument is not less favourable and, in fact, is more favourable in the sense that it reduces his compliance costs. The determination applies to Gordon.

Example 1.6

> Lisa falls within a class of entities for which the Commissioner has exercised the Remedial Power and modified the operation of a provision in the income tax law. To determine whether the modification applies to her, Lisa considers the impact on her tax liability for the relevant income year as well as the costs of complying with the modified provision. Lisa decides that although she will need to pay slightly more tax for the relevant income years, her compliance costs will be significantly reduced and that therefore, overall, the legislative instrument results in a more favourable outcome for her than the operation of the unmodified law. Lisa self-assesses that the modification to the operation of the law applies to her.

1.61 The formulation that the first entity must treat a modification made under the power as not applying to it and any other entity if the modification would produce a less favourable result for the first entity ensures that an entity must ignore any modification that would have a less favourable result for it. This is intended to capture any less favourable flow on effects to a particular entity from another entity applying the modification. This is to cater for circumstances in the taxation law where the application of a modification will directly impact on more than one entity to produce an outcome that is beneficial to one entity and not beneficial to another. For example, if one entity (the first entity) applied a modification because it was favourable to it, but a second entity would have a less favourable result because of the first entity applying the modification, then the second entity would treat the modification as having not been applied to itself or the first entity. This would be the case even though the first entity had in fact applied the modification (because it was favourable to the first entity). Requiring the second entity to treat the modification as not applying ensures that the second entity is not adversely affected by the first entity's application of the modification.

1.62 An example of this is the treatment of supplies under the core provisions of the Goods and Services Tax (GST) law. If a supply is a taxable supply, the supplier will be liable to pay GST in respect of that supply, but the acquirer may be entitled to an input tax credit, based on the GST payable on the supply, provided the acquirer satisfies other conditions (for example, the acquisition was made in carrying on an enterprise and the acquirer is registered for GST).

1.63 A modification to the operation of such a provision made under the Remedial Power may have differential impacts in these circumstances. For example, a modification to treat a supply as not being a taxable supply may produce a more favourable result for the supplier, but a less favourable result for the acquirer if they are no longer able to claim an

input tax credit in respect of that acquisition. In these circumstances, the supplier would be able to apply the modification but the acquirer would treat the modification as not applying to itself and the supplier, which would lead to asymmetrical tax outcomes.

1.64 In situations where the law, as in this GST example, intends that there is a symmetrical outcome between the impacted parties, the Commissioner may consider that making a modification would not be reasonable because it would lead to an inappropriate asymmetrical tax outcome (see paragraph 1.41). It is anticipated that asymmetrical outcomes would be handled in the following way:

- in cases where the risk of unintended asymmetry cannot be reasonably managed, it is anticipated that the Commissioner would not exercise the power

- in cases where the risk of unintended asymmetry can be reasonably managed (for example, through sharing of information between the entities impacted by the modification), the Commissioner may make the modification, but it is anticipated that the modification would stipulate conditions within the instrument which would need to be satisfied before the modification could apply (see paragraphs 1.66 to 1.67 and Example 1.7).

Scope of determinations to specified circumstances

1.65 A determination may provide that it only applies in specified circumstances ***[Schedule 1, item 3, paragraph 370–5(3)(b)]***. This may help to ensure that a particular modification does not result in asymmetrical outcomes.

1.66 In addition to the favourable application rule (see paragraphs 1.56 to 1.64), an entity will need to consider the terms of the legislative instrument to work out the scope of application of the particular determination and whether it applies to them. Specifying that the determination only applies in specified circumstances could, for example, include a requirement to apply the modification consistently over the ten year period that an instrument remains in force (see paragraphs 1.72 to 1.73).

1.67 A further example of where a determination may state the modification only applies in ‘specified circumstances’ is where the

determination caters for asymmetrical outcomes by providing that it does not apply to you if it would:

- produce a less favourable result for another entity because the other entity's rights or obligations under a taxation law are worked out by reference to your rights or obligations under a taxation law; and

- be reasonable for you to be aware of this impact on the other entity – for example, where it would be reasonable to expect you to be aware that the other entity's rights or obligations under a taxation law are worked out by reference to yours.

Example 1.7

Sharyn and Carolyn operate a partnership together. The partnership agreement provides that Sharyn is entitled to 100% of the capital gains and Carolyn is entitled to 100% of the income of the partnership.

The Commissioner determines a modification to the operation of a provision of the relevant taxation law via legislative instrument. The legislative instrument provides that it does not apply to you if it would be reasonable, in the circumstances, for you to be aware that it would produce a less favourable result for another entity because the other entity's rights or obligations under a taxation law are worked out by reference to your rights or obligations under a taxation law. Sharyn falls within the class for which the determination has been made. The modification has the effect of characterising some of the profits of the partnership as income. However, were it not for the modification, those profits would have been characterised as capital gains under the relevant taxation law.

In working out whether the determination applies to her, Sharyn must consider the impact of the modification of the operation of the law on both herself and Carolyn. This is because Carolyn's rights and obligations under the taxation law are calculated by reference to Sharyn's rights and obligations under the taxation law because they are in a partnership. The determination is favourable to Sharyn because she will not need to account for the profits in question. However, the determination is less favourable for Carolyn because Carolyn will need to account for the profits in question. Sharyn therefore concludes that the determination will not apply to her because of the less favourable result for Carolyn. In addition, Carolyn also assesses that the modification will not apply to her because it would produce a less favourable result for her. The determination will nonetheless be a valid legislative instrument.

No application where it would interfere with a court order

1.68 A determination made under the Remedial Power will not apply to an entity where it would affect a right or liability of that entity under an order made by a court (including any judgment, conviction or sentence) before the commencement of the determination. This ensures that the exercise of the Remedial Power will not interfere with a decision of a court in a particular matter. Ensuring that a determination would not apply in such circumstances reflects the importance of the separation of powers, and ensures that there is not an interference with federal judicial power in a manner that is inconsistent with the Constitution. ***[Schedule 1, item 3, subsection 370–5(5)]***

No enforceability where legislative instrument not registered

1.69 The ordinary rules about registration of legislative instruments set out in the LA apply to the exercise of the Remedial Power. This means that any instruments made using the power must be registered on the Federal Register of Legislation (see subsection 15H(1) of the LA). Failure to register an instrument will make it unenforceable (see subsection 15K(1) of the LA). This ensures that all legislative instruments are made publicly available (see further section 15C of the LA).

Commencement and repeal of legislative instruments made under the Commissioner's Remedial Power

Commencement of legislative instruments

1.70 Legislative instruments made by the Commissioner under the Remedial Power can only take effect on or after the first day that the relevant legislative instrument is no longer able to be disallowed (or taken to be disallowed) by Parliament. This will ensure that Parliament has full opportunity to scrutinise an instrument and, if it considers necessary, to disallow it. ***[Schedule 1, item 3, section 370–20]***

1.71 Under section 42 of the LA, the Houses of Parliament have 15 sitting days each following the tabling of an instrument to bring a notice of a motion to disallow the legislative instrument. Generally, where a notice of motion is agreed to, the instrument is disallowed and ceases to have effect. If a notice has not been resolved or has not been withdrawn within 15 sitting days of the notice being given, the instrument is deemed to have been disallowed and ceases to have effect.

Sunsetting of legislative instruments

1.72 Consistent with the standard period for sunsetting of legislative instruments under subsection 50(1) of the LA, a legislative instrument made under the Remedial Power will sunset on the first of April or first of October ten years after it was registered.

1.73 As the sunsetting date approaches, it is expected that the Commissioner will review an instrument to work out whether it is still required. The review will determine whether it is necessary to remake the instrument or if it is more appropriate to allow the instrument to cease. The review could also consider whether, for some issues, changes to the primary legislation should be made, if there is capacity at that time. If an instrument is remade, this will be a new exercise of the Remedial Power.

Review, repeal or amendment of legislative instruments

1.74 It is expected that the Commissioner will review any legislative instrument which modifies the operation of a taxation law following a change in circumstances or any amendments made to the primary legislation to ensure that the change in circumstances or amendments to the primary legislation and the legislative instrument can operate together. Where the change in circumstances or amended primary legislation and the modification cannot operate together, or the modification is no longer necessary, it is anticipated that the Commissioner will repeal or amend the relevant legislative instrument that made the modification.

1.75 The Commissioner may repeal an instrument made under the Remedial Power by issuing a legislative instrument ***[Schedule 1, item 3, subsection 370–15(1)].*** That legislative instrument may specify application, saving or transitional provisions for the repeal ***[Schedule 1, item 3, subsection 370–15(2)].*** The repealing instrument cannot take effect until after the Parliamentary disallowance period has expired ***[Schedule 1, item 3, section 370–20].*** These rules apply for repealing, rescinding or revoking legislative instruments made under the Remedial Power instead of subsection 33(3) of the AIA. ***[Schedule 1, item 3, subsection 370–15(3)]***

1.76 If the Commissioner amends a legislative instrument made under the Remedial Power, the ordinary rules for amending or varying legislative instruments set out in subsection 33(3) of the AIA will apply ***[Schedule 1, item 3, subsection 370–15(3)].*** This means that the Commissioner may amend an instrument made under the Remedial Power, provided that the amendment is made by legislative instrument and subject to the same conditions for exercising the Remedial Power. This includes that the

instrument varying or amending an instrument made under the Remedial Power cannot commence until after the Parliamentary disallowance period has expired. In addition, the following limitations for the Remedial Power must be satisfied for an amendment or variation:

- the modification is not inconsistent with the intended purpose or object of the provision;
- the Commissioner considers the modification to be reasonable, having regard to both the intended purpose or object of the relevant provision and whether the costs of complying with the provision are disproportionate to achieving the intended purpose or object; and
- the Department of the Treasury or the Department of Finance advises the Commissioner that any impact on the Commonwealth budget would be negligible.

Application and transitional provisions

1.77 Schedule 1 of the Bill commences on the day after Royal Assent. This allows the Commissioner to make legislative instruments from that date to modify the operation of a taxation law.

1.78 Legislative instruments made under the Remedial Power are subject to subsection 12(2) of the LA. This ensures that a legislative instrument with purported retrospective effect will not apply in relation to a person to the extent that it would disadvantage the rights of a person. In addition, a legislative instrument made under the Remedial Power can only take effect on or after the first day that it is no longer able to be disallowed (or taken to be disallowed) by Parliament (see paragraphs 1.70 to 1.71).

EXAMPLE LEGISLATIVE INSTRUMENT AND EXPLANATION

An example of a modification that could be made using the Remedial Power is included below. The example legislative instrument is based on the *Capital Gains Tax Relief for Taxpayers Affected by Natural Disasters Proposals Paper* dated 9 October 2011, but only reflects a component of

those proposals. This is because the scope of the Remedial Power is limited, as demonstrated by the roll-over modification in the legislative instrument.

Taxation Administration (Remedial Power – Natural Disaster Replacement Asset Programs) Determination 2016

1 Name

This is the Taxation Administration (Remedial Power—Natural Disaster Replacement Asset Programs) Determination 2016.

2 Commencement

(1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	**Column 2**	**Column 3**
Provisions	**Commencement**	**Date/Details**
1. The whole of this instrument	The first day this instrument is no longer liable to be disallowed, or to be taken to have been disallowed, under section 42 of the *Legislation Act 2003*.	

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

(2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under the *Taxation Administration Act 1953*.

4 Schedules

Each modification of the operation of a taxation law that is set out in a Schedule to this instrument is determined for the purposes of section 370–5 in Schedule 1 to the *Taxation Administration Act 1953*.

Schedule 1—Natural disaster replacement asset programs

1. The operation of Subdivision 124–B (Asset compulsorily acquired, lost or destroyed) of the *Income Tax Assessment Act 1997* (and any other provision of a taxation law the operation of which is affected by the operation of that Subdivision) is modified in the way set out below.

Scope of modification

2. The modification applies if, under a natural disaster replacement asset program, you dispose of a CGT asset (the original asset) you own and you receive money or another CGT asset (except a car, motor cycle or similar vehicle), or both, as a replacement for the original asset (or part of it).

3. A natural disaster replacement asset program is a program that is run by an Australian government agency or local governing body under which assets affected by a natural disaster are replaced with money or other assets, or both.

4. The modification applies to all entities.

5. The modification applies to CGT events happening on or after 1 July 2011.

Modification

6. The modification is that the disposal is to be treated, for the purposes of Subdivision 124–B, as the loss or destruction of the original asset, and subsection 124–70(2) is to be disregarded.

Taxation Administration (Remedial Power – Natural Disaster Replacement Asset Programs) Determination 2016: Explanation

Explanation

1. The following is information to help you understand the Commissioner's determination of the modification specified in Schedule 1 to the Taxation Administration (Remedial Power – Natural Disaster Replacement Asset Programs) Determination 2016.

Modification is not inconsistent with intended purpose or object of provision

2. A replacement asset roll over under Division 124 of the *Income Tax Assessment Act 1997* allows you, in special cases, to defer the making of a capital gain or loss from one CGT event until a later CGT event happens. It involves your ownership of one CGT asset ending and you acquiring another one.

3. Subdivision 124–B allows you to disregard a capital gain that you make in certain circumstances and prescribes a number of events where you can choose roll over relief. All of these events relate to circumstances where:

(a) an asset you own is compulsorily acquired, lost or destroyed (as stated in the heading to the Subdivision); and

(b) in return you receive money, another CGT asset or both.

(See also the Explanatory Memorandum to the relevant Bill (the Tax Laws Improvement Bill (No. 1) 1998).)

4. Roll-over relief under the unmodified taxation law would generally be available if an asset has been lost or destroyed as a result of a natural disaster. However, this is not always the case. For example, when the Lockyer Valley Regional Council gave the flood devastated residents of Grantham the option to move to higher ground as part of a voluntary land swap initiative following the 2011 Queensland floods, the residents were not able to satisfy the conditions of section 124–70; their land was neither compulsorily acquired, nor lost or destroyed, and the replacement land was not compensation for an event listed in subsection 124–70(1).

5. The intended purpose or object of Subdivision 124–B is to provide an optional CGT roll-over if, because of events outside of your direct control, your CGT asset is replaced by money or other assets. Given the nature of natural disaster replacement asset programs, it is not inconsistent with this intended purpose or object to extend the roll-over to such programs.

6. The modification made by the legislative instrument treats the disposal of the asset (CGT event A1) as a loss or destruction of the asset for the purposes of ensuring the roll-over is available under Subdivision 124–B. The disposal of the asset will still be a CGT event A1, but will be treated as a loss or destruction for the purpose of obtaining the roll-over.

Modification is reasonable

7. The Commissioner considers the modification to be reasonable, having regard to the matters mentioned in paragraph 370–5(1)(b) in Schedule 1 to the *Taxation Administration Act 1953*. The modification recognises the difficulties faced by entities that have been affected by a natural disaster. In particular, the modification reduces an obstacle to participation in government replacement asset programs and makes it easier for entities to comply with their future CGT obligations.

8. Under the unmodified taxation law, if you are affected by a natural disaster you may face immediate CGT consequences when an asset you own is lost or destroyed, or if you dispose of the asset. This CGT outcome applies even where you participate in a government assistance program that provides replacement assets to entities affected by natural disasters. If you participate in such programs you would not be able to access a CGT roll-over in order to defer any CGT consequences because the available roll-overs would not cover your circumstances. As a result, if you dispose of your original asset in order to receive a replacement asset, the first element of the cost base of the replacement asset is the market value of what you gave to receive the replacement asset – that is, the market value of the original asset.

Example: Current treatment

William owns an investment property in an area affected by a natural disaster. The natural disaster substantially damaged the house on William's land, and it is no longer inhabitable. William acquired the property after 20 September 1985, and the house and land are treated as a single asset.

William is eligible to participate in a land swap program run by his local Council in response to the disaster. To participate, he must

> transfer his property (including the house) to the Council and the Council will provide him with a new parcel of land in return.
>
> William's cost base (and reduced cost base) for the original investment property is $200,000. The value of the replacement land at the time William acquires it is $250,000.
>
> William makes a capital gain of $50,000 on the disposal of his property to the Council. William cannot access roll-over relief under Subdivision 124-B, because his property was neither compulsorily acquired, nor lost or destroyed.

