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Tax Laws Amendment (2005 Measures No. 2) Bill 2005

Bernard Pulle
Economics, Commerce and Industrial Relations Section

Contents

Glossary

The following abbreviations and acronyms are used throughout this Digest.

Abbreviation	**Definition**
ATO	Australian Taxation Office
CGT	capital gains tax
Commissioner	Commissioner of Taxation
DGR	deductible gift recipients
domestic IRUs	indefeasible rights to use domestic telecommunications cables
FBT	fringe benefits tax
FBTAA 1986	*Fringe Benefits Tax Assessment Act 1986*
GST	goods and services tax
GST Act	*A New Tax System (Goods and Services Tax) Act 1999*
international IRU	indefeasible rights to use international telecommunications cables
IRU	indefeasible rights to use domestic and international telecommunications cables
ITAA 1936	*Income Tax Assessment Act 1936*
ITAA 1997	*Income Tax Assessment Act 1997*
member spouse	is defined in section 90MD of the *Family Law Act 1975* to mean, in relation to a superannuation interest, the spouse who has the superannuation interest

non-member spouse	is defined in section 90MD of the *Family Law Act 1975* to mean, in relation to a superannuation interest, the spouse who is not the member spouse in relation to the superannuation interest
PAYG	pay as you go
payment split	is defined in section 90MD of the *Family Law Act 1975* to mean the application of section 90MJ of that Act, or a splitting order, in relation to a splittable payment
RSE	registrable superannuation entity
SIS Act	*Superannuation Industry Supervision Act 1993*
SSA Act	*Superannuation Safety Amendment Act 2004*
TAA 1953	*Taxation Administration Act 1953*

Tax Laws Amendment (2005 Measures No. 2) Bill 2005

Date Introduced: 17 March 2005

House: House of Representatives

Portfolio: Treasury

Commencement: This Act commences on Royal Assent as stated by clause 2 of the Tax Laws Amendment (2005 Measures No. 2) Bill 2005 (the Bill). The application dates for various measures in the Bill will be indicated in the Main Provisions section of this Digest.

Purpose

There are eight schedules to the Bill. The main purpose of each schedule, as stated in the 'General outline and financial impact' section of the Explanatory Memorandum to the Bill, is set out below.[1]

> Schedule 1 to this Bill amends the simplified imputation system to ensure that, in certain situations, private companies that pay franked distributions will not have their franking deficit tax offset reduced in respect of the income year in which they first incur an income tax liability.[2]
>
> …
>
> Schedule 2 to this Bill amends the *Income Tax Assessment Act 1997* to provide an automatic capital gains tax (CGT) roll-over for the transfer of assets of registrable superannuation entities that merge during the transitional period to comply with licensing requirements under superannuation safety reforms.
>
> The CGT roll-over ensures that the capital gain or capital loss that would otherwise be recognised when the transfer of assets occurs is disregarded and that the recognition of the accrued capital gain or loss is deferred until later disposal of the assets by one or more successor registrable superannuation entity trustees.[3]
>
> …
>
> Schedule 3 to this Bill amends the *Income Tax Assessment Act 1997* to provide appropriate taxation treatment of expenditure incurred on acquiring certain telecommunications rights.[4]
>
> …
>
> Schedule 4 to this Bill amends the *Taxation Administration Act 1953* to simplify the movement of taxpayers from paying annual pay as you go (PAYG) instalments to paying quarterly PAYG instalments where they become ineligible to pay annual

instalments in certain cases. The amendments apply in cases where ineligibility is the result of registering or becoming required to register under the goods and services tax law or becoming a member of an instalment group. Taxpayers who become ineligible to pay annual instalments during an income year in these circumstances will commence paying quarterly instalments from the first instalment quarter of the following income year for which they are required to pay an instalment under the quarterly payment rules.[5]

…

Schedule 5 to this Bill amends the *Income Tax Assessment Act 1997* to update the lists of deductible gift recipients (DGRs).[6]