9. With the modification, you will be able to choose a CGT roll-over for assets that a government agency (Commonwealth, State, Territory or local) replaces as a consequence of a natural disaster. Where you choose the roll-over, the capital gain from the disposal is disregarded and the first element of the replacement asset's cost base is the original asset's cost base at the time of the disposal (unless you acquired the original asset before 20 September 1985, in which case different rules apply).

10. You may choose not to access the roll-over if you wish to realise a capital gain and have the relevant records or can reconstruct them.

Intended purpose or object of provision

11. The intended purpose or object of Subdivision 124 B of the *Income Tax Assessment Act 1997* is discussed earlier in this explanation.

Compliance cost

12. The cost of complying with the unmodified taxation law is not disproportionate to achieving its intended purpose or object.

Budgetary impact

13. The Commissioner has received advice from the Secretary of the Department of the Treasury, the Secretary of the Department of Finance or an authorised APS employee of either department that any impact of the modification on the Commonwealth budget would be negligible.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Commissioner's Remedial Power

1.79 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

1.80 The Government announced on 1 May 2015 (and on 12 May 2015 as part of the 2015–16 Budget) that it would provide more certainty and better outcomes for entities and reduce the regulatory burden on individuals, business and community organisations by providing the Commissioner with a Remedial Power.

1.81 Schedule 1 to this Bill establishes a Remedial Power for the Commissioner to allow for a more timely resolution of certain unforeseen or unintended outcomes in the taxation (and superannuation) laws.

1.82 The power allows the Commissioner to make, by disallowable legislative instrument, one or more modifications to the operation of a taxation law to ensure the law can be administered to achieve its intended purpose or object. The power can only be validly exercised where:

- the modification is not inconsistent with the intended purpose or object of the provision;
- the Commissioner considers the modification to be reasonable, having regard to both the intended purpose or object of the relevant provision and whether the costs of complying with the provision are disproportionate to achieving the intended purpose or object; and
- the Department of the Treasury or Department of Finance advises the Commissioner that any impact on the Commonwealth budget would be negligible.

1.83 Before exercising the power, the Commissioner must be satisfied that any appropriate and reasonably practicable consultation has

been undertaken. This allows an opportunity to identify and consider all implications from the exercise of the power and to ensure that the exercise of the power is appropriate in the circumstances. This is consistent with the approach to amendments of primary legislation, which are subject to public consultation.

1.84 The law specifically provides that the disallowable legislative instrument made under the Commissioner's Remedial Power cannot commence prior to the expiry of the disallowance period (see paragraphs 1.70 to 1.71). This allows Parliament full opportunity to disallow a legislative instrument made under the Remedial Power before the instrument takes effect.

1.85 The 'favourable application rule' also ensures that the exercise of the Remedial Power cannot adversely affect an entity. This is because any modification to the operation of a taxation law, retrospective or prospective, that would produce a less favourable result for an entity (the first entity) must be treated by the first entity as not applying to it and any other entity. This rule applies in addition to subsection 12(2) of the LA which provides that a legislative instrument with purported retrospective effect will not apply in relation to a person to the extent that it would disadvantage the rights of a person.

Human rights implications

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

Conclusion

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

REGULATION IMPACT STATEMENT

Introduction

1.88 This Regulation Impact Statement (RIS) was prepared by the Department of the Treasury at the decision making stage and was assessed as being compliant with the Government's requirements by the Office of Best Practice Regulation.

1.89 A RIS is a document prepared by departments and, as such, this RIS reflects the Department of the Treasury's assessment of the costs and benefits of each option at the decision making stage. Accordingly, this RIS does not reflect changes arising from further consultation during the legislative development of these amendments.

Background

1.90 Australia's taxation (and superannuation) law is very complex. The nature and volume of taxation law and its evolution over time has, and continues to, produce unforeseen or unintended outcomes in its application. These outcomes can result in entities generating tax liabilities where this was not intended, or entities being subject to record keeping or other compliance requirements that were not intended. The impact of unforeseen or unintended outcomes can range from minor to large. Unintended outcomes that cannot be addressed administratively are resolved through primary law change, which can be a lengthy and resource intensive process.

1.91 While amendments to the primary law are appropriate for large unintended outcomes, there is a need for a timelier option to address smaller unintended outcomes that cannot be resolved administratively. This option would allow the taxation law to be remedied to apply as intended in more situations, enhancing certainty and reducing compliance costs for entities. It would also enhance the capacity of existing legislative mechanisms to consider more significant taxation law changes. This too would deliver greater certainty for entities, as contemplated taxation law changes could be considered and delivered more quickly.

1.92 This regulatory impact statement analyses options to reduce the regulatory impact and uncertainty imposed on entities, which are caused by unintended outcomes arising in the application of the taxation law.

1.93 The options considered to alleviate the uncertainty and compliance costs for entities which arise from unintended and unforeseen outcomes in the law are:

- providing the Commissioner of Taxation (the Commissioner) with greater flexibility in addressing such issues (preferred option);
- providing greater resources to manage such issues through existing mechanisms; or
- continuing with the current approach.

Public consideration of a Remedial Power

1.94 Tax professional bodies have raised whether a Remedial Power for the Commissioner could assist the Commissioner to ensure the taxation laws can be administered to give effect to the purpose or object of the law.

1.95 The idea of granting the Commissioner a discretionary power to deal with unintended outcomes in the application of the taxation law is not new. This suggestion was previously considered by both the Tax Design Review Panel (TDRP) and the Inspector-General of Taxation.

1.96 In May 2009, the Treasury released a discussion paper on an Extra-statutory concession power for the Commissioner of Taxation. The proposal received mixed external support and the previous government did not move to implement the proposal. The key concern raised by stakeholders related to potential Constitutional separation of power issues.

1.97 A working group was established in 2014 to consider the feasibility of a Remedial Power, including what such a power could achieve and how it may operate in practice. Although the working group did not formulate any recommendations, there was broad in-principle support for the proposal.

1. The problem

1.98 The existing approach towards resolving unforeseen and unintended outcomes in the taxation law is lengthy and resource intensive. This creates uncertainty and compliance costs for entities applying the law, additional costs for the Commissioner to administer the law and additional pressure on resource constrained legislative processes.

1.99 Unintended outcomes create uncertainty by delivering tax outcomes that do not make sense in their context. The Commissioner can resolve some unintended outcomes by taking a purposive approach to the interpretation of a provision or using the general powers of administration. However, the Commissioner cannot resolve unintended tax outcomes by giving effect to the purpose or intention of a provision, where such an approach would extend beyond the words of the provision. This leaves the lengthy process of law change as the remaining avenue to resolve these unintended outcomes.

1.100 The inability to address unintended outcomes in a timely manner creates compliance costs for entities, who inevitably request clarification around the application of the taxation law in these anomalous situations. This increases administration costs for the ATO, in the form of advice and clarification of the Commissioner's administrative approach provided to entities.

1.101 The inability to address unintended outcomes in a timely manner also places the onus on entities to either comply with the provision and the unintended outcome it gives effect to, thereby incurring additional tax costs or additional compliance requirements; or, comply with the provision as intended but bear the risk of being penalised.

1.102 The undesirability of these alternatives leads to calls for unintended outcomes to be addressed through change to the primary law.

1.103 For large unintended outcomes this process is appropriate. However, the process is less suitable for smaller unintended outcomes. Sometimes these may be bundled together and addressed through Bills making minor technical changes to the taxation laws. However, to be included in these Bills minor changes must compete for the same resources that cater for more significant primary law changes. This often results in minor changes being deferred or delayed, as they struggle to be prioritised ahead of more significant matters for resolution through law change. As the Financial Services Council note in their consultation submission, 'A deficiency of our current tax system is that considerable effort is put into reforms but the same level of focus is not given to legislative updates for small amendments and technical changes. Over time this increases the complexity and decreases the effectiveness of the

taxation law.' At any point in time there would be a range of smaller unintended outcomes in the taxation law that could be resolved through law change, but which must wait to be prioritised before they can be addressed.

1.104 In any case, even when the decision is made to address a minor change through primary law change, this is a lengthy and resource intensive process. There are limited departmental and parliamentary resources that can be directed towards effecting law changes. These resources are spread across the full range of government legislative priorities. The legislative process is subject to necessary checks and balances that take time. It also takes time to ensure stakeholders are properly consulted on the impact of contemplated law changes. The process of effecting law change can take up to and sometimes more than two years between the identification and resolution of a problem. Minor unintended outcomes can sometimes wait several years until they are prepared to be properly considered by the public and the Parliament. Indicatively, at the time the Government was elected, there were 96 tax changes of ranging significance that had been announced by various governments but had not yet been legislated, with some of them stretching back several years.[1]

1.105 The time between announced changes and legislation has led to an administrative approach the Commissioner applies for some yet to be legislated taxation law changes.[2] Although this approach enables entities to comply with the announcement in anticipation of new law, as an administrative undertaking it can only give limited protection for entities. Where the law change is not enacted for several years, this creates a high degree of uncertainty for the entity around their compliance with tax obligations. While the entity may have complied with the Commissioner's administrative approach, they have not complied with the legislation as it exists up until it is changed.

1.106 The time it takes to address unintended outcomes through law change creates pressure for the subsequent change to apply

[1] For example, changes to the simplified imputation system were announced on 22 March 2001, to take effect from 1 July 2002. Another example is changes to the foreign currency provisions which were announced on 5 August 2004 to take effect from 1 July 2003. Although some of these changes have been enacted, many remain outstanding.

[2] There are occasions where, in the interests of efficient administration, the Commissioner may accept entities anticipating a proposed retrospective change to the law. Where the ATO advises entities of particular circumstances where this is appropriate, entities may be protected from any shortfall penalties and GIC or SIC. The general powers cannot go so far as to provide protection from shortfalls in primary tax (see Law Administration Practice Statement PS LA 2007/11).

retrospectively, especially where entities have been able to apply the anticipated change since announcement. Retrospective law changes create complexity for entities in understanding their obligations and for the ATO in administering anticipated retrospective law changes.

1.107 There is the need for a timelier option to supplement law change in addressing more minor unintended tax outcomes. This would help to clarify obligations for entities more quickly, providing certainty and confining the need for complicated anticipatory administrative approaches.

Illustrative examples of the problem

1.108 Example 1.8 below illustrates a situation where an unintended outcome led to a policy announcement that resulted in an announced but unenacted measure of the previous government. Purposive interpretation and the Commissioner's general powers of administration were not sufficient to remedy the unintended outcome.

Example 1.8 Capital gains tax – relief for taxpayers affected by natural disasters

The taxation law may give rise to unintended capital gains tax (CGT) outcomes for victims of natural disasters receiving necessary assistance or compensation.

For example, when the Lockyer Valley Regional Council gave the flood devastated resident landholders of Grantham the option to move to higher ground as part of a voluntary land swap initiative, the law did not produce appropriate outcomes for resident landholders who chose to participate in the program. One of the issues was that they were not able to satisfy the requirements of the CGT rollover relief to allow them to disregard the immediate CGT consequences.

This situation created uncertainty and cost for entities in determining how the law applied to them. Applying the law also brought the cost of locating or reconstructing records under difficult circumstances.

Allowing relief in these circumstances would not be inconsistent with the purpose or the object of the CGT relief provisions for entities who have assets destroyed as a result of circumstances beyond their direct control. The purpose or the object of such relief is to allow entities to choose to defer any adverse CGT consequences on destroyed assets which are replaced. Therefore, if in the future the Commissioner had the proposed Remedial Power unintended CGT consequences for victims of natural disasters such as this may be resolved in a more timely manner.

This example is similar to an announcement made by the previous government that the law would be changed to give CGT relief to entities in such circumstances. Although the announcement was made in October 2011 the matter remained unlegislated until December 2013, when it was subsequently announced that this measure would not proceed.

Example 2 below demonstrates a situation where the taxation law gives an unintended outcome. This led to a policy announcement that resulted in an announced but unenacted measure of the previous government.

Example 1.9 Improvements to company loss recoupment rules

Companies are able to deduct losses from earlier years if they have continuity of ownership or carry on the same business. Establishing continuity of ownership is very difficult for widely held companies with large numbers of small shareholdings. Recognising this difficulty, the taxation law provides an alternative simpler test to allow a widely-held company to aggregate all small shareholdings and treat them as if owned by a single notional person. This simpler test does not work if there is a restructure to interpose a new holding company because, due to the operation of other rules, that single notional person holding is now *treated* as being owned by the new holding company. This constitutes a change in ownership which means that the company may not be able to claim losses from earlier years even though there is no actual change in its underlying ownership.

In addition, there are instances where the taxation law may be operating as intended but imposes compliance costs that are disproportionate to achieving the purpose or object of the law. For example, after a provision is enacted, it is found that, because of developments in the practices of businesses or the Commissioner, the provision imposes compliance costs which are disproportionate to achieving the purpose or object of the relevant law.

Changes to the current approach would enable issues like these to be addressed in a more timely manner, provided any budget impact was negligible. This would alleviate entities from bearing the costs associated with unintended outcomes in the taxation laws.

2. Case for government action / Objective of reform

1.109 Taxation laws are public goods that only the government can provide. Similarly, only government action can resolve uncertainty arising where the taxation law does not achieve its purpose or object.

1.110 Absent government action to address unintended or unforeseen outcomes, entities themselves must bear the risk of being found not to have complied with their obligations, or they must bear the costs of additional tax or additional compliance costs. Entities must also bear the compliance costs of understanding how the law applies, the ATO's administrative approach and the impact of any contemplated law change.

1.111 At the moment government resolves unintended outcomes through law changes. As noted this can be a lengthy process, resulting in uncertainty and extra compliance costs for entities, difficulties in administering the law and additional pressure on legislative resources.

1.112 Government action is needed to provide for the more timely resolution of unintended outcomes, particularly smaller unintended outcomes which struggle to be prioritised for resolution under the existing approach of primary law change.

3. Policy options

1.113 The proposed options to provide for the timelier resolution of unintended or unforeseen outcomes in the taxation laws are:

- providing the Commissioner with a Remedial Power to make a disallowable legislative instrument to modify the operation of a taxation law to allow the law to be administered consistently with its intended purpose or object;
- providing greater resources to enable government to enact minor law changes to manage unintended consequences arising from the application of the current legislation; or
- continuing with the current approach.

Option 1: Providing the Commissioner with a Remedial Power

1.114 A Remedial Power would allow the Commissioner to make a disallowable legislative instrument to modify the operation of a taxation law in circumstances where:

- the application of the law produces outcomes which are inconsistent with the intended purpose or the object of the law (this may include circumstances where it is reasonably clear that particular arrangements or transactions were not contemplated at the time of the policy development or the drafting of the law); or

- the application of the law results in compliance costs for entities that are disproportionate to achieving the intended purpose or the object of the law, and those costs can be relieved in a way that is not inconsistent with that purpose or object.

1.115 The power would only be available where:

- the modification would not be inconsistent with the intended purpose or object of the provision;
- the Commissioner considered the modification to be reasonable, having regard to the intended purpose or object of the relevant provision and whether the costs of complying with the provision are disproportionate to achieving the intended purpose or object; and
- the Commissioner has received advice from the Secretary of the Treasury or Secretary of the Department of Finance (or an authorised APS employee of either department) that any impact on the Commonwealth budget would be negligible.

1.116 These key thresholds limit the scope within which the Commissioner would be able to validly exercise the Remedial Power. Should an entity form the view that the Commissioner's exercise of the Remedial Power extends beyond the limitations of the power, they may be able to seek review by the courts.

The modification must not to be inconsistent with the purpose or object of the provision

1.117 The exercise of the Remedial Power would only be valid where the modification in question is not inconsistent with the intended purpose or object of the provision which is sought to be modified. This limitation reflects the intention that the power would enable the Commissioner to administer taxation provisions in accordance with their intended purpose or object. The power would not allow the Commissioner to alter or extend the intended purpose or object of the law.

1.118 The Commissioner would identify the intended object or purpose of the law as part of deciding whether the Remedial Power is available. The intended purpose or object would be identified objectively. In ascertaining the intended purpose or object of a provision consideration would need to be given to the material referred to in subsection 15AB(2) of the *Acts Interpretation Act 1901* (AIA). It may also be relevant for the Commissioner to consider the full legislative history associated with a

particular provision. Notably, there would be no requirement for the text of the relevant provisions of the taxation law to be considered in ascertaining the intended purpose or object. While these provisions could still be considered, they would not be given primacy, or a greater weight, in ascertaining the intended purpose or object of a provision.

1.119 The intended purpose or object ascertained for the exercise of the Remedial Power may differ from the purpose or object ascertained through statutory interpretation principles. This is because the Remedial Power would be a power of last resort for the Commissioner, and where the Commissioner sought to use it, he or she would have already established that purposive interpretation could not adequately resolve the issue.

1.120 These requirements would allow a court to scrutinize whether or not the Commissioner acted within the scope of the power and ultimately whether the use of the power was valid.

The modification must be reasonable

1.121 The Commissioner would need to be satisfied before exercising the Remedial Power that the modification would be reasonable having regard to the intended purpose and object of the relevant provision. The Commissioner would also need to consider whether the cost of complying with the provision is disproportionate to achieving that object or purpose.

1.122 Although its exercise would be subject to limitations, the Remedial Power would still be a discretionary power. The Commissioner could therefore choose to take other matters into account when determining whether it is appropriate to exercise the power. There are a range of matters the Commissioner could take into account, and weigh up against each other, before deciding whether it would be reasonable to exercise the power. These include the extent to which the modification would be favourable to an entity, any impacts on any current judicial interpretations of the provision, or whether the exercise could lead to asymmetrical outcomes.

Any impact on the Commonwealth budget must be negligible

1.123 The Remedial Power would only be intended to operate in situations where any impact on the Commonwealth budget would be negligible. This would ensure the Remedial Power would be used to resolve smaller issues that would be less likely to warrant resolution by way of primary law change. Prior to making a legislative instrument under the Remedial Power, the Commissioner would need to receive advice from the Department of The Treasury or the Department of Finance that

any impact on the Commonwealth budget would be negligible. Impacts on the Commonwealth budget will be determined in accordance with ordinary processes and budget rules.

Other key features of the power include:

Only to apply where favourable

1.124 A legislative instrument made in exercise of the power must be treated by an entity (the first entity) as not applying to the first entity or any other entity where it would produce an unfavourable result for the first entity. This ensures that the modified law will only apply where it is favourable to entities. It would not apply to any group or particular entities if they would be adversely affected.

1.125 Having an application rule as opposed a 'favourable only' limitation for the Remedial Power would prevent a modification from being found invalid because the modification would be less favourable to one entity in a class. Were this to occur, the application rule would mean the modification would not apply to that particular entity, but the legislative instrument making the modification would be valid and would be capable of applying to the other entities.

Parliamentary scrutiny

1.126 Any exercise of the power would be by disallowable legislative instrument, giving Parliament the opportunity to scrutinise and, if necessary, disallow the instrument. To give Parliament even greater scrutiny, legislative instruments made under this power would not commence until after the full disallowance period has finished. This would ensure any modification could not apply until Parliament had a full opportunity to scrutinise the instrument. To manage concerns as to any impact from a delayed commencement date, it would still be possible for the legislative instrument to specify that it applies before the commencement date. For example, even though an instrument would commence at the end of the disallowance period it could be specified to have application from a previous date.

Constitutional validity

1.127 The Remedial Power would be a delegation of Parliament's legislative power. The delegation of this power is not a broad delegation of power allowing the Commissioner to legislate at large. To help ensure the validity of the use of the power, the power would be framed by clear

legislative limitations. The parliamentary oversight and scrutiny noted above helps to ensure this delegation would operate consistently with Constitutional requirements.

1.128 The Remedial Power would apply broadly to entities and circumstances, helping to ensure that the power properly relates to taxation and prevent it from being exercised in an arbitrary way. This ensures that the power's use would be consistent with the requirements of the Constitution.

1.129 An instrument made under the Remedial Power would not apply where it would interfere with an order made by a court before the commencement of the instrument. This helps to ensure that the exercise of the Remedial Power would not interfere with a decision of a court in a particular matter. Ensuring that a determination would not apply in such circumstances reflects the importance of the separation of powers, and ensures that there is not an interference with federal judicial power in a manner that is inconsistent with the Constitution.

Retrospective application

1.130 Although it is generally expected that legislative instruments made under the Remedial Power would operate prospectively, there may be circumstances where the Commissioner decides a retrospective application would be appropriate and reasonable.

1.131 A legislative instrument with retrospective application would not commence until the disallowance period for Parliament has expired, and would have no effect if the instrument would disadvantage the rights of an entity.

Sunsetting periods

1.132 Legislative instruments made under the Remedial Power to modify the operation of the taxation law would be subject to ordinary sunsetting arrangements in the Legislation Act 2003. This would mean legislative instruments would expire after a period of ten years. The ten year period would allow instruments to apply for a sufficient period to both address the identified unintended outcome, while also allowing more lasting solutions to be pursued where necessary.

1.133 As the sunsetting date approaches it will be necessary to review whether an instrument is still required. A review will determine whether it is necessary to remake the instrument or if it is more appropriate to allow the instrument to cease. Such a review could also consider whether, for

some issues, changes to the primary legislation should be made if there was capacity at that time.

Option 2: Increasing resources dedicated to taxation law development

1.134 Another option to better manage unforeseen and unintended outcomes in the taxation system would be to increase the resources directed to different contributors for the development of tax legislation. This would provide greater capacity to consider law changes, enabling more unintended tax outcomes to be resolved through corrective legislative amendments.

1.135 There are several parties involved in the development of taxation law. The Office of Parliamentary Counsel drafts new taxation law, as instructed by The Treasury, with Treasury working in conjunction with the ATO. The ATO draws on insights from entities and tax agents to identify areas where the taxation law is not operating as intended. Treasury assesses tax policy changes, consults with the community on contemplated changes, briefs ministers and develops drafting instructions and explanatory materials for new law. The Office of Parliamentary Counsel drafts new taxation law for introduction into Parliament. The Cabinet or portfolio ministers make decisions on tax policies. Portfolio ministers also guide new legislation through internal policy committees and oversee the introduction and passage of new legislation through Parliament. Both houses of Parliament consider proposed legislation. The community is involved throughout the process, providing comments on policy changes and legislative proposals.

1.136 Increasing the resources directed towards taxation law changes would involve redirecting existing resources, or increasing the overall resources directed towards taxation law development. Increasing the resources directed towards the development of taxation law would enable existing processes to be used to address a larger number of unintended outcomes more quickly. Increasing the resourcing of Treasury would enable a larger number of potential taxation law changes to be considered and put to government. Allocating further responsibility for law design and development to the ATO could enable existing expertise and resources to be redirected towards taxation law development, again allowing a larger number of potential law changes to be considered. Addressing unintended outcomes through legislative amendments would need to be supported by increasing the resources directed towards other parts of the law making process, such as legislative drafting functions of the Office of Parliamentary Counsel.

1.137 This would have implications for each party involved in the development of taxation law. Increasing resources, or redirecting existing resources towards tax changes, both come with an opportunity cost for the other functions those resources could have been directed towards.

1.138 Irrespective of the level of resources, some elements of the law making process remain relatively fixed. There are limits on the number sitting days each year and the number of law changes the government could consider during parliamentary sitting periods. Increased resources may enable legislative solutions to be identified, consulted on and drafted for a larger number of taxation changes. However, there may be no additional space on the legislative agenda to consider those changes.

1.139 The legislative process regularly involves detailed community consultation on law changes, as well as necessary procedural checks and balances, making it a lengthy process. Increased resourcing would not change the time needed to fulfil these steps. The ability of increased resourcing to result in the timelier resolution of unintended outcomes would therefore be constrained.

1.140 The development of taxation law is just one function amongst many undertaken by the government. Increasing the resources directed towards developing taxation legislation to resolve unforeseen and unintended outcomes in the taxation system would need to be assessed in the context of overall government priorities, budget constraints and existing departmental resourcing priorities.

Option 3: Continuing the current approach

1.141 An alternative to government action would be not intervening and instead continuing to use the existing legislative process to address some unintended outcomes while leaving many issues unresolved.

1.142 While the Commissioner has general powers of administration which are used to manage and administer the taxation system, these powers have limitations. These powers are limited to assessing and collecting taxes according to the law, applying the law and acting with administrative common sense. They do not extend to creating, extinguishing or modifying the legal rights of entities. They cannot be used to change the operation of the law so that it may operate consistently with its purpose or object. Consistent with section 15AA of the AIA, the Commissioner applies purposive principles to the interpretation of the taxation laws to give effect to the purpose or object of the law. This approach also has limitations. A purposive approach gives meaning to the words of the law which best achieve the purpose or object of the law.

There are some instances where an interpretation that gives effect to the purpose or object of the law is not available from the words of the law. In these circumstances, the Commissioner would continue to have a duty to apply the law, even where it may produce outcomes that are not consistent with the purpose or object of the law.

1.143 In the development of new taxation law, principles based drafting can provide more flexibility in administering the law. However, this would not deal with the large legacy of existing complexity in the system that needs to be managed.

1.144 The existing complexity in the law combined with rapidly evolving business practices will continue to create scope for intended or unforeseen consequences with the operation of the taxation laws. Use of existing processes and resources would likely mean that such issues would not be resolved in a timely manner due to competing demands on the same resources to progress legislative change. Relying on the existing approach is likely to perpetuate uncertainty and compliance costs for entities.

4. Cost benefit analysis of each option / Impact analysis

Option 1: Providing the Commissioner with a Remedial Power

1.145 The Remedial Power would apply to all Acts for which the Commissioner has the general powers of administration. The power itself would have no impact on entities, as it only enables legislative instruments to be made. When those legislative instruments are made they could impact on the full range of entities from individuals to large companies. The impacts of the Remedial Power would differ amongst entity groups, reflecting the fact that not all of the taxation laws impact on all entities. For example, individuals are unlikely to experience an impact of the power being exercised to modify the operation of the law in relation to corporate taxation rules.

Benefits and costs for business, community organisations and individuals

1.146 The Remedial Power would provide benefits for the community by enabling the resolution of unintended or unforeseen tax outcomes in a timelier and less resource intensive manner than changing the primary law.

1.147 The need for this power is acknowledged in consultation submissions. Greenwoods & Herbert Smith Freehills note, 'We have seen too many instances where it is accepted that the text of the income tax legislation has miscarried, but the ATO regards itself as unable to interpret and administer the provision in a way that produces an outcome it acknowledges would be sensible.'

1.148 As noted, impacted entities often respond to unintended tax outcomes by seeking clarification from the ATO or from external advisers on the operation of the tax provision. This is often followed by calls for law change. Where law change is contemplated to resolve an unintended outcome, administrative approaches which provide limited benefit may be required until law change is made. This uncertainty imposes compliance costs and risks associated with understanding and fulfilling tax obligations onto entities.

1.149 It can take up to two years to amend the taxation law to resolve an unintended outcome. Where amendments are particularly complex or are of a lower priority vis-à-vis other law changes on the whole of government legislative agenda, it can take even longer. Complex changes would take longer to draft, while minor changes would rarely warrant a standalone place on the legislative program. Instead, minor changes would be combined with other measures into a single Bill that gave effect to multiple different law changes. This increases the time in which minor changes can be addressed through law change, as they must await a place in a suitable Bill and wait for other changes in that Bill to be properly consulted on and prepared ready for introduction to Parliament. Any delays in enacting other measures in the Bill will also impact on the minor change. This makes the resolution of minor changes through law change lengthy and unpredictable.

1.150 The Remedial Power would allow more minor unintended outcomes to be resolved more quickly through a standalone process that would be expected to take between six and nine months. Once identified as a suitable candidate, the Commissioner could begin the process of resolving an unintended outcome using the Remedial Power. This would create certainty for entities helping to provide a level of confidence over their obligations. This could circumvent the need for entities to seek clarification in relation to the operation of a provision. Articulating the solution to an unintended outcome sooner, thereby sparing entities from the need to seek clarification to understand an unintended outcome, or complicated administrative approaches they generate, would help to reduce compliance costs for entities. It would also reduce the imposition of the risks and costs created by unintended outcomes on entities. Consultation submissions noted the significance the Remedial Power could have in improving the overall efficiency of the administration of the taxation law. The Australian Institute of Superannuation Trustees noted

the Remedial Power would 'smooth the administration of superannuation and taxation law, particularly in relation to non-contentious technical issues'.

1.151 The ability to resolve unintended outcomes by using the Remedial Power would be expected to deliver significant compliance relief for impacted entities. Consultation submissions noted the Remedial Power should allow for the efficient resolution of minor unintended consequences in the taxation law and a reduction of compliance issues for affected entities.

1.152 It is estimated that the Commissioner may use the Remedial Power to modify the operation of the law up to ten times per annum. Indicatively, had the Remedial Power been applied to Example 1 above it is estimated this would have led to regulatory savings of $330,000 each year. The estimated savings for Example 2 would have been $335,000 each year. Compliance cost savings will vary depending on the nature of the issue the Remedial Power addresses.

1.153 The Remedial Power would offer a less resource intensive method for addressing minor unintended outcomes. Improving the efficiency in the use of government resources to address minor unintended outcomes benefits the community by reducing the need to draw on public resources.

1.154 The Remedial Power would also produce costs for the community. The Remedial Power would create a small to negligible impact on entities initially as they and their advisers gain an understanding of how the new process to modify the operation of the taxation laws using the Remedial Power may operate.

1.155 The creation of new legislative instruments would require community input into their development. While this already takes place for new legislation, to the extent a larger number of minor unintended outcomes would be addressed through the Remedial Power than are addressed under the existing arrangements, there would be a commensurate increase in the need for community input.

1.156 As the Remedial Power was used to address unintended outcomes, potentially impacted entities would need to acquaint themselves with the instruments made and assess whether they were applicable to their circumstances. In the event the Remedial Power introduced a retrospective change, entities would experience the same compliance costs related to amending their tax returns as would be generated by retrospective change to the primary law.

1.157 Instruments made under the power would also create an additional source of complexity for entities, as they would modify the operation of taxation provisions. These modifications would increase the complexity for the community in understanding how a particular provision works. This would generate small compliance costs for impacted entities.

1.158 The ATO will help to reduce the costs by building familiarity with the Remedial Power through existing communication channels such as the ATO website and consultation groups. Strategies for communicating the changes to various entity groups would vary in accordance with the complexity of potential impacts from the use of the Remedial Power for different entity groups.

1.159 The Remedial Power would provide an avenue to effect temporary changes to the taxation provisions. This could create additional uncertainty and compliance costs if the unintended outcome an instrument addressed has not been permanently fixed before the instrument sunsets. Any uncertainty leading up to sunsetting could be managed through consultation to determine whether the instrument was still needed. Where the legislative instrument was still needed it could be remade. This consultation would impose additional costs on the community.

1.160 In summary, the Remedial Power would be expected to deliver valuable benefits for entities in terms of reductions in compliance costs, as well as the reductions in the risks and costs associated with the timelier resolution of unintended outcomes. The Remedial Power would also generate a range of costs for impacted entities in terms of learning about the power, as well as contributing to and understanding instruments made under it. It would also deliver manageable risks associated with its inappropriate use.

Benefits and costs for Government

1.161 The Remedial Power would deliver benefits for government by offering a quicker and less resource intensive alternative process for addressing minor unintended outcomes. This would enable more minor unintended outcomes to be resolved, avoiding a backlog of unresolved issues, while also allowing the existing approach of changing the primary law to be focussed on more significant tax changes. Addressing minor unintended outcomes more quickly would reduce the government resources dedicated towards managing the unintended outcome until it is resolved. This could remove the need for formal guidance on interim administrative approaches. It would also reduce the pressure for processes such as that which the Government undertook to address the backlog of announced but unenacted tax measures.

1.162 The Remedial Power would enable minor unintended outcomes to be remedied without the need for amendment to the primary law.

1.163 The administration benefits this would create are shown by comparing the process for resolving an issue by way of a legislative amendment to a primary law and the process for issuing a legislative instrument. Legislative amendments to the primary law require considerably more steps than the process for issuing a legislative instrument.