…

Schedule 6 to this Bill amends the *A New Tax System (Goods and Services Tax) Act 1999* to prevent entities from reducing or eliminating their goods and services tax (GST) liability on supplies of real property through unintended outcomes arising from the interaction of a number of special rules in the Act. It also clarifies the operation of the margin scheme and ensures entities joining a GST group have appropriate adjustments to input tax credits.[7]

…

Schedule 7 to this Bill amends the *Income Tax Assessment Act 1936* (ITAA 1936) to provide appropriate tax treatment for superannuation annuities that have been split upon marriage breakdown. The broad aim of these amendments is to ensure that where a superannuation annuity is split upon marriage breakdown then the taxation consequences will be the same as those that currently apply where an equivalent benefit in a superannuation fund is split.

Schedule 7 also amends the ITAA 1936 to correct minor anomalies in relation to how the taxation law applies when superannuation benefits are split on marriage breakdown.[8]

…

Schedule 8 to this Bill amends the *Fringe Benefits Tax Assessment Act 1986* to remove the condition that contributions to approved worker entitlement funds must be required under an industrial instrument in order to be eligible for an exemption from fringe benefits tax (FBT).[9]

Background

As there is no central theme to the Bill, the background to the various measures in each schedule will be discussed under the Main Provisions section below.

Main Provisions

Schedule 1—Amendments to the simplified imputation system

The imputation system was introduced into the Australian tax system in 1987. Its objectives are to pass on to resident shareholders of a company the benefit of the tax paid by the company and to avoid the double taxation of the income of a company in the hands of a company and when distributed in the hands of shareholders. The imputation system allows corporate entities to pass on credits for income tax paid on corporate income to their members and allows the Australian members to claim a tax offset for that credit. In some circumstances, taxpayers can claim a refund if they are unable to utilise the tax offset fully.

A 'franking account' is an account that a corporate tax entity maintains to keep track of the income tax credits that it can pass on to its members. The franking account is credited with franking credits and debited with franking debits. A 'franking credit' arises when a corporate tax entity pays income tax and a 'franking debit' arises when a corporate tax entity makes a distribution.

A simplified imputation system (SIS) was introduced with effect from 1 July 2002 and the rules for its operation are contained in Part 3-6 of the *Income Tax Assessment Act 1997* (ITAA 1997). The key features of SIS are as follows:

- entries in the franking account are recorded on a tax-paid basis
- the franking account will operate as a rolling balance account
- franking deficit tax will be imposed on a corporate entity if a franking account is in deficit at the end of the income year; or at 30 June for certain late balancing corporate tax entities under the *New Business Tax System (Franking Deficit Tax) Act 2002*
- franking deficit tax will be creditable against income tax payable by the corporate entity under section 205-70 of the ITAA 1997, but
- to discourage corporate entities paying franked distributions in excess of relative franking credits arising in an income year, subsection 205-70(2) provides for a reduction of the franking deficit tax offset by 30 per cent if it exceeds 10 per cent of the total amount of franking credits that arose in the relevant year. This reduction in the franking deficit tax offset is generally referred to as a 'franking deficit tax penalty' or 'limited offset rule'.

This franking deficit tax penalty has been a disincentive to private companies in declaring dividends in the year in which they first make profits after incurring losses in previous years because it will give rise to a franking deficit and attract the franking deficit tax penalty. There will be no countervailing franking credit if the losses of the previous years are fully set off against the profits of the first profitable year.

On 11 May 2004, the Treasurer in a joint press release with the Minister of Small Business indicated that the Government will provide greater flexibility to private companies by allowing them, in certain situations, to make franked distributions in their first profitable year of operation. This will be facilitated by waiving the franking deficit tax limited offset rule where the private company anticipates franking credits based on a reasonable estimate of the company's expected tax liability for that income year.[10]

Item 2 of **Schedule 1** inserts **proposed subsection 205-70(5)** to provide relief to a private company from the franking deficit tax penalty under certain conditions.