1.164 A legislative amendment requires a problem to be identified as one that requires law change, a process that usually involves Treasury canvassing views from the community and the ATO. Once identified as a problem requiring law change ministers would be briefed and policy approvals for the change sought. Instructions on the law change to be effected would be prepared and sent to the Office of Parliamentary Counsel, who would then create the draft law. The draft law would generally be consulted on, along with explanatory materials. These would be finalised, along with second reading speeches and briefing materials before the change is introduced into Parliament. Both houses of Parliament would then consider the law change and amendments could be proposed. After passing both houses of Parliament the change would await Royal Assent before it finally entered into force.

1.165 Although the process for making and tabling a legislative instrument would involve some Ministerial engagement and departmental resources, it would be at a reduced level.

1.166 The saving on administration and parliamentary resources, while difficult to quantify, would be significant. The savings would also enable Treasury, Government and parliamentary resources to be dedicated to higher priority issues.

1.167 The Remedial Power would also introduce additional costs for government. Resources from the ATO and Treasury would still be required to consult the community, prepare legislative instruments and explanatory materials, brief ministers on the problems the instruments were being used to address and lodge the instruments. Parliamentary resources would be required to oversee the instruments created to ensure they were appropriate and within power. The resources of various departments would be required to manage the sunsetting of instruments created. However, these costs would be far less significant than those associated with making changes to the primary law.

1.168 The Remedial Power would also provide a discretionary means for resolving unintended outcomes, a potential cost of the power would be any inappropriate use. This concern was reflected in some consultation submissions, which pointed to the sensitivities around perceptions of an unelected official making the law. Transparent governance processes would be implemented to mitigate such risks. The requirements of the Legislation Instruments Act 2003 would apply to instruments made under the Remedial Power. In addition, instruments made using the power would be subject to Parliamentary disallowance.

Summary of benefits and costs

Benefits

- Timelier and less resource intensive resolution of unintended or unforeseen tax outcomes than changing primary law.
- An alternate option for resolving unintended outcomes, avoiding delays associated with minor measures being deprioritised or held up by other measures.
- Current law change processes could focus on more significant tax issues.
- Reduced need for entities to seek tax advice or clarification; less need for complicated administrative approaches; reduced compliance costs.
- Better allocation of government resources to resolving problems rather than managing symptoms.

Costs

- Small initial costs for entities and advisers to familiarise themselves with the Remedial Power.
- Increased need for community input on changes as more minor unintended outcomes would be addressed.
- Minor additional compliance cost for entities to understand Remedial Power modifications.
- Remedial Power instruments create an impermanent fix; may be a need for the underlying problem to be resolved before sunset period.

- Costs for government to create instruments; conduct public consultation; prepare explanatory material; brief ministers; oversee the instruments; and manage sunsetting arrangements. (Note: these would be significantly less than costs of making primary law changes.)

Option 2: Increasing the allocation of resources dedicated to taxation law development

Benefits and costs for business, community organisations and individuals

1.169 Increasing the resources directed towards taxation law development would benefit the community by allowing a greater number of issues to be considered and law changes prepared for introduction to Parliament.

1.170 An increase in the number of changes prepared for introduction into parliament would be expected to result in more tax changes being considered by Parliament. However, as the number of tax changes ready for introduction into Parliament increases, the potential space on the legislative agenda to consider those changes would diminish. At some point, increasing resources could simply create a backlog of prepared measures waiting for parliamentary consideration.

1.171 Moreover, an increase in the resources for taxation law development may not end up in those resources being directed towards addressing minor unintended outcomes. The resources may simply be directed towards higher priority law changes. In this case there may be little or no improvement in the timeliness with which minor unintended outcomes were addressed.

1.172 Nonetheless, to the extent increased resources result in more unintended outcomes being considered and addressed by Parliament, entities would have more certainty over the operation of tax provisions. This would reduce compliance costs associated with entities seeking clarification around the operation of provisions, or trying to understand complex administrative approaches.

1.173 Increased resources should also lead to an improvement in the timeliness with which unintended outcomes were resolved through law change. With more resources the potential wait for contemplated changes to be prepared ready for Parliament would be reduced. However, improvements in timeliness would be tempered by the time constraints inherent in the legislative process.

1.174 There would be clear costs associated with increasing the resources directed towards taxation law development. These resources would require funding, which would need to come from additional tax revenue or reductions in other government spending.

1.175 There would be indirect costs associated with having more tax measures considered more quickly, in terms of increased demands for community input into taxation law development.

Benefits and costs for government

1.176 Increasing the resources directed towards the development of taxation law would benefit the government by providing the capacity to consider more taxation law fixes. This would result in an increase in the number of taxation law changes considered by Parliament, which would help to improve the taxation law. In turn, this would help to reduce the amount of guidance the government would need to provide around uncertain areas of the taxation law.

1.177 Increasing resources would also be expected to result in more timely consideration of taxation law changes. This would help to reduce the need for the government to undertake stocktakes of unenacted measures.

1.178 This approach would also generate costs for the government. Increasing the resourcing of taxation law development would result in the government undertaking more taxation law changes. This could lead to a disproportionate focus on taxation law, at the opportunity cost of other policy priorities.

Summary of benefits and costs

Benefits

- More changes assessed for consideration by Parliament.
- Greater certainty over the operation of the tax provision, reducing the need for entities to seek clarification.
- Less need for guidance on uncertain areas of the taxation law; reducing costs for government.

Costs

- Increased need for community input, as more unintended outcomes would be considered.
- Additional resources may result in the identification of additional solutions; if the solutions remained unenacted the underlying problem persists.
- May lead to a backlog of measures waiting for parliamentary consideration.
- Funding would be required for the additional government resources required; this would need to come from additional tax revenue or cuts to government spending.
- Additional resources directed to taxation law change could create a disproportionate focus on taxation law at the expense of wider government policy priorities.

Option 3: Continuing the current approach

1.179 Continuing the current approach would mean addressing unintended outcomes through existing measures, including purposive interpretation of provisions, while attempting to limit the growth in unintended outcomes through principles based drafting.

1.180 This approach would be unlikely to address unintended outcomes. The existing legislative approach has struggled to adequately address unintended outcomes in a timely manner. Principles based drafting would be unable to resolve unintended outcomes which arise as a result of interactions with the stock of existing law. Purposive interpretation would be insufficient to remedy defects or omissions in the law where the words of the law do not support its purpose or object.

1.181 Continuing with the current approach would be expected to result in a build-up of unresolved unintended tax outcomes and the compliance costs they generate.

Benefits and costs for business, community organisations and individuals

1.182 The benefits of continuing with the current approach would be that no additional resources would be required, so there would be no need for additional funding of taxation law development. Moreover, as there would be no increase in the consideration or resolution of unintended tax outcomes, there would be no increase in the need for the community to contribute to the development of new law, or to learn about how law changes would apply.

1.183 Continuing with the current approach would also deliver costs from unintended outcomes not being addressed in a timely manner. Entities would still be confronted by uncertainty over tax obligations where unintended outcomes persist. Entities would still need to seek advice and clarification around the operation of the law. There would continue to be a diversion of resources away from other legislative priorities where minor unintended outcomes were addressed through law change.

Benefits and costs for Government

1.184 Continuing with the current approach has the benefit of requiring no additional resources.

1.185 However, this would deliver a variety of costs. Smaller unintended outcomes would continue not to be addressed in a timely manner, which would be expected to continue to result in calls for law change. Over time there may be a growth in unaddressed unintended outcomes, which would require resources to manage. Resources would continue to be allocated towards managing the collection of unaddressed unintended outcomes, rather than resolving individual unintended outcomes themselves.

1.186 Continuing to rely on the existing approach of changing the primary law to address unintended outcomes would continue to be resource intensive. Where primary law change was used to address unintended outcomes, this would continue to place pressure on the legislative agenda.

1.187 Over time the continued growth in unintended outcomes in the law and the inability to address these in a timely manner could reduce people's confidence in the tax system and willingness to voluntarily comply with tax obligations. This could also draw resources away from resolving unintended outcomes and towards managing downstream impacts from the growth in unintended outcomes.

Summary of benefits and costs

Benefits

- No redirection in resources towards taxation law development.
- Costs
- Risk of having to keep dealing with build-up in unaddressed unintended outcomes.
- Resources would continue to be directed towards managing the problem presented by a collection of unintended outcomes, rather than resolving particular unintended outcomes.
- Resolving unintended outcomes would continue to be resource intensive, demanding the same resources as solutions for more substantial problems requiring law change. There would be no tailoring of resources to the size of the problem.
- Over time an erosion of confidence in the system.

5. Consultation plan

1.188 As discussed above, prior to the decision by government to establish a Remedial Power, some consultation occurred around the possible operation of the Remedial Power and its merits, including a targeted consultation process with representatives from the Department of the Treasury, the ATO, the Australian Government Solicitor and key industry and professional associations.

1.189 The purpose of the consultation was to consider the feasibility of a Remedial Power and what factors would be relevant to the operation of such a power. Following the Government's announcement to establish a Remedial Power, the Government has undertaken public consultation on the proposed legislation to implement the Remedial Power. This consultation resulted in 12 written submissions, including submissions from major representative groups and industry participants. Public consultation was supported by targeted consultation with a representative group of tax advisers and industry.

1.190 The objective of such consultation was to test the design of the proposed legislation and to seek feedback on any aspect of the proposal from the community. Many submissions supported the Remedial Power and noted it struck a good balance between providing the Commissioner with a discretion, while including suitable safeguards and limitations to ensure the discretion was appropriately used.

1.191 Submissions raised a range of more specific issues:

- Submissions queried the rationale for a five year sunsetting period and although views were mixed, the balance of submissions favoured the usual ten year period. As a result, a ten year sunsetting period will be proposed for instruments made under the Remedial Power.

- Submissions stressed the need for the power to operate to complement, rather than substitute, ordinary law change processes. This reflects how the Remedial Power would be expected to operate.

- Submissions noted the need for the Remedial Power to be transparent and regularly reported upon. This is reflected in a requirement for the Commissioner to include information in the ATO Annual Report on the exercise of the Remedial Power during the relevant year. The use of the Remedial Power would be expected to be accompanied by community consultation.

- Some submissions asked for further guidance on when the operation of an instrument made under the Remedial Power would be less favourable for an entity. Submissions noted the difficulty of assessing whether a result was less favourable for an entity and queried how the Commissioner would establish this. In practical terms, under the self assessment regime it would be up to entities themselves to assess whether the application of an instrument made under the Remedial Power would be less favourable for them.

- Submissions noted it would be beneficial to have more examples of instances in which the Remedial Power could have been used.

- While most submissions praised the limitations on the exercise of the Remedial Power, others raised concerns regarding the appropriateness of allowing the Commissioner, a non elected official, to modify the operation of legislation. There are intentional limits and safeguards on the operation

of the power to address this concern. Parliament would have oversight of all instruments made under the power and instruments would not take effect until after the parliamentary disallowance period has finished. The limitations in the Legislative Instruments Act 2003 will apply to the exercise of the power. Instruments made under the power would not only apply where they would produce a less favourable result for the entity applying the instrument. Further, it is expected any exercise of the power would be accompanied by public consultation.

6. Option selection / Conclusion

1.192 The best option to address the problem is the Remedial Power option (Option 1 in Section 4). This provides the greatest net benefit to entities with manageable risk and cost to government.

1.193 Option 1 uses fewer resources than Options 2 and 3 to resolve unintended outcomes in a timelier manner creating greater certainty for entities. This option does not require the same resources from the Treasury or the same amount of parliamentary time. Overall, Option 1 provides a net compliance benefit to entities in the form of greater certainty and reduced risks associated with tax obligations, while also promoting greater confidence in administration of the taxation system.

Compliance cost benefit

1.194 There would be some initial compliance costs as entities familiarise themselves with the new process during the early stages of the Remedial Power implementation. However, this cost is expected to be small and would generally decrease as entities gain a better understanding of the process.

1.195 There will be ongoing small compliance costs as entities may spend time preparing and submitting issues to the ATO that might be addressed by the Remedial Power. However, this would be no different to any other entity initiating contact with the ATO or the Treasury to raise an issue for legislative amendment.

1.196 There would be some increased complexity as entities would need to consider legislative instruments in addition to the primary legislation. This cost would be expected to diminish as entities become familiar with the Remedial Power process. However the reduction in compliance costs from the use of the Remedial Power by resolving unintended consequences (particularly those that increase compliance

costs) would significantly outweigh the costs of having to consider the legislative instruments in addition to the primary law.

Government cost benefit

1.197 Exercising the Remedial Power may have some minimal cost on the budget. However, this impact would be limited because the power would only be available where any budget impact would be negligible. The government would be subject to fewer demands to enact minor law changes and resources could be focussed on more significant issues requiring law change.

Other risks

1.198 There could be the risk of adverse public perception that the Commissioner, being an unelected official, has the power to change taxation laws. Such a perception may undermine confidence in the taxation system. Another risk could be public perception that lobby groups influence issues which are considered. To mitigate this risk, the Commissioner must be satisfied that any appropriate and reasonably practicable consultation has been undertaken before exercising the power and therefore it is expected that the Commissioner would be expected to consult with the public to ensure transparency before exercising the Remedial Power.

1.199 This proposal could also be perceived to be in conflict with the Government's deregulation policy as it creates an additional body of law for entities to become familiar with.

7. Implementation and evaluation / review

1.200 Legislation is required to implement the proposal. The Commissioner would then exercise the power by making legislative instruments, which would be subject to parliamentary scrutiny and the scrutiny of the Senate Standing Committee on Regulations and Ordinances. The legislation providing the Commissioner with the power would be simple to implement. The Commissioner would establish governance arrangements to assist in managing the process for consideration of issues and to ensure the proper and transparent exercise of the Remedial Power. The Commissioner would also conduct any appropriate and reasonably practicable public consultation prior to exercising the power.

1.201 The Minister would have the discretion to seek a review of the operation of the Remedial Power provisions within three to five years of the provisions commencing. A review of the operation of the provisions might include a review of the consultation undertaken prior to exercising the power, how issues were raised with the Commissioner and how long it took to resolve issues using the power. The person conducting the review would be required to give the Minister a written report. The Minister would be required to table the report before each House of Parliament within 15 sitting days of receiving the report.

Chapter 2
Primary producer income averaging

Outline of chapter

2.1 Schedule 2 to this Bill amends the *Income Tax Assessment Act 1997* (ITAA 1997) to allow primary producers to access income tax averaging 10 income years after choosing to opt out, instead of that choice being permanent.

2.2 This assists primary producers as averaging only recommences when it is to their benefit (they receive a tax offset) and they can still opt out if averaging no longer suits their circumstances.

Context of amendments

2.3 Income tax averaging smooths out the income tax liability of eligible individuals from year to year. Broadly, this is achieved by providing a tax offset to a taxpayer where their income is higher than average or requiring them to pay extra income tax where their income is lower than average.

2.4 For tax averaging to apply to an individual taxpayer they must satisfy the following basic conditions:

- be carrying on a primary production business for two or more income years in a row; and
- for at least one of those income years, have a basic taxable income that is less than or equal to basic taxable income in the next income year.

2.5 Primary producers may choose to opt out of the averaging rules, but if they do so, this choice applies permanently.

2.6 If primary producers face a permanent reduction of income for retirement or other reasons, they can choose to discontinue and re-start averaging from a fresh ‘year 1’ in line with the averaging rules.

Summary of new law

2.7 This Schedule amends the law so that primary producers can re-access the benefits of income tax averaging 10 income years after opting out. If a primary producer wants to opt out again, they may still do so, but that choice to opt out is effective for 10 income years.

Comparison of key features of new law and current law

New law	***Current law***
Primary producers can access income tax averaging 10 income years or more after they opted out.	Once a primary producer has opted out of income tax averaging it cannot be applied in any future years.

Detailed explanation of new law

2.8 The amendments replace the permanent choice to opt out of income tax averaging with a choice which is effective for 10 income years. ***[Schedule 2, item 3, subsection 392-25(1)]***

2.9 After the 10 year opt-out period has ended, primary producers are effectively treated as new primary producers in applying the basic conditions. ***[Schedule 2, item 2, subsection 392-10(3); note to subsection 392-10(3)]***

2.10 The averaging adjustment applies again to a taxpayer's assessment where the following conditions are satisfied:

- income tax averaging has not applied to the taxpayer because they permanently opted out 10 or more income years ago;
- the taxpayer is carrying on a primary production business for two income years in a row; and
- their basic taxable income in the first year (after the 10 year opt-out period has passed) is less than or equal to their basic taxable income in the later year.