Proposed subsection 205-70(5) states that the 30 per cent reduction will generally not apply to the private company's first year of tax liability, the relevant year, if:

- taking into account tax offsets (other than the tax offset under section 205-70) the company would have had an income tax liability for the relevant year (**proposed paragraph 205-70(5)(b)**), and
- this income tax liability is at least 90 per cent of the deficit in the company's franking account at the end of the relevant year (**proposed paragraph 205-70(5)(d)**), and
- the company has not had an income tax liability for an earlier income year (**proposed paragraph 205-70(5)(c)**)

The reader is referred to the relevant Australian Taxation Office (ATO) publications for further details of certain aspects of the imputation system which apply to measures in Schedule 1.[11]

Application

Item 3 of **Schedule 1** provides that the amendments made by **Schedule 1** apply to assessments for the income year in which the amendments commence and later income years. Under **clause 2** of the Bill, the amendments will commence on Royal Assent, so that the amendments made by **Schedule 1** apply to the income year in which the proposed Act receives Royal Assent and later years.

Schedule 2—CGT roll-over for transfer of assets to superannuation funds with licensed trustees

The *Superannuation Safety Amendment Act 2004* (the SSA Act) amended the *Superannuation Industry (Supervision) Act* 1993 (the SIS Act) to provide new superannuation safety arrangements to modernise and strengthen the prudential regulation of superannuation funds with effect from 1 July 2004. It set a transitional period of 2 years ending on 30 June 2006. Under these arrangements, a trustee of a registrable superannuation entity (RSE) is required to meet new licensing requirements for the better management and protection of member benefits. If the trustee is unable to meet these new licensing requirements, the SSA Act allows that RSE to transfer its assets (or merge with) one or more RSEs with a licensed trustee.

Trustees of self-managed superannuation funds regulated by the ATO and public sector superannuation schemes are exempt from these requirements. All superannuation entities other than those self-managed superannuation funds regulated by the ATO and exempt public sector superannuation schemes are required to be registered. The Australian Prudential Regulation Authority (APRA) is responsible for the licensing and registration of RSEs and has issued an Explanatory guide on licensing and registration.[12]

In a press release on 11 May 2004, Senator Helen Coonan, the then Minister for Revenue and Assistant Treasurer indicated that CGT taxing points or CGT events are likely to occur when superannuation funds merge in response to measures in the SSA Act. In consequence capital gains or losses would be realised earlier than would have been the case if the funds did not merge. Senator Coonan announced that changes will be made to the CGT regime to provide an automatic roll-over to ensure that superannuation entities that merge as a consequence of complying with the new licensing requirements in the SSA Act will not have a CGT liability at the time of the merger. However, the CGT liability will arise on the subsequent disposal of the assets by the successor entity. Senator Coonan also indicated that the proposed changes will ensure that no CGT consequences arise for members of the superannuation entities that merge.[13]

Item 2 of **Schedule 2** inserts **proposed Subdivision 126–F** into the ITAA 1997 to provide a roll-over for the transfer of assets of a superannuation fund to one or more other superannuation funds that is made between 30 June 2004 and 1 July 2006 because the trustee of the first fund will not be licensed by 1 July 2006 and the other funds have licensed trustees.

An example is given after **proposed subsection 126-210(4)** in the Bill to illustrate of how the roll-over of a block of land and units in a unit trust from the first RSE trustee to a successor RSE trustee will operate.

Application

Proposed paragraphs 126-210(1)(a) and **(b)** state that there is a roll-over if one or more CGT events happen because the trustee of a RSE ceases to hold all its CGT assets after 30 June 2004 and before 1 July 2006 because of an inability to obtain a licence and a successor RSE trustee with a licence takes over those assets.

The amendments made by **Schedule 2** will therefore apply to mergers taking place after 30 June 2004 and before 1 July 2006.

Schedule 3—Providing capital allowance deductions for certain telecommunications rights

In a press release on 11 May 2004 in connection with the 2004–05 Budget, Senator Helen Coonan, the then Minister for Revenue and Assistant Treasurer announced that the Government will allow capital allowance tax deductions for indefeasible rights to use (IRUs) domestic telecommunications cables and telecommunications site access rights (indefeasible rights cannot be forfeited or cancelled). Senator Coonan added that this measure will remove the inconsistent taxation treatment of domestic and international IRUs. At present no capital allowance deduction is available for a domestic IRU and the cost of purchasing a domestic IRU or telecommunication site access right may be allowable as a capital loss on expiry of that right.

Part 1—Extension of capital allowance deduction to domestic IRUs

The current definition of an 'IRU' in subsection 995-1(1) of the ITAA 1997 is that it is an indefeasible right to use an international telecommunications submarine cable system.

The uniform capital allowance regime is contained in Division 40 of Part 2-10 of the ITAA 1997 and its purpose is to allow the deduction of an amount equal to the decline in value of depreciating assets in working out taxable income. Subsection 40-30(1) defines what is a depreciating asset and provides that intangible assets specified in subsection 40-30(2) are depreciating assets. IRUs are included in paragraph 40-30(2)(e) and are therefore depreciating assets. It will thus be seen that domestic IRUs are not at present included in the definition of a depreciating asset.

Item 3 of **Schedule 3** amends the definition of 'IRU' in subsection 995-1(1) by replacing the words 'an international telecommunications submarine' in that definition with the words 'a telecommunications'. This proposed amendment effectively extends the definition of IRU to cover both international and domestic IRUs.

Item 2 of **Schedule 3** will similarly amend subsection 40-95(9) to ensure that the effective life of an IRU is the effective life of the underlying telecommunications cable over which the IRU is granted, whether it is a domestic or international IRU.

Application

Sub-item 5(1) of **Schedule 3** provides that the capital allowance deduction for domestic IRUs will apply in relation to expenditure incurred on or after 12 May 2004, the day after the announcement of this measure.

Sub-item 5(2) of **Schedule 3** provides that if an IRU was purchased before 12 May 2004 and in consequence of consolidation under the consolidation regime, the IRU is taken to have been purchased on or after 12 May 2004 because of subsection 701-55(2) of the ITAA 1997, the capital allowance deductions do not apply to the expenditure on such IRUs.[14] Consolidation allows wholly-owned corporate groups to operate as a single entity for income tax purposes from 1 July 2002. The Commonwealth Government introduced consolidation to reduce compliance costs for business, remove impediments to the most efficient business structures and improve the integrity of the tax system.

Sub-tem 5(3) of **Schedule 3** precludes any claim for capital allowance deduction on expenditure replacing IRUs that existed prior to 12 May 2004 over a cable system:

- with IRUs over the same cable system granted on or after 12 May 2004, and
- where the right under the new IRU covers the same level of capacity over that cable system as the previous IRU covered.

The reader is referred to an example of an application of **sub-item 5(3)** on page 22, paragraph 3.17 of the Explanatory Memorandum.

Part 2—Grant of capital allowance deduction to 'telecommunications site access rights'

The amendment to the ITAA 1997 by **item 9** of **Schedule 3** will provide that 'telecommunication site access rights' will be an intangible asset eligible for the capital allowance deduction. **Item 9** inserts **proposed paragraph 40-30(2)(h)** into subsection 40-30(2).

Item 11 of **Schedule 3** will amend the dictionary in subsection 995(1) to define a definition of 'telecommunication site access right' as a right (except an IRU) of a carrier (as defined in section 7 of the *Telecommunications Act 1997*):

(a) to share a facility (as defined in section 7 of the *Telecommunications Act 199*), or

(b) to install such a facility at a particular location or on a particular structure, or

(c) to enter or cross premises for the purposes of installing or maintaining such a facility that is on the premises, or is at a location, or on a structure, that is accessible by way of the premises.