2.11 If these basic conditions are not met, an averaging adjustment will not be made until they are met in a later income year.

Table 2.1: Explanation of the amendments using the 2016-17 income year as an example

2.12 This table shows how the measure works for primary producers who permanently opted out of income averaging in 2006-07 (or any previous income year).

Income year	Year	Measure
2006-07	1	Primary producer has permanently opted out of income tax averaging for this income year (or any previous income year).
2007-08	2	
2008-09	3	
2009-10	4	
2010-11	5	**10 year waiting period**
2011-12	6	
2012-13	7	
2013-14	8	
2014-15	9	
2015-16	10	
2016-17	1	Income tax averaging automatically starts to reapply as if you were a new primary producer.
2017-18	2	Year 2: offset becomes available if the basic conditions met.

2.13 The 10 year waiting period illustrated above applies to primary producers who opted out in any subsequent income years.

Example 2.1: Primary producer who opted out less than 10 years ago

Amy, an orchardist, opted out of the averaging regime in 2009-10. Under the existing law, her choice to opt out was permanent. Under the new law, Amy is eligible to re-access income tax averaging in the 2019-20 income year when 10 income years have passed. If she runs a primary production business for two years in a row (after the 10 year opt-out period) and the second year of which her basic taxable income is more or equal to the first year, she is eligible for a tax offset.

If Amy has no change in her basic taxable income, no tax offset is payable because her average income is the same as her basic taxable income in each year. If she earns more in year 2, a tax offset is payable.

This means the first year Amy is eligible for a possible tax offset under the averaging rules is the 2020-21 income year.

2.14 In applying the basic conditions after the 10 year opt-out period has passed, none of the years in the opt-out period can be counted for the purposes of income tax averaging. ***[Schedule 2, item 2, subsection 392-10(3)]***

Example 2.2: Income years in the opt-out period are not averaged once opt-out period has ended

It is now the 2016-17 income year. Christine opted out of averaging in 2006-07 and ceased primary production activities for several years commencing in 2010-11. Christine was carrying on a primary production business in both the 2015-16 and 2016-17 income years. Further, her basic taxable income for 2015-16 was less than her basic taxable income in the current year (2016-17).

Whilst the amendments apply from the 2016-17 income year, Christine is not eligible for a tax offset until the 2017-18 income year. The measure takes past years into account for the purposes of working out the 10 income year exclusion period, but it does not operate retrospectively.

Upon re-accessing income tax averaging, none of the income years which are subject to the 10 year opt-out period can be taken into account when applying section 392-10.

Accordingly, the first year of the two year eligibility period under section 392-10 is the 2016-17 income year, and not the 2015-16 income year (or any prior year) which fall within the 10 year opt-out period.

2.15 Taxpayers who opted out of the averaging rules prior to the 2006-07 income year may re-access income tax averaging as 10 income years or more have passed since they opted out. ***[Schedule 2, item 3, subsection 392-25(1)]***

Example 2.3: Primary producer who opted out more than 10 years ago

Max is a wool grower who opted out of income tax averaging in the 2002-03 income year. Max leased the farm to another operator and moved into a town for work. Now the farm is productive again and the lease has expired.

Max has decided to farm sheep for wool production again. For the 2016-17 income year, he makes a reasonable profit. For the 2017-18 income year, he continues to run a primary production business and his basic taxable income is more than in the 2016-17 income year.

Under the existing law, Max could not benefit from income tax averaging as he opted out and that had permanent effect. As a result of these changes, when he lodges his income tax return for 2017-18, the Commissioner of Taxation applies income tax averaging again, and Max receives a tax offset.

2.16 Primary producers may still opt out where it does not suit their circumstances, and where they do so the choice applies for 10 income years. ***[Schedule 2, item 3, subsection 392-25(1)]***

Example 2.4: Primary producer who is eligible to automatically re-access averaging but does not want to

Mirabel opted out of income tax averaging for the 2003-04 income year. It is now the 2017-18 income year and she has been operating a primary production business for 2016-17 and 2017-18 and earned more basic taxable income in the latter year than in the former.

Although she is eligible for a tax offset, this does not suit her circumstances so she makes a choice not to access averaging for the 2017-18 income year by opting out again. The choice is effective for the next 10 income years and the next time she is eligible for an automatic tax offset, if the standard conditions are met, is the 2028-29 income year.

2.17 If taxpayers have opted out and wish to extend the opt-out period, this decision is valid for the subsequent 10 years. They cannot extend the opt-out period to, say, 15 years by making a further choice to opt out when they are still in the initial 10 income year opt-out period. ***[Schedule 2, item 3, subsection 392-25(1A)]***

Example 2.5: Taxpayers cannot extend the opt-out period while within it

Michelle opted out of income averaging for the 2013-14 income year. It is now the 2018-19 income year. Michelle decides she does not want to have her income tax liability averaged until another 10 years have passed. However, she cannot make another choice to opt out until averaging is again available in 2023-24. She cannot opt out for another 10 years from 2018-19 because she is already in a 10 year opt-out period.

Consequential amendments

2.18 The amendments update subsection 392-5(6) to reflect that the choice not to have an income tax liability adjusted under Division 392 is effective for 10 income years, rather than for life. ***[Schedule 2, item 1, subsection 392-5(6)]***

Application and transitional provisions

2.19 The amendments apply for the 2016-17 income year and later income years. ***[Schedule 2, item 5]***

2.20 This Schedule applies prospectively, with the first possible averaging year being the 2016-17 income year and the benefit of the tax offset being available from the 2017-18 income year (at the earliest). ***[Schedule 2, item 2, subsection 392-10(3); note to subsection 392-10(3)]***

2.21 Although the measure applies for the 2016-17 income year and later income years, the tax offset will not be available until the second year after commencement because income from two income years must be averaged in order for the Commissioner of Taxation to pay an averaging tax offset.

2.22 Primary producers must have opted out from averaging in the 2006-07 income year or any previous year in order for the benefit of averaging to apply to the 2017-18 income year (at the earliest).

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Primary producer income averaging

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

Overview

2.24 This Schedule amends the ITAA 1997 to allow primary producers to access income tax averaging 10 income years after choosing to opt out, instead of that choice being permanent.

2.25 This Schedule benefits primary producers as averaging only recommences when it is to their benefit (they receive a tax offset). It allows a primary producer to opt out again if averaging no longer suits their circumstances.

Human rights implications

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

Conclusion

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

Chapter 3
Cars for display by public institutions

Outline of chapter

3.1 Schedule 3 to this Bill amends the *A New Tax System (Luxury Car Tax) Act 1999* (LCT Act) to provide relief from luxury car tax (LCT) to certain public institutions that import or acquire luxury cars for the sole purpose of public display. The changes apply to public museums, galleries, and libraries that are registered for goods and services tax (GST) and that have been endorsed as a deductible gift recipient (DGR).

Context of amendments

Luxury car tax

Importations of luxury cars

3.2 An entity that makes a taxable importation of a luxury car is required to pay LCT on the importation. The definition of 'luxury car' is contained in the LCT Act and covers cars whose value exceeds the LCT threshold.

3.3 An entity makes a taxable importation of a luxury car if:

- the car is imported; and
- the entity enters the car for home consumption.

3.4 'Entry for home consumption' is a concept used in the customs law and generally means that particular imported goods have passed out of customs control.

3.5 There are a number of exemptions in the current law that can prevent an importation from being a taxable importation. As such, an entity that would otherwise make a taxable importation does not have to pay LCT if:

- the entity quotes their ABN for the importation;
- LCT has already become payable in respect of the car;
- the car is an import covered by items 10, 11, 15, 18, 21 or 24 in Schedule 4 to the *Customs Tariff Act 1995*; or
- the car is re-imported after being subject to LCT.

3.6 An entity that quotes their ABN for the importation of a luxury car is generally registered for GST and the car is usually held as trading stock, used in research and development, or exported.

3.7 In broad terms, items 10, 11, 15, 18, 21 and 24 in Schedule 4 to the *Customs Tariff Act 1995* cover duty-free importations of goods relating to foreign government use, foreign military service use, personal effects of travellers or crew, warranty and safety recalls, repair and export, and deceased estates.

Supplies of luxury cars

3.8 Similarly, a supplier that makes a taxable supply of a luxury car is required to pay LCT on the supply. A supply of a luxury car is a taxable supply if:

- the supply is made in the course of an enterprise that the supplier carries on;
- the supply is connected with the indirect tax zone; and
- the supplier is registered for GST or required to be registered.

3.9 There are a number of exceptions in the current law that can prevent a supply from being a taxable supply. As a result, the supplier of a luxury car does not have to pay LCT if:

- the recipient quotes their ABN for the supply;
- the car is more than two years old; or
- the car is exported, and the export is GST free.

3.10 As with the quotation exemption for the importation of luxury cars, a recipient that quotes their ABN for a supply of a luxury car is generally registered for GST, and the car is usually held as trading stock, used in research and development, or exported.

3.11 For the purposes of the LCT Act, a car is more than two years old at the time of a supply if:

- where the car was not imported - it was manufactured more than two years before the time of supply; or
- where the car was imported - it was entered for home consumption more than two years before the time of supply.

LCT adjustments

3.12 Particular events or changes in circumstances that occur after a car is imported or supplied can mean that too much or too little LCT was paid by the importer or supplier at the time of the importation or supply.

3.13 To ensure that the correct amount of LCT is ultimately imposed on an importation or supply, adjustments are made to increase or decrease an entity's net amount for a tax period. Depending on the circumstances, these adjustments can be made by the importer, supplier, or recipient of a car.

3.14 Examples of adjustments that can occur are:

- An increasing LCT adjustment for the importer of a luxury car, where no LCT was payable on the importation because the importer quoted for the importation, but the importer later used the car for a purpose other than a quotable purpose (such as no longer holding the car as trading stock).
- A decreasing LCT adjustment for the supplier of a luxury car, where LCT was payable on the supply but no consideration for the supply was received, and the supplier writes-off the consideration owed as a bad debt.

Works of art and collectors' items

3.15 While LCT is payable on a luxury car that is imported or supplied for the purpose of public display (unless one of the existing exemptions apply), the importation of a luxury car is exempt from customs duty if:

- the car is a work of art or a collectors' item;
- the car is consigned to certain public institutions (including museums, galleries, and libraries); and

- the institution is endorsed as a DGR under Subdivision 30-BA of the *Income Tax Assessment Act 1997* (ITAA 1997).

3.16 This exemption from customs duty is provided by item 7 of Schedule 4 to the *Customs Tariff Act 1995* (referred to subsequently as item 7). The exemption in item 7 is not specific to luxury cars – it applies to works of art and collectors' items generally.

3.17 While the DGR condition is set out in item 7 itself, the considerations that are relevant in determining when a work of art or collectors' piece is covered by item 7 are determined by reference to the following international agreements 'applying' to the work of art or collectors' piece:

- Annex B to the *Agreement on the Importation of Educational, Scientific and Cultural Materials 1950*; and

- Annex B to the *Protocol to the Educational, Scientific and Cultural Materials Agreement*, being the Protocol concluded at Nairobi on 26 November 1976.

Summary of new law

3.18 Schedule 3 to this Bill amends the LCT Act to provide an exemption from LCT for the importation of luxury cars. The amendments also provide a decreasing LCT adjustment to recipients of luxury cars for LCT paid on the supply of a luxury car.

3.19 The changes apply to importations and acquisitions by public museums, galleries and libraries that are registered for GST and that have been endorsed as a DGR. In order for an exemption or adjustment to apply, the luxury car that is imported or acquired must be either a work of art or collectors' piece, and must have been imported or acquired for the sole purpose of public display.

3.20 These amendments also introduce other adjustment rules to increase the importer or recipient's liability to LCT where the car is used for a purpose other than public display, or supplied to another entity.

Comparison of key features of new law and current law

New law	*Current law*
Importations of luxury cars	
An importation of a luxury car that is a work of art or collectors' piece is exempt from LCT if it is imported by a public museum, gallery, or library that is registered for GST and endorsed as a DGR, and the DGR imports the car for the sole purpose of publicly displaying it.	There is no specific exemption from LCT for an importation of a luxury car that is a work of art or collectors' piece. Importations of such cars are subject to LCT unless they are covered by another exemption.
Acquisitions of luxury cars	
A public museum, gallery, or library that is registered for GST and endorsed as a DGR and which paid LCT on the acquisition of a luxury car that is a work of art or collectors' piece, has a decreasing LCT adjustment if the DGR acquired the car for the sole purpose of publicly displaying it, and the car was not used for any other purpose from the time the car was acquired.	No equivalent.
Increasing LCT adjustments	
A public museum, gallery, or library that qualifies for an exemption or decreasing LCT adjustment in relation to a luxury car as a result of these amendments has an increasing LCT adjustment if the car is subsequently used for a purpose other than public display, or it is supplied to another entity. However, the increasing LCT adjustments do not apply to supplies made to another entity that is also a public museum, gallery, or library that is registered for GST and endorsed as a DGR, and the other entity acquires the car solely for the purpose of public display.	No equivalent.

Detailed explanation of new law

LCT exemption for luxury cars imported for public display

3.21 These amendments provide an additional exception to when an importation is a taxable importation under the LCT rules.

3.22 This exception applies to the importer of a luxury car if particular conditions are satisfied. Where the exemption applies to an entity, the importer does not make a taxable importation for the purposes of the LCT Act. ***[Schedule 3, item 1, paragraph 7-10(3)(ba)]***

3.23 Some of these conditions are directly linked to the requirements for the exemption from customs duty in item 7. To the extent the two exemptions are aligned, the considerations for determining if the customs exemption applies are relevant in determining if the importation of the car is exempt from LCT.

3.24 As a result of these amendments, the importer of a luxury car does *not* make a taxable importation if:

- the importer is a public museum, gallery, library or institution that is registered for GST and endorsed as a DGR under items 12.1.2 to 12.1.5 of the table in subsection 30-100(1) of the ITAA 1997;
- the car is consigned to the importer;
- the car is a work of art or collectors' piece; and
- the car is imported for the sole purpose of public display.

[Schedule 3, item 1, paragraph 7-10(3)(ba)]

3.25 The conditions about the car being a work of art or collectors' piece are due to the requirement that the car must be 'covered by item 7 in Schedule 4 to the Customs Tariff'. ***[Schedule 3, item 1, subparagraph 7-10(3)(ba)(i)]***

3.26 Item 7 requires that Annex B to the *Agreement on the Importation of Educational, Scientific and Cultural Materials 1950*, or Annex B to the *Agreement on the Importation of Educational, Scientific and Cultural Materials 1950* apply to a particular work of art or collectors' piece. The requirement about the car being a work of art or collectors' piece ensures that the exemption is restricted to the types of luxury cars that are typically placed on public display by a museum, gallery or library. The annexes to those agreements describe the types of

works of art or collectors' pieces to which they apply. Although these parts of the relevant agreements are not specific to luxury cars, they are applicable to cars that are works of art or collectors' pieces. Whether a particular car qualifies for this LCT exemption depends on the nature of the car. It is expected that in most cases the reason that a gallery, museum or library will display a car is because of its cultural or historic significance. Given this, there is expected to be a very strong correlation between the types of cars that are imported by such institutions for this purpose, and the status of these cars as a work of art or collectors' piece under item 7. However, the mere fact of public display is not of itself sufficient to determine that a particular car satisfies the conditions in item 7– it must be able to be objectively determined that the car is a work of art or collectors' piece.

Importer must be registered for GST and endorsed as a DGR

3.27 Item 7 also requires that the relevant work of art or collectors' piece be consigned to a museum, gallery, or library that is endorsed as a DGR. In broad terms, the endorsement rules referred to in item 7 cover public museums, public art galleries and public libraries, as well as institutions consisting of two or more of these types of organisations.

3.28 In contrast to the customs duty exemption provided by item 7 (which can apply to any entity that imports a work of art or collectors' piece, provided the thing imported is consigned to a public institution), the LCT exemption for importations only applies to importations of luxury cars in relation to which the importer is also the relevant public institution to which the car is consigned. ***[Schedule 3, item 1, subparagraph 7-10(3)(ba)(ii)]***

3.29 The LCT exemption for importations is restricted in this way because of the additional public display requirements that must be satisfied by a public institution and the fact that the increasing LCT adjustments for changes in use or a supply of the car to another entity (explained in further detail below) only apply to the public institution.