The term 'carrier' is defined in section 7 of the *Telecommunications Act 1997 to* mean the holder of a carrier licence granted under section 56. 'Facility' as defined in section 7 means:

(a) any part of the infrastructure of a telecommunications network; or

(b) any line, equipment, apparatus, tower, mast, antenna, tunnel, duct, hole, pit, pole or other structure or thing used, or for use, in or in connection with a telecommunications network.

Item 10 of **Schedule 3** amends the table in subsection 40-95(7) to provide that the effective life of a telecommunications site access right is the term of the right.

Item 9 of **Schedule 3** inserts **proposed paragraph 40-70(2)(e)** to include a telecommunications site access right among the assets where a person cannot use the diminishing value method to work out the decline in value of the asset. Therefore the prime cost method must be used to work out the decline in value of a telecommunications site access right. The diminishing value method would enable a higher deduction to be claimed in the initial years of the term of the right, while the prime cost method will spread the claim equally over the term of the right.

Application

Sub-item 12(1) of **Schedule 3** provides that the capital allowance deduction for telecommunications site access rights will apply in relation to expenditure incurred on or after 12 May 2004, the day after the announcement of this measure.

Sub-item 12(2) of **Schedule 3** provides that if a telecommunications site access right was purchased before 12 May 2004 and in consequence of consolidation the telecommunications site access right is taken to have been purchased or after 12 May 2004, the capital allowance deductions do not apply to the expenditure on such telecommunications site access right.

Sub-item 12(3) of **Schedule 3** provides that where an entity holds a telecommunications site access right prior to 12 May 2004 and that right ends prior to the date it would normally have ended under the contract under which it was granted, and a right of the same kind is entered after that date, no deduction is allowed in respect of the new right.

The reader is referred to examples of the application of **sub-item 12(3)** on page 24, paragraph 3.30 of the Explanatory Memorandum.

Schedule 4—Changing from annual to quarterly payment of PAYG instalments

In the 2004–05 Budget the Treasurer announced that the Government will simplify the movement from annual to quarterly Pay As You Go (PAYG) instalments to reduce compliance costs and increase certainty to taxpayers. Currently, taxpayers must commence quarterly instalments from the quarter in which they become ineligible to pay annual instalments, for example, because they register for the GST, under section 45-150 of Schedule 1 of the *Taxation Administration Act 1953* (TAA 1953). It was proposed to allow such taxpayers to commence paying quarterly instalments from the first quarter of the following income year.[15]

Item 4 of **Schedule 4** of the Bill repeals current section 45-150 and substitutes a revised **section 45-150** to give effect to the above proposal.

Application

Item 5 of **Schedule 4** read with **clause 2** of the Bill provides that the **proposed section 45-150** will commence for income years starting on the day on which this Act receives Royal Assent.

Item 5 of **Schedule 4** also saves the application of the current section 45-150 (which is repealed by this Schedule) for income years that start prior to the day on which this Act receives Royal Assent.

Schedule 5—Deductible gift recipients

Income tax law allows taxpayers to claim income tax deductions for certain gifts to the value of $2 or more to deductible gift recipients (DGRs). To be a DGR, an organisation must fall within a category of organisations set out in Division 30 of the ITAA 1997 and be endorsed by the ATO, or be specifically listed under that Division. The amendments in **items 1** to **5** of **Schedule 5** include as DGRs the funds and organisations specified in the table below.

Name of fund	*Date of effect*	***Special conditions***
Freedom Across Australia	8 November 2004	The gift must be made before 8 November 2006.
Rotary Leadership Victoria Australian Embassy for Timor-Leste Fund Limited	8 November 2004	The gift must be made before 8 November 2006.
National Police Memorial	8 November 2004	The gift must be made before 8 November 2006.
Page Research Centre Limited	13 January 2005	None
Russian Welfare Aid to Russia Fund	23 December 2004	The gift must be made before 23 December 2006.

The reader is referred to page 32 of the Explanatory Memorandum for a brief background of the funds listed in the above table.[16]

Application

The amendments by **items 1** to **5** of **Schedule 5** apply from the dates of effect shown in the above table.

Schedule 6—Goods and services tax and real property

In the second reading speech, the Minister for Revenue and Assistant Treasurer stated that **Schedule 6** to the Bill amends the GST law to uphold the original policy intent that GST is payable on the value added to real property once it enters the GST system.[17] These measures, which are designed to enhance the integrity of the GST provisions dealing with real property, were not announced prior to the introduction of this Bill.

Tax minimisation arrangements involving real property

The Explanatory Memorandum to the Bill sets out the context to the amendments in paragraphs 6.2 to 6.10 on pages 35 and 36.[18] Paragraph 6.2 states as follows.

> The Australian Taxation Office (ATO) has identified a number of arrangements used by entities to reduce or eliminate their GST liabilities on the supply of real property. Some arrangements involve manipulating the interaction of provisions of the GST Act – such as supplies of GST-free going concerns – or GST-free farm land, associates, GST groups, and GST joint ventures – with the margin scheme to avoid paying GST on the full value added to the real property. Other arrangements include using the grouping or joint venture provisions in an attempt to avoid paying GST on the sale of new residential property by transforming taxable sales of '… new residential premises …' into input taxed sales.[19]

The tax minimisation arrangements to avoid paying GST on the full value added to real property, to which the proposed amendments in **Schedule 6** are directed, according to paragraph 6.2, involve manipulating the interaction of provisions in the *A New Tax System (Goods and Services Tax) Act 1999* (the GST Act) such as:

- GST-free going concerns,[20]
- GST-free farm land,[21]
- GST groups and associates,[22] and/or
- GST joint ventures[23]

with the provisions in the GST Act dealing with the margin scheme for real property.

What is the margin scheme?

Division 75 of the GST Act allows a taxpayer to use a margin scheme to bring within the GST system taxable supplies of freehold interests in land, of stratum units and of long-term leases.

Under the margin scheme, the amount of the GST payable on a taxable supply of real property is 1/11th of the margin on the supply, as provided for in section 75-10 of GST Act. The margin is the amount by which the consideration for the supply exceeds the consideration for the acquisition of the interest, unit or lease in question.

This contrasts with the basic rule that GST is payable on 1/11th of the GST- inclusive price which applies generally to the supply of goods and services.

'Real property' as defined in section 195-1 of the GST Act, includes:
(a) any interest in or right over land
(b) a personal right to call for or be granted any interest in or right over land, or
(c) a licence to occupy land or any other contractual right exercisable over or in relation to land.

Purchasers of real property on the margin scheme are not entitled to claim input tax credits for GST supplied by the supplier because acquisitions under the margin scheme are not creditable acquisitions under section 75-20.

There are special rules at present for determining the margin for real property acquired before 1 July 2000[24] (the date the GST came into operation), and for real property acquired on or after 1 July 2000.[25]

A brief description of the proposed changes to the margin scheme, to prevent the tax minimisation practices which the ATO has identified, is given below.

Who decides whether the margin scheme will apply under the proposed law?

Item 10 of **Schedule 6** repeals current subsection 75-5(1) and substitutes revised **subsection 75-5(1)** which requires the supplier and the recipient of the supplier to agree in writing that the margin scheme is to apply in working out the amount of the GST on a taxable supply of real property. Currently, under subsection 75-5(1) it is left to the supplier to choose to apply the margin scheme without any written agreement with the recipient of the supply.

When must the supplier and the recipient choose to apply the margin scheme under the proposed law?

Item 10 of **Schedule 6** also inserts **proposed subsection 75-5(1A)**, which requires that the agreement between the supplier and the recipient is to be made on or before the making of the supply or within such further period as the Tax Commissioner allows.