3.30 In addition, the importer must be registered for GST. Because they affect an entity's net amount, increasing and decreasing LCT adjustments can only apply to entities that are registered for GST. Requiring an importer to be registered for GST aligns the public display exemption for imports with the decreasing LCT adjustment for supplies of luxury cars that are publicly displayed. It also ensures that the increasing LCT adjustment rules for changes in use or on-supplies can be applied to the importer (the decreasing LCT adjustment and increasing LCT adjustment rules introduced by these amendments are explained in further detail below).

Luxury car must be imported for the sole purpose of public display

3.31 For the exemption from LCT to apply, the importer of the car must import the car for the sole purpose of public display. ***[Schedule 3, item 1, subparagraph 7-10(3)(ba)(iii)]***

3.32 The term 'public display' takes its ordinary meaning, and means that the car must be exhibited or shown in an environment that is accessible to the general community (for example, it must be displayed in a museum that is open to the general public).

3.33 While a reasonable fee for entry (for example, to enter the relevant institution or to access an event that was organised by the institution) for viewing the car would be within the scope of the public display requirement, prohibitive conditions such as an exclusive membership requirement or an excessive fee for viewing the car would not constitute public display.

3.34 Because the exemption prevents a car from being a taxable importation, the question about intended use must be answered at the time that the importer enters the car for home consumption. The test is forward looking in the sense that it relates to intended use rather than evidence of the way the car is ultimately used. While an importer must take a reasonable position about their intended use of the car after it is imported, any future changes in use that take the car outside of the scope of the public display requirement will be picked up by the increasing LCT adjustment rules (explained below).

3.35 The requirement that the car is imported for the 'sole' purpose of publicly displaying it precludes the car from being used for other purposes (for example, by staff or associates of the relevant public institution using the car for private transport or enjoyment). However, it does permit uses of the car that are ancillary to the public display purpose, for example:

- staff of the public institution transporting the car to a place where it is to be publicly displayed;
- incidental storage of the car whilst not on public display; or
- restoration or maintenance of the car in preparation for public display.

3.36 In such cases, an ancillary use of the car that supports the public display purpose would be consistent with a sole purpose of public display, and would not prevent the LCT exemption from applying.

Decreasing LCT adjustment for luxury cars acquired solely for public display

3.37 These amendments also provide a decreasing LCT adjustment to the recipient of a taxable supply of a luxury car. ***[Schedule 3, item 2, subsection 15-30(1A)]***

3.38 Providing relief from LCT on the supply of a luxury car through an adjustment for the recipient of the supply is a different approach to the exemption provided for importations. Despite this difference, the outcome for the entity that acquires the car is ultimately the same. The reason for taking this different approach is that, in contrast to the exemption for importations (which only applies where the importer is the institution that publicly displays the car), the acquisition of a luxury car involves an additional party (being the supplier).

3.39 The conditions for when relief from LCT is available for the acquisition of a luxury car are essentially the same as when an importation is exempt from LCT. Some of these conditions will be difficult for the supplier of a luxury car to easily or objectively ascertain at the time of supply as they relate to the status of the recipient, and their subjective purpose in acquiring the car.

3.40 Given this, providing a decreasing LCT adjustment to the recipient of the car is appropriate because it means that the recipient, rather than the supplier, is responsible for obtaining relief from LCT on the supply of a luxury car.

3.41 As a result of these amendments, the recipient of a supply of a luxury car has a decreasing LCT adjustment if:

- the recipient is registered for GST at the time of the supply;
- LCT is payable on the supply;
- had the recipient imported the car for the same purpose that they have in acquiring it, LCT would not have been payable on the importation because of the public display exemption introduced by these amendments; and
- the recipient does not intend to use the car, or permit it to be used, for any other purpose.

[Schedule 3, item 2, subsection 15-30(1A)]

3.42 The requirement that the recipient be registered reflects that LCT adjustments are only available to registered entities because they affect net amounts. Similarly, the increasing adjustments that apply for a change in use or supply of the luxury car to another entity can only apply to registered entities, and as such it is appropriate to limit the relief from LCT to entities that can also have an increasing LCT adjustment.

3.43 The requirement that LCT is payable on the supply ensures that the recipient of a luxury car does not have a decreasing LCT adjustment in respect of a supply that also qualified for an exemption from LCT (for example, the supply of a luxury car that was more than two years old). Providing a decreasing adjustment in such circumstances would provide the recipient with a double benefit because they would not have been charged LCT on the supply, and would also benefit from a decreasing adjustment.

3.44 Requiring the recipient of the luxury car to determine whether they would have qualified for an exemption for the car as a result of these amendments if they had imported the car ensures that the primary considerations for the importation exemption and obtaining a decreasing LCT adjustment are aligned.

Solely for public display

3.45 In working out whether the public display exemption would have applied to the importation of the luxury car, the recipient must satisfy all of the conditions contained in that exemption. These conditions are that:

- the car being consigned to the recipient, and the recipient being a public museum, gallery, library or an institution that is endorsed as a DGR under items 12.1.2 to 12.1.5 of the table in subsection 30-100(1) of the ITAA 1997;
- the car's status as a work of art or collectors' piece; and
- the car being imported for the sole purpose of public display.

3.46 Whether the car is a work of art or collectors' piece, or the recipient is a public museum, gallery, library, or institution endorsed as a DGR under the relevant provisions will be determined by its actual status at the time of importation.

3.47 In contrast, the requirement about the sole purpose of public display relies on the recipient's purpose for importing the car in the hypothetical importation. To determine whether these conditions are satisfied, the purpose for which the recipient actually acquired the car is

taken to be the purpose for which it imported the car in the hypothetical importation.

Amount of the decreasing LCT adjustment

3.48 Where the recipient of a supply of a luxury car has a decreasing LCT adjustment because of these amendments, the amount of the adjustment is equal to the amount of LCT that was payable on the supply through which the recipient acquired the car.

3.49 The amount of this decreasing LCT adjustment is determined through the existing provisions in section 15-30. Specifically, subsection 15-30(2) already states that the amount of a decreasing LCT adjustment is equal to the amount of LCT that was payable on a supply – this existing rule extends appropriately to the decreasing LCT adjustment introduced by these amendments.

Increasing LCT adjustments for luxury cars

3.50 Increasing LCT adjustments apply to an importer or recipient of a luxury car if there is a change in circumstances that would have prevented the importer or recipient from qualifying for an exemption from LCT or a decreasing LCT adjustment for public display.

3.51 These adjustments apply where either no LCT was payable by the importer of a car because of the importation exemption for public display, or where the recipient of a car had a decreasing LCT adjustment for acquiring the car for the sole purpose of public display. ***[Schedule 3, items 3 and 4, subsection 15-30(3A) and subsection 15-35(3A)]***

3.52 An increasing LCT adjustment can apply where there is a change in use or a supply of the luxury car to another entity. In such circumstances, the amendments ensure that the importer or recipient of a luxury car that benefits from these amendments continues to hold the car, and use it for the sole purpose that qualified it for the exemption or decreasing adjustment.

3.53 These increasing LCT adjustments apply to changes in circumstances that occur after the time of importation or acquisition, but are subject to the four year limitation in subsection 13-10(2) that applies to LCT adjustments generally.

Increasing LCT adjustment for changes in use

3.54 An importer or recipient has an increasing LCT adjustment in relation to their importation or acquisition of a luxury car if:

- they use the car, or allow it to be used; and
- had that use been the purpose for which they imported or acquired the car, the importer or recipient would not have qualified for the public display exemption or decreasing LCT adjustment.

[Schedule 3, items 3 and 4, subparagraph 15-30(3A)(c)(i) and subparagraph 15-35(3A)(c)(i)]

3.55 The increasing adjustments for changes in use ensure that an entity that imports or acquires a luxury car for the sole purpose of public display does not retain the benefit of an exemption from LCT, or a decreasing LCT adjustment, if they subsequently use the car in a way that is inconsistent with the purpose for which the relevant public display concession from LCT was obtained.

3.56 An example of a change in use that would cause an increasing LCT adjustment of this kind is where a public museum qualifies for an exemption from LCT on the importation of a luxury car for the sole purpose of public display, but permits the director of that museum to use the car for private purposes. In such circumstances, the importer would be required to make an increasing adjustment to negate the effect of the exemption from LCT that was originally claimed.

3.57 However, consistent with the explanation above about the requirement that a luxury car be imported solely for the purpose of public display, uses of a particular luxury car that are ancillary to the purpose of public display (for example, transport of the car to a venue for the purpose of publicly displaying it) are consistent with a purpose of public display of the car. In such circumstances, the ancillary use would not result in a decreasing LCT adjustment of the kind imposed by these amendments.

Increasing LCT adjustment for supplies to other entities

3.58 An importer or recipient will also have an increasing LCT adjustment in relation to their importation or acquisition of a luxury car if they supply the car to another entity. ***[Schedule 3, items 3 and 4, subparagraph 15-30(3A)(c)(ii) and subparagraph 15-35(3A)(c)(ii)]***

3.59 The increasing adjustment for supplies to other entities ensures that the importer or recipient of a luxury car does not retain the benefit they obtained through an exemption or decreasing LCT adjustment that

they received on importing or acquiring the car if they subsequently decide to supply it to another entity (subject to the exception below). In such cases, the importer or recipient will have an increasing adjustment to negate the effect of the exemption or decreasing LCT adjustment that was originally claimed.

Increasing LCT adjustments do not apply to certain supplies made to other public institutions

3.60 The increasing LCT adjustments for supplies to other entities do not apply if, had the other entity imported the car for the same purpose that they acquired it from the first entity, LCT would not have been payable on that importation because of the public display exemption introduced by these amendments. ***[Schedule 3, items 3 and 4, subsection 15-30(3B) and subsection 15-35(3B)]***

3.61 This restriction prevents the increasing LCT adjustments introduced by these amendments from applying to a public institution that supplies a luxury car to another public institution that also acquires the car for the sole purpose of public display.

3.62 The considerations outlined above in relation to decreasing LCT adjustments for the recipients of luxury cars are also relevant in determining if a supplier is required to make an increasing LCT adjustment for supplying a luxury car to another entity.

3.63 In contrast to decreasing LCT adjustments (which are assessed by the recipient), the supplier of a luxury car will need to make this assessment. Requiring the supplier to make this assessment is appropriate given that the restriction on increasing LCT adjustments is intended to be limited to circumstances in which the supplier is actually aware that they are supplying the car to another public institution that is endorsed as a DGR, and that acquires the car for the purpose of publicly displaying it.

3.64 For supplies of cars that are less than two years old (within the meaning of the LCT Act), the recipient will also need to make this assessment in order to have a decreasing LCT adjustment for the supply.

Amount of the increasing LCT adjustments

3.65 The existing rules for determining the amount of an increasing LCT adjustment relate to adjustments related to an exemption from LCT that was claimed because the importer quoted for the importation, and for a decreasing adjustment that applied.

3.66 Where the recipient of a supply of a luxury car has an increasing LCT adjustment because of these amendments, the amount of

the adjustment is equal to the amount of the decreasing LCT adjustment to which the recipient was entitled when they acquired the luxury car.

3.67 The amount of this increasing LCT adjustment is determined through the existing rules in section 15-30. Specifically, paragraph 15-30(4)(b) already provides for increasing LCT adjustments that arise because a decreasing LCT adjustment previously applied. The amount of increasing LCT adjustment of this kind is equal to the amount of the recipient's original decreasing LCT adjustment.

3.68 However, the existing rules are not relevant to the increasing LCT adjustment introduced by these amendments that relates to importers that claimed the public display exemption from LCT.

3.69 To ensure that increasing LCT adjustments of this kind are dealt with appropriately, the amount of these increasing LCT adjustments is equal to the amount of LCT that would have been payable by the importer had the public display exemption not applied.

3.70 This approach ensures that the importer is returned to the position that they would have been in had they not claimed the LCT exemption. ***[Schedule 3, item 5, paragraph 15-35(4)(c)]***

Example 3.1: Supply to another entity with no increasing LCT adjustment

Public Museum is registered for GST and endorsed as a DGR. Public Museum imports a luxury car that is a collectors' item, and is entitled to an exemption from LCT for the import because it intends to use the car solely for the purpose of publicly displaying it.

Public Museum uses the car solely for the purpose of public display but then sells it to Public Gallery. Public Gallery is also registered for GST and endorsed as a DGR, and acquires the car solely for the purpose of publicly displaying it.

Despite supplying the luxury car to another entity, Public Museum does not have an increasing LCT adjustment.

This is because Public Museum has, based upon information it has received from Public Gallery, determined that if Public Gallery had imported the luxury car for the purpose that it acquired it (that is, for the sole purpose of publicly displaying the car), LCT would not have been payable by Public Gallery because of the exemption from LCT in paragraph 7-10(3)(ba).

In addition, if the supply of the luxury car is a taxable supply (for example, because the supply is made within two years of Public Museum importing the car), the supply may be a taxable supply for LCT purposes. In such circumstances, although Public Museum

will charge Public Gallery for the LCT payable on the supply, Public Gallery will also be entitled to a decreasing LCT adjustment in relation to the supply.

Example 3.2: Supply to another entity with an increasing LCT adjustment

Public Institution is registered for GST and endorsed as a DGR. Public Institution imports a luxury car that is a collectors' item, and is entitled to an exemption from LCT for the import because it intends to use the car solely for the purpose of publicly displaying it.

Public Institution initially uses the car solely for the purpose of public display but then sells it to a private collector. The collector acquires the car for a private purpose, and does not satisfy the public display, GST registration, or DGR requirements. As a result, Public Institution has an increasing LCT adjustment when it supplies the car to the private collector.

However, if the supply of the luxury car is a taxable supply (for example, because the supply is made within two years of Public Institution importing the car), the LCT payable by Public Institution on the supply is reduced by the amount of the increasing LCT adjustment that Public Institution has as a result of supplying the car. This is because subsection 5-15(2) results in the LCT payable on a supply being reduced by any LCT applied to a previous sale or importation of a luxury car, and the increasing LCT adjustment has the effect of applying LCT to the importation.

Application and transitional provisions

3.71 These amendments apply to importations and supplies that are made, and importations that occur from the day after which this Schedule receives Royal Assent. ***[Schedule 3, item 6]***

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Luxury car tax – exemption for cars for display by public institutions

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

Overview

3.73 Schedule 3 to this Bill amends the *A New Tax System (Luxury Car Tax) Act 1999* to allow certain public institutions that have been endorsed as a deductible gift recipient to acquire cars, either by supply or importation, free of luxury car tax.

3.74 The exemption only applies to luxury cars that constitute a work of art or collector's piece which are acquired for the sole purpose of public display, consigned to the collection and not used for private purposes.

Human rights implications

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

Conclusion

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

Chapter 4
Miscellaneous amendments

Outline of chapter

4.1 This Schedule makes a number of miscellaneous amendments to the taxation, superannuation and other laws. These amendments are part of the Government's commitment to the care and maintenance of the taxation and superannuation systems.

4.2 These amendments include style and formatting changes, the repeal of redundant provisions, the correction of anomalous outcomes and corrections to previous amending Acts.

Context of amendments

4.3 Miscellaneous amendments to the taxation and superannuation laws such as those contained in Schedule 4 are periodically made to remove anomalies and correct unintended outcomes. Progressing such amendments gives priority to the care and maintenance of the tax system, a process supported by a recommendation of the 2008 Tax Design Review Panel, which was appointed to examine how to reduce delays in the enactment of tax legislation and improve the quality of tax law changes.

Summary of new law

4.4 These miscellaneous amendments address technical deficiencies and legislative uncertainties within the taxation, superannuation and other laws.

4.5 Schedule 4 contains the following Parts:

- Part 1: Community Development Employment Projects (CDEP) Scheme
- Part 2: Other amendments of principal Acts
- Part 3: Amendments of amending Acts
- Part 4: Repeals of Excise Tariff Acts

- Part 5: Other repeals

Detailed explanation of new law

Part 1 - CDEP Scheme

Consequential amendments to the tax law following the cessation and repeal of the Community Development Employment Projects Scheme

Context of the amendments

4.6 The CDEP Scheme operated from 1977 as a means of assisting Indigenous job-seekers to find and retain employment. The CDEP Scheme was subsumed into the Remote Jobs and Communities Program in July 2013, and ceased operation on 1 July 2015. The *Social Security Legislation Amendment (Community Development Program) Bill 2015* (the SSLA Bill) will, if enacted, amend the social security law to reflect the cessation of the CDEP Scheme. This Schedule amends the taxation law to remove redundant references to the CDEP Scheme.