When is a supply ineligible for the margin scheme under the proposed law?

Currently, under subsection 75-5(2) the supplier cannot choose to apply the margin scheme if the freehold interest, stratum interest or long-term lease was acquired through a taxable supply on which GST was worked out without applying the margin scheme.

Item 11 of **Schedule 6** repeals current subsection 75-5(2) and substitutes revised **subsection 75-5(2)** which states that the margin scheme does not apply if the freehold interest, stratum unit or long-term lease was acquired through a supply that was 'ineligible for the margin scheme' as defined in **proposed subsection 75-5(3).**

The three categories of supplies that are ineligible for the margin scheme under **proposed subsection 75-5(3)** are:

- a taxable supply on which GST was worked out without applying the margin scheme
- a supply of a thing that was inherited from a deceased person and the deceased person had acquired it through a supply that was ineligible for the margin scheme, because of one or more previous applications of **proposed subsection 75-5(3)**, and
- in the case of a member of a GST group[26], it is a supply to which all of the following apply:
  - (a) the supplier was a member of a GST group at the time the interest, unit or lease was acquired,
  - (b) the entity from whom the person acquired it was a member of the GST group at that time, and
  - (c) the last supply of the interest, unit or lease by an entity who was not a member of the GST group to an entity who was such a member was a supply, which because of one or more previous applications of **proposed subsection 75-5(3)** was ineligible for the margin scheme.

Basically, the margin scheme is only available to a member of a GST group if the member who originally acquired it could have used the margin scheme if that member had supplied the property to an entity outside the group.

Proposed changes to margins for supplies of real property in particular circumstances

Item 16 of **Schedule 6** inserts **proposed section 75-11** to work out margins for supplies of real property in particular circumstances:

- margin for supply of real property acquired from a fellow member of GST group (**proposed subsections 75-11(1)** and **(2)**)
- margin for supply of real property acquired from deceased estate (**proposed subsections 75-11(3)** and **(4)**)
- margin for supply of real property acquired as a GST-free going concern (**proposed subsection 75-11(5)**)
- margin for supply of real property acquired on GST-free farm land (**proposed subsection 75-11(6)**), and
- margin for supply of real property acquired from an associate (**proposed subsection 75-11(7)**).

The reader is referred to the Explanatory Memorandum paragraphs 6.12 to 6.38 on pages 40 to 52 for a detailed explanation of the proposed law and examples of its application.

Summary of the effect of the proposed law

A summary of the effect of the proposed law, as set out in paragraph 6.11 on pages 36 and 37 of the Explanatory Memorandum, is set out below.

> 6.11 These amendments:
>
> - provide that the margin must be calculated with reference to the GST-inclusive market value of the property at 1 July 2000 if the property were acquired as a GST-free going concern or GST-free farm land
> - ensure that the grouping and joint venture provisions cannot be used to re-open eligibility to the margin scheme
> - ensure the grouping and joint venture provisions cannot be used to avoid paying GST on 'new residential premises' by converting otherwise taxable sales of 'new residential premises' into input taxed sales
> - introduce increasing and decreasing adjustments for a change to the extent of creditable purpose caused by an entity entering or exiting a GST group

- calculate the margin under the margin scheme with the GST-inclusive market value as the consideration for a supply to an associate and the GST-inclusive market value as the consideration for an acquisition from an associate
- ensure that property that has been inherited is not subject to unintended tax consequences under the margin scheme
- allow entities to use the margin scheme even though they are selling amalgamated real property, providing those entities have an adjustment for input tax credits entitlements in respect of that part of the property that was purchased under the basic rules
- clarify that for the purposes of the margin scheme, consideration for the acquisition of the property does not include any consideration for costs incurred in developing or improving the real property, including legal costs, renovation costs and statutory fees
- require that the use of the margin scheme be agreed in writing by the supplier and recipient, and
- ensure that when an entity sells a property on which they have not paid full consideration, the margin should be calculated with reference to the amount of consideration actually paid, rather than the sale price.