Detail of the amendments

4.7 Prior to the amendments made by this Schedule, an amount paid under Part 3.15A of the *Social Security Act 1991* (the SSA) was considered a 'rebatable benefit' under paragraph 160AAA(1)(a) of the ITAA 1936.

4.8 Following cessation of the CDEP Scheme itself, the whole of Part 2.27 (Northern Territory CDEP Transition payments) and Part 3.15A (CDEP Scheme) of the SSA are repealed by the SSLA Bill. This Schedule removes the redundant inclusion of Part 2.27 and Part 3.15A payments from the definition of 'rebatable benefit'. ***[Schedule 4, items 1 and 7, paragraphs 160AAA(a) and 160AAA(d) of the ITAA 1936]***

4.9 Sections 202CB and 202CE of the ITAA 1936 respectively relate to the requirement for recipients of eligible PAYG payments to quote their tax file number in a tax file number declaration, and the effect of incorrectly quoting a TFN. Paragraphs 202CB(6)(a) and 202CE(7)(a) state that earlier paragraphs in those sections do not apply to a person in receipt of a CDEP Scheme Participant Supplement.

4.10 This Schedule removes the words 'CDEP Scheme Participant Supplement' from those paragraphs as their inclusion is redundant following cessation of the CDEP Scheme. ***[Schedule 4, items 2 and 3, paragraphs 202CB(6)(a) and 202CE(7)(a) of the ITAA 1936]***

4.11 Prior to the amendments made by this Schedule, ***eligible pensioner*** was defined in paragraph 16(c) of the *Income Tax Rates Act 1986* as including a person to whom a compensation, pension, allowance or benefit was payable under Part 3.15A of the SSA.

4.12 With the repeal of Part 3.15A of the SSA, it is redundant to include Part 3.15A payments in the definition of 'eligible pensioner', and so the reference to Part 3.15A payments is removed from paragraph 16(c) of the *Income Tax Rates Act 1986*. ***[Schedule 4, item 4, paragraph 16(c) of the Income Tax Rates Act 1986]***

4.13 Subsection 12-110(1) of Schedule 1 of the TAA 1953 requires an entity to withhold an amount from a payment it makes to an individual if the payment is specified in that subsection. At paragraph 12-110(1)(d) of Schedule 1, a payment made under Part 3.15A of the SSA is listed as such a payment.

4.14 With the repeal of Part 3.15A, its inclusion in paragraph 12-110(1)(d) of the TAA 1953 is redundant, and so the paragraph is repealed. A minor grammatical amendment is also made to paragraph 12-110(1)(cb), because it will be the last item in the list. ***[Schedule 4, items 5 and 6, paragraphs 12-110(cb) and 12-110(d) in Schedule 1 of the TAA 1953]***

Application and transitional provisions

4.15 The amendments at items 1 to 12 and 8, commence at the same time as Part 1 of Schedule 2 to the *Social Security Legislation Amendment (Community Development Program) Act 2015* will commence, if enacted. This ensures that references to the CDEP Scheme in the tax law are repealed at the same time as the references to the CDEP Scheme in the social security law.

4.16 The amendment at item 7 also commences at the same time as Part 1 of Schedule 2 to the *Social Security Legislation Amendment (Community Development Program) Act 2015* will commence, if enacted. However, if item 146 of Schedule 12 to the *Omnibus Repeal Day (Spring 2015) Act 2015* commences at or before that time, the amendment does not commence at all. This is because item 146 of that Act contains a similar amendment.

4.17 Despite the amendments made by this Schedule to a particular provision, the provision continues to apply on and after commencement in relation to payments made under Part 2.27 or Part 3.15A prior to commencement. ***[Schedule 4, item 8]***

Parts 2 and 3 – Other amendments of principal Acts and amending Acts

Updating terminology in various provisions of the TAA 1953, ITAA 1997, ITAA 1936 and the GST Act 1999 to improve clarity in the law

4.18 Prior to the amendments made by this Schedule, ***Education Minister*** was defined in subsection 995-1(1) of the ITAA 1997 as the Minister administering the *Student Assistance Act 1973*. ***Education Secretary*** was defined as the Secretary of the Department administered by the Education Minister.

4.19 The term Education Minister was also used in section 177-10 of the GST Act, which also defined Education Minister by reference to the *Student Assistance Act 1973*.

4.20 Following the Administrative Arrangements Order made on 18 September 2013, responsibility for the *Student Assistance Act 1973* is moved from the Minister for Education to the Minister for Social Services. Therefore, since 18 September 2013, the legal meaning of the terms Education Minister and Education Secretary under the tax law did not accord with their ordinary meaning.

4.21 Therefore, this Schedule improves clarity by, wherever the terms appears in the TAA 1953, ITAA 1997, ITAA 1936 and the GST Act:

- replacing the term ‘Education Minister’ with ‘Student Assistance Minister’, which means the Minister administering the *Student Assistance Act 1973*; and
- replacing the term ‘Education Secretary’ with ‘Student Assistance Secretary’, which means the Secretary of the Department administered by the Student Assistance Minister.

[Schedule 4, items 9 to 18, 21, 22, 24, 28 to 30, 50, 79, 83, 90 and 91, subsections 6(1) and 202CB(6) of the ITAA 1936; item 2.1.7 in the table in subsection 30-25(1), subsections 52-131(9) (note) and 995-1(1), paragraphs 30-30(1)(c) and 30-30(1)(d) of the ITAA 1997; item 4 in the table in subsection 355-65(2) in Schedule 1 to the TAA 1953; subsection 177-10(3) and section 195-1 of the GST Act]

4.22 A reference to the Secretary of the Department of Education and Training has been retained in table item 5 of section 355-65(2). That table item currently allows taxation officers to share protected information with the Education Secretary for the purpose of administering any Commonwealth law relating to financial assistance to students. This includes both the *Student Assistance Act 1973* and the *Higher Education Support Act 2003*.

4.23 To ensure the scope of this ability to share information does not change, this Schedule allows information to be shared with both the Student Assistance Secretary and the Secretary of the Department administered by the Minister administering the *Higher Education Support Act 2003*. ***[Schedule 4, item 91, item 5 in the table in subsection 355-65(2) in Schedule 1 to the TAA 1953]***

4.24 This amendment applies in relation to records and disclosures of information on or after 18 September 2013 (regardless of when the information was acquired). This will ensure that the scope of taxation officers' ability to share protected information did not change when the responsibility for administering the *Student Assistance Act 1973* moved from the Minister for Education to the Minister for Social Services. ***[Schedule 4, subitem 92(1)]***

Removing duplicate reference in the Commonwealth Grants Commission Act 1973

4.25 Subsection 25(2) of the *Commonwealth Grants Commission Act 1973 (CGC Act)* concerns reports made by the Commonwealth Grants Commission under certain listed sections of the CGC Act being laid before Parliament. Prior to the amendments made by this Schedule, section 16AA was listed twice in subsection 25(2). This Schedule removes the extra reference to section 16AA. ***[Schedule 4, item 19, subsection 25(2) of the CGC Act]***

Repealing redundant paragraph of the definition of assessment in the ITAA 1936

4.26 Prior to the amendments made by this Schedule, the definition of ***assessment*** in section 6(1) of the ITAA 1936 included the ascertainment of an amount of additional tax under section 128TE (section 6(1)(f)). Section 128TE has been repealed. Therefore this Schedule repeals paragraph (f) of the definition of assessment because it is ineffective. ***[Schedule 4, item 20, subsection 6(1) (paragraph (f) of the definition of assessment) of the ITAA 1936]***

Updating the definition of securities dealer in the ITAA 1936 and ITAA 1997

4.27 Section 202A of the ITAA 1936 defines 'securities dealer' by reference to the *Securities Industry Act 1980*. However, the *Securities Industry Act 1980* was repealed in 2001 with the introduction of the *Corporations Act 2001*. Prior to the amendments made by this Schedule, the ITAA 1997 did not define securities dealer. This Schedule updates the definition in the ITAA 1936 and ITAA 1997 to refer to dealing in securities under the *Corporations Act 2001*, drawing on the definitions of 'deal' and 'securities' in that Act. ***[Schedule 4, items 23 and 81, subsection 995-1(1) of the ITAA 1997 and section 202A of the ITAA 1936]***

Duplication of word 'the' in the ITAA 1997

4.28 Subsection 25-25(4) of the ITAA 1997 sets out a method statement for working out how much you can deduct for borrowing expenses in an income year. Prior to the amendments made by this Schedule, the word 'the' was erroneously duplicated in step 1 of the method statement. This Schedule corrects the error. ***[Schedule, 4, item 26, subsection 25-25(4) of the ITAA 1997]***

Name changes for deductible gift recipients

4.29 Three deductible gift recipients changed their names because they changed entity type. These are technical and minor changes.

4.30 The amendments apply retrospectively. This ensures that all gifts collected by the entities after they changed name are lawful and tax deductibility for donations is preserved.

4.31 Given that the entities have not changed their activities or objects, the Australian Taxation Office has been administering the law by allowing deductions made on or after the names changed to the renamed entities. Therefore, retrospective application of the changes is beneficial to taxpayers.

National Trust of Australia (Queensland) Limited (ABN 85 836 591 486)

4.32 The National Trust of Queensland became a public company limited by guarantee, effective from 1 July 2014.

4.33 Schedule 4 updates the listing of The National Trust of Queensland to the National Trust of Australia (Queensland) Limited, effective for gifts or contributions made from 1 July 2014. ***[Schedule 4, items 27 and 33, item 6 in the table in section 30-15, and item 6.2.15 in the table in subsection 30-55(2) of the ITAA 1997]***

4.34 These amendments apply in relation to gifts or contributions made on or after 1 July 2014. ***[Schedule 4, item 34)***

RSPCA Australia (ABN 99 668 654 249)

4.35 R.S.P.C.A. Australia Incorporated became a public company limited by guarantee, effective from 10 July 2015.

4.36 Schedule 4 updates the listing of R.S.P.C.A. Australia Incorporated to RSPCA Australia, effective for gifts or contributions made from 10 July 2015. ***[Schedule 4, item 31, item 4.2.14 in the table in subsection 30-45(2) of the ITAA 1997]***

4.37 This amendment applies in relation to gifts or contributions made on or after 10 July 2015. ***[Schedule 4, item 32]***

Playgroup Queensland Ltd (ABN: 80 180 917 496)

4.38 Playgroup Queensland Incorporated became a public company limited by guarantee, effective from 17 December 2014.

4.39 Schedule 4 updates the listing of Playgroup Queensland Incorporated to Playgroup Queensland Ltd, effective for gifts or contributions made on or after 17 December 2014. ***[Schedule 4, item 35, item 8.2.6 in the table in subsection 30-70(2) of the ITAA 1997]***

4.40 This amendment applies in relation to gifts or contributions made on or after 17 December 2014. ***[Schedule 4, item 36]***

Consequential amendments

4.41 The index in Division 30 has been updated to reflect the amended listing for Playgroup Queensland Ltd. ***[Schedule 4, item 37, item 86C in the table in section 30-315 of the ITAA 1997]***

4.42 The index does not require consequential amendment for the name changes for the National Trust of Australia (Queensland) Limited or RSPCA Australia because the entries in the index are to 'National Trust bodies' and the 'Royal Societies for the Prevention of Cruelty to Animals', which are broad enough to cover the changes.

Removing incorrect references to determinations in various provisions of the ITAA 1997

4.43 Several provisions and notes in the ITAA 1997 refer to a determination made under subsection 250-150(3) of that Act. However, subsection 250-150(3) does not provide for the making of determinations. This Schedule amends the language in these provisions and notes to remove the references to determinations. ***[Schedule 4, items 38, 41 to 49, paragraph 40-25(8)(a), subsections 40-525(1), (2), (3) and (4) (paragraph (a) of the note), subsection 40-630(1) (paragraph (a) of the note), subsection 40-730(1) (paragraph (a) of the note), subsection 40-735(1) (paragraph (a) of note 2), subsection 40-750(1) (paragraph (a) of note 2), subsection 40-755(1) (paragraph (a) of the note), section 40-835 (paragraph (a) of the note), subsection 40-880(1) (paragraph (a) of the note) and subsection 43-140(1) (paragraph (a) of note 2) of the ITAA 1997]***

4.44 Additional references to subsection 250-150(3) of the ITAA 1997 in section 40-525 of that Act are updated to more correctly describe the application of that subsection. The references to determinations in those references have already been removed by Schedule 2 to the *Tax Laws Amendment (Small Business Measures No. 2) Act 2015*. ***[Schedule 4, item 41, subsections 40-525(1), (2), (3) and (4) (paragraph (a) of the note) of the ITAA 1997].***

Incorrect paragraph reference in a note in the ITAA 1997

4.45 The *Tax and Superannuation Laws Amendment (2015 Measures No. 2) Act 2015* inserted a note into subsection 40-180(4) of the ITAA 1997. Prior to the amendments made by this Schedule, the note referred to reducing the first element of cost under section 40-1105 of the ITAA to account for exploration benefits received under farm-in farm-out arrangements.

4.46 Section 40-1105, also introduced by the *Tax and Superannuation Laws Amendment (2015 Measures No. 2) Act 2015*, relates to reducing the termination value of interests in a mining, quarrying or prospecting right.

4.47 This Schedule amends the note to refer instead to section 40-1130, which relates to reducing the first element of the cost when the taxpayer provides an exploration benefit in relation to the transfer to them of part of another entity's interest in a mining, quarrying or prospecting right. This is the correct paragraph reference. ***[Schedule 4, item 39, subsection 40-180(4) (note) of the ITAA 1997]***

Inconsistent use of term 'live stock' in the ITAA 1997

4.48 Subsection 995-1(1) of the ITAA 1997 includes a definition of live stock. However, prior to the amendments made by this Schedule, the ITAA 1997 used 'livestock' (without a space) in several places instead of 'live stock'. This Schedule amends various provisions of the ITAA 1997 to change references from 'livestock' to 'live stock' for consistency throughout the Act. ***[Schedule 4, items 40, 52-53, 55-56, 60, 74-76, subsection 40-520(1), subsection 124-784B(2), paragraphs 165-60(3)(a), 165-60(3)(b), 701-25(4)(b), 701-35(4)(b), and 705-30(1)(b), and section 328-285 (note 2) of the ITAA 1997]***

Formatting changes in the ITAA 1997

4.49 Subsection 122-25(3) of the ITAA 1997 includes a definition of 'precluded asset'. This Schedule amends the subsection to ensure 'precluded asset' is bolded and italicised in line with drafting practice throughout the Act. ***[Schedule 4, item 51, subsection 122-25(3) of the ITAA 1997]***

Missing asterisks for defined phrase in the ITAA 1997

4.50 Prior to the amendments made by this Schedule, paragraphs 149-15(3)(e) and 165-202(1)(c) of the ITAA 1997 use the defined phrase 'local governing body' without asterisks. This Schedule inserts the missing asterisks to make the paragraphs consistent with drafting practice throughout the Act. ***[Schedule 4, items 54 and 58, paragraphs 149-15(3)(e) and 165-202(1)(c) of the ITAA 1997]***

Correcting paragraph referencing in the ITAA 1997

4.51 Subsection 165-115A(1A) of the ITAA 1997 refers to paragraph 165-115A(1)(c). This Schedule corrects the reference to 'paragraph (1)(c)', because the referenced paragraph is in the same section. ***[Schedule 4, item 57, subsection 165-115A(1A) of the ITAA 1997]***

Missing word in the ITAA 1997

4.52 Subsection 307-290(3) of the ITAA 1997 sets out a formula used to calculate the taxable component of a superannuation lump sum. This Schedule adds the missing word 'where' after the formula but before the terms used in the formula are explained. ***[Schedule 4, item 59, subsection 307-290(3) of the ITAA 1997]***

Consequential amendments relating to the standardisation of the definition of Australia across the tax law and Norfolk Island tax reforms

4.53 Schedule 4 to the *Treasury Legislation Amendment (Repeal Day) Act 2015* made various amendments to the tax law as part of rewriting and standardising the definition of 'Australia' for income tax purposes. A number of consequential amendments to Division 355 of the ITAA 1997 were not made to reflect the new terminology.

4.54 Division 355 of the ITAA 1997 (Research and Development) contained references to 'Australia or an external Territory' or 'Australia and the external Territories'. The definition of 'Australia' in the ITAA 1997 already includes the external territories, making the additional words unnecessary. This Schedule removes these unnecessary references in Division 355 of the ITAA 1997. ***[Schedule 4, items 61 to 69, subparagraphs 355-210(1)(d)(i), 355-210(1)(e)(i), 355-210(1)(e)(ii), 355-215(b)(i) and 355-220(1)(b)(i), paragraphs 355-210(1)(a), 355-215(a) and 355-220(1)(a), and subsection 355-210(1) (note) of the ITAA 1997]***

Ensuring life insurance companies are entitled to an exploration development incentive tax offset in accordance with the policy intent

4.55 Section 418-15 of the ITAA 1997 determines when a life insurance company will be entitled to an exploration development incentive tax offset.

4.56 Life insurance companies hold assets wholly on behalf of their policy holders rather than for the benefit of their shareholders. These assets are taxed for income tax and imputation purposes consistently with the treatment those assets would receive if they were held in comparable investment arrangements such as superannuation funds or managed investment trusts.

4.57 Section 418-15 is intended to provide that life insurance companies would be eligible to obtain the exploration development incentive tax offset for that portion of exploration credits they receive in respect of investments they hold on behalf of policy-holders, provided the offset is applied wholly for the benefit of policy-holders.

4.58 However, prior to these amendments, section 418-15 did not apply to all exploration credits received by life insurance companies in respect of assets they held on behalf of policy holders because an incorrect cross-reference was included. This Schedule makes amendments to ensure that this provision applies in accordance with the policy intent. ***[Schedule 4, item 70, paragraph 418-15(1)(d) of the ITAA 1997]***

4.59 The amendments commence from the commencement date of item 2 of Schedule 6 to the *Tax and Superannuation Laws Amendment (2014 Measures No. 7) Act 2015* (which alongside the *Excess Exploration Credit Tax Act 2014* introduced the exploration development incentive tax offset).

Ensuring the correct paragraphs of the ITAA 1997 are repealed

4.60 Item 21 of Schedule 6 to the *Tax and Superannuation Laws Amendment (2014 Measures No. 7) Act 2015* purported to repeal subparagraphs 418-80(2)(b)(ii) and (iii) and to substitute a new subparagraph. However, those subparagraphs do not exist. This Schedule repeals the correct subparagraphs, which are subparagraphs 418-80(3)(d)(ii) and (iii) of the ITAA 1997, and substitutes the same words as were originally to be substituted. ***[Schedule 4, items 71, 72, 94 and 95, subparagraphs 418-80(3)(d)(ii) and 418-80(3)(d)(iii) of the ITAA 1997, item 8 in the table in subsection 2(1) and item 21 of Schedule 6 to the Tax and Superannuation Laws Amendment (2014 Measures No. 7) Act 2015]***

Removing the redundant '5 share requirement' for rollover relief in the ITAA 1997

4.61 Division 615 of the ITAA 1997 is intended to provide rollover relief for certain business restructures that involve the introduction of an interposed company.

4.62 Prior to the amendments made by this Schedule, paragraph 615-10(1)(a) of the ITAA 1997 restricted rollover relief in cases where existing interests are cancelled or redeemed to cases where the interposed entity owned no more than five shares or units in the company before the restructure, although subsection 615-10(3) permits the interposed entity to receive additional interests in the course of the redemption or cancellation. The requirement for the interposed entity to own no more than five shares or units in the company served no current purpose, being a requirement that was retained from the prior versions of these provisions in the ITAA 1936.

4.63 This Schedule removes the requirement for the interposed entity to own no more than five shares or units in the company, removing an arbitrary restriction. ***[Schedule 4, item 73, paragraph 615-10(1)(a) of the ITAA 1997]***

Spelling error in heading to Subdivision 716-S of the ITAA 1997

4.64 Prior to the amendments made by this Schedule, the heading to Subdivision 716-S of the ITAA 1997 contained a spelling error of the word 'Miscellaneous'. This Schedule corrects the error. ***[Schedule 4, item 77, Subdivision 716-S (heading) of the ITAA 1997]***

Removing reference to a repealed subsection in the ITAA 1997

4.65 Prior to the amendments made by this Schedule, paragraph 770-135(1)(b) of the ITAA 1997 referred to subsection (3), (5) and (6) of that section. This Schedule removes the reference to subsection (6) because subsection (6) was repealed in 2010. ***[Schedule 4, item 78, paragraph 770-135(1)(b) of the ITAA 1997]***

Incorrect capitalisation of the words 'government agency' in the ITAA 1997

4.66 Prior to the amendments made by this Schedule, subsection 995-1(1) of the ITAA 1997 defined ***public official*** as an employee or official of an Australian Government Agency or of a local governing body. This Schedule removes the incorrect capitalisation of the words 'government agency'. ***[Schedule 4, item 80, subsection 995-1(1) (definition of public official) of the ITAA 1997]***

Spelling error in definition of shortfall amount in the ITAA 1997

4.67 Subsection 995-1(1) of the ITAA 1997 defines ‘shortfall amount’. Prior to the amendments made by this Schedule, this definition contained a spelling error. By replacing the word 'give' with 'given', this Schedule corrects the spelling error. ***[Schedule 4, item 82, subsection 995-1(1) (definition of shortfall amount) of the ITAA 1997]***

Incorrect paragraph reference in the Product Grants and Benefits Administration Act 2000

4.68 Section 42 of the *Product Grants and Benefits Administration Act 2000* was amended by the *Treasury Legislation Amendment (Repeal Day) Act 2015* as part of the consolidation of administrative provisions into Schedule 1 to the TAA 1953. Section 42 was incorrectly amended to include a reference to section 350-10 in Schedule 1 to the TAA 1953 (about the evidentiary effect of official tax documents).

4.69 This Schedule corrects the reference to section 353-10 in Schedule 1 to the TAA 1953, which is about information gathering. The amendment commences from 25 February 2015, the commencement of item 6 of Schedule 2 to the *Treasury Legislation Amendment (Repeal Day) Act 2015*. ***[Schedule 4, item 84, subsection 42(2A) of the Product Grants and Benefits Administration Act 2000]***

Reference to incorrect Act

4.70 Prior to the amendments made by this Schedule, section 20N of the *Superannuation (Unclaimed Money and Lost Members) Act 1999* referred to the Immigration Secretary (within the meaning of the

ITAA 1936). The words 'Immigration Secretary' do not appear in the ITAA 1936.

4.71 This Schedule amends the section to refer to the Immigration Secretary within the meaning of the ITAA 1997, which is the Act containing the definition of Immigration Secretary. ***[Schedule 4, item 85, paragraph 20N(2)(a) of the Superannuation (Unclaimed Money and Lost Members) Act 1999]***

Consequential amendments relating to the consolidation of the confidentiality of taxpayer information provisions

4.72 *Tax Laws Amendment (Confidentiality of Taxpayer Information) Act 2010* consolidated various secrecy and disclosure provisions that were located throughout various taxation Acts into Division 355 in Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953). As part of this consolidation, section 3D (relating to taxation information given to the Australian Crime Commission) and section 3E (relating to taxation information given to relevant law enforcement agencies and eligible Royal Commissions) in the TAA 1953 were repealed. They had become redundant as they were replicated in Division 355. However some references to these sections were not removed at this time. This Schedule removes the redundant references to sections 3D and 3E from subsection 3B(1C) of the TAA 1953. ***[Schedule 4, item 86, subsection 3B(1C) of the TAA 1953]***

4.73 Removing the redundant reference to section 3E prevents confusion arising from the fact that the section number 3E has since been reused for a provision that is unrelated to the repealed section 3E. The current section 3E requires the Commissioner to publish the final annual amount of an entity's annual Petroleum Resource Rent Tax payable.

Repealing redundant definition in the TAA 1953

4.74 Prior to the amendments made by this Schedule, section 14ZQ of the TAA 1953 included a definition of starting base assessment. The phrase 'starting base assessment' is not used anywhere in the TAA 1953. The provisions that used that phrase (sections 14ZZK and 14ZZO) have previously been repealed. This Schedule repeals the redundant definition. ***[Schedule 4, item 87, section 14ZQ (definition of starting base assessment) of the TAA 1953]***

Consequential amendments relating to the consolidation of the evidence provisions and the Commissioner's information gathering provisions

4.75 As part of the *Treasury Legislation Amendment (Repeal Day) Act 2015*, various evidence provisions were consolidated into one set of rules for application across all tax laws. This involved amendments to

item 2 of the table in subsection 350-10(1) in Schedule 1 to the TAA 1953, which concerns the evidentiary effect of official tax documents for the purposes of taxation laws.

4.76 Item 262 of Schedule 1 of the *Indirect Tax Laws Amendment (Assessment) Act 2012* contains conflicting amendments to item 2 of that table, which will commence on 1 January 2017. This Schedule amends item 262 and amends the table in subsection 350-10(1) in Schedule 1 to the TAA 1953 to ensure that the amendments purported to be made by item 262 are given effect, without undoing the consolidation of the evidence provisions. ***[Schedule 4, items 88 to 89 and 93, subsections 350-10(1), and 350-10(2) in Schedule 1 to the TAA 1953 and item 262 of Schedule 1 to the Indirect Tax Laws Amendment (Assessment) Act 2012]***

4.77 Section 271-100 in Schedule 2F to the ITAA 1936 concerns the evidentiary effect of a notice of liability relating to family trust distribution tax. However, section 271-100 was not included in the consolidation of the evidence provisions. This Schedule brings section 271-100 into the consolidated framework. ***[Schedule 4, items 25 and 88, section 271-100 in Schedule 2F of the ITAA 1936 and subsection 350-10(1) in Schedule 1 to the TAA 1953]***

Update references in the exception to the confidentiality of taxpayer information provisions regarding the Trade Support Loans Act

4.78 Prior to the amendments made by this Schedule, item 5AA of the table in subsection 355-65(2) in Schedule 1 to the TAA 1953 created an exception to the secrecy provisions where a record or disclosure is made to the Industry Secretary for the purpose of administering the *Trade Support Loans Act 2014*.

4.79 Following the Administrative Arrangements Order made on 23 December 2014, responsibility for the *Trade Support Loans Act 2014* moved to the Education Minister.

4.80 This Schedule updates item 5AA of the table to ensure that the Australian Tax Office (ATO) may disclose protected information to the department that has responsibility for the *Trade Support Loans Act 2014* (currently the Department of Education and Training). ***[Schedule 4, item 91, item 5AA in the table in subsection 355-65(2) in Schedule 1 to the TAA 1953]***

4.81 This amendment applies in relation to records and disclosures of information on or after 23 December 2014 (regardless of when the information was acquired). This will ensure that the scope of taxation officers' ability to share protected information did not change when the responsibility for administering the *Trade Support Loans Act 2014* moved from the Minister for Industry and Science to the Minister for Education and Training. ***[Schedule 4, subitem 92(2)]***

Incorrect commencement dates in Tax and Superannuation Laws Amendment (2015 Measures No. 1) Act 2015

4.82 Prior to the amendments made by this Schedule, the commencement table in section 2 of *Tax and Superannuation Laws Amendment (2015 Measures No. 1) Act 2015* incorrectly provided that Schedule 4 commenced on Royal Assent.

- Part 1 of that Schedule was meant to commence the day after Royal Assent.
- Part 2 should not commence until 1 July 2021.

This is clear from the headings to these Parts. This Schedule corrects the commencement dates in section 2 of *Tax and Superannuation Laws Amendment (2015 Measures No. 1) Act 2015*. ***[Schedule 4, item 96, item 7 in the table in subsection 2(1) of the Tax and Superannuation Laws Amendment (2015 Measures No. 1) Act 2015]***

Repeal amendments made by the Treasury Legislation Amendment (Repeal Day) Act 2015 that conflicted with other amendments

4.83 Item 3 of Schedule 2 to the *Treasury Legislation Amendment (Repeal Day) Act 2015* amended subsection 102(3) of the *Petroleum Resource Rent Tax Act 1987* on 25 February 2015; this clashed with item 89 of that Schedule, which repealed the whole of Part IX at the same time. Item 36 of Schedule 2 to the *Treasury Legislation Amendment (Repeal Day) Act 2015* also purported to amend that subsection on 1 July 2015, although the provision had already been repealed (by item 89). This Schedule repeals items 3 and 36 of the amending Act, as the amendments made by those items were ineffective and unnecessary. ***[Schedule 4, items 97 to 98, items 3 and 36 of Schedule 2 to the Treasury Legislation Amendment (Repeal Day) Act 2015]***

4.84 The amendments commence immediately after the time specified in the *Treasury Legislation Amendment (Repeal Day) Act 2015* for the commencement of items 3 and 36 respectively. Item 3 will be repealed from 25 February 2015 and item 36 from 1 July 2015.

Part 4 – Repeals of Excise Tariff Acts

Repeals of Excise Tariff Acts

4.85 Schedule 4 to this Act repeals 45 amending Acts that are largely redundant. ***[Schedule 4, items 99 to 143]***

4.86 Subsection 5(2) of the *Excise Tariff Act 1921* (ETA 1921) states that it is the amending Act that imposes excise where the amending Act alters the Schedule to the ETA 1921.

4.87 In 2006, the whole table contained in the Schedule to the ETA 1921 was repealed and replaced, so it is no longer possible for an excise tariff amending Act before 2006 to impose excise. For that reason, these 45 amending Acts are no longer operative and can be repealed.

Example 4.1: the repeals do not invalidate any excise already collected or any future liability

Golden Whistler Co paid excise on 6 October 1933 on 50 crates of beer at a rate of 1 shilling and 9 pence per gallon as imposed by the *Excise Tariff (No. 2) 1933*. Even though *Excise Tariff (No. 2) 1933* is now repealed, this collection is validated by the savings provision which provides that the imposition and collection of excise was lawful valid and effectual before the repeal and is so to the same extent after the repeal.

Transitional rules

4.88 Schedule 4 also includes general savings provisions. These provisions, which are standard when there are repeals of legislation that has become inoperative, preserve the rights and obligations of taxpayers in relation to past years. This ensures that the repeal can have no effect on liabilities and entitlements in prior income years, even where these liabilities or entitlements are not identified until after the repeal commences. ***[Schedule 4, items 144 to 148]***

Part 5 – Other repeals

Repeal inoperative Act (Income Tax (War-time Arrangements) Act 1942)

4.89 This Schedule repeals the *Income Tax (War-time Arrangements) Act 1942*, as it is inoperative. ***[Schedule 4, item 149, Income Tax (War-time Arrangements) Act 1942]***

Finding tables

4.90 This Chapter includes finding tables to assist in identifying which provision in this Schedule corresponds to a provision in the old law that has been rewritten, and vice versa.

4.91 References to old law in the finding tables are to these provisions in the ITAA 1936.

4.92 References to the new law are to provisions in the TAA 1953, unless otherwise indicated.

Finding table 1 — old law to new law

Old law	***New law***
264A	353-25 and 353-30 in Schedule 1
271-100 in Schedule 2F	350-10(1) in Schedule 1

Finding table 2 — new law to old law

New law	***Old law***
350-10(1) in Schedule 1	271-100 in Schedule 2F
353-25 in Schedule 1	264A
353-30 in Schedule 1	264A

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Schedule 4: Miscellaneous Amendments

4.93 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

4.94 This Schedule makes a number of miscellaneous amendments to the taxation, superannuation and other laws. These amendments are part of the Government's commitment to the care and maintenance of the taxation and superannuation systems.

4.95 These amendments include style and formatting changes, the repeal of redundant provisions, the correction of anomalous outcomes and corrections to previous amending Acts.

Human rights implications

4.96 These amendments make a number of minor and machinery changes to the taxation and superannuation provisions to ensure the provisions are consistent with their original policy intent. As such, this Schedule does not engage any of the applicable rights or freedoms.

Conclusion

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

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