Application

Item 28 of **Schedule 6** provides for the application of the amendments as follows.

Subject to what is stated below, the amendments apply, in relation to supplies made on or after 17 March 2005 (that is the day the Bill was introduced into the Parliament)(**sub-item 28(1)**).

The amendments made by **items 3** to **7** of **Schedule 6** to the provisions treating GST groups as single entities for certain purposes apply in relation to adjustments arising under Division 129 of the GST Act on or after 17 March 2005 (the day the Bill was introduced into Parliament). Division 129 deals with adjustments that may need to be made to the net amount of GST payable or refundable for each tax period, when the extent of a creditable purpose is changed by subsequent events (**sub-item 28(2)**).

The amendments made by **items 9** and **10** of **Schedule 6** to the conditions for applying the margin scheme and in particular, the need for a written agreement, take effect in relation to supplies made on or after the day on which this Act receives Royal Assent (**sub-item 28(3)**).

Schedule 7—Superannuation and family law

Part VIIIB of the *Family Law Act 1975* (the Family Law Act), which was inserted by the *Family Law Legislation Amendment (Superannuation) Act 2001*, commenced on 28 December 2002. It enables couples separating on breakdown of marriage to split their superannuation interests either by agreement or court order.

Consequential amendments were also made to relevant taxation legislation by the *Family Law Legislation Amendment (Superannuation) (Consequential Provisions) Act 2001* to ensure that appropriate tax treatment is applied to superannuation interests split as a consequence of marriage breakdown.

The *Family Law Amendment (Annuities) Act 2004* allows eligible annuities to be split between separating couples on breakdown of marriage in the same way as other superannuation interests. 'Eligible annuity' for the purposes of Part VIIIB of the Family Law Act means an annuity purchased out of rolled-over amounts. The reader is referred to the Bills Digest on the Family Law Amendment (Annuities) Bill 2004 for the history of Part VIIIB of the Family Law Act and the changes in relation to the inclusion of eligible annuities in the definition of 'superannuation interest' for the purposes of Part VIIIB of the Family Law Act.[27]

The amendments proposed in **Schedule 7** are intended to provide tax treatment for eligible annuities that have been split on marriage breakdown similar to the tax treatment of other superannuation interests that are split on marriage breakdown.

Item 14 of **Schedule 7** inserts **proposed subsection 27ACB(1A)** into the ITAA 1936 to deal with the tax treatment of the split of an eligible annuity on the breakdown of a marriage in either of two circumstances.

First, **proposed paragraph 27ACB(1A)(a)** covers the situation where an annuity is created for the non-member spouse in circumstances prescribed by the regulations.

Second, **proposed paragraph 27ACB(1A)(b)** covers the situation where an amount is transferred to a superannuation fund in circumstances prescribed by the regulations for the benefit of the non-member spouse.

If either of these conditions exist, the **proposed subsection 27ACB(1A)** provides:

- an eligible termination payment (ETP) is taken to be created for the non-member spouse equal to the amount split (or created) for the benefit of the non-member spouse or the amount transferred, as the case may be (**proposed paragraph 27ACB(1A)(c)**)
- an ETP is taken to be created for the member spouse equal to the value of the eligible annuity of the member spouse before the split less the ETP created for the non-member spouse (**proposed paragraph 27ACB(1A)(d)**), and

- there is taken to be a roll-over of those ETPs (**proposed paragraph 27ACB(1A)(e)**).

Item 15 of **Schedule 7** provides that 'eligible annuity' has the same meaning as in Part VIIIB of the Family Law Act.

It will be seen that the above measure ensures that the concessional tax treatment that applies to ETPs will be available to the non-member spouse as well as the member spouse after the split. In addition, amendments to subsections 140M(1A) and 140M(1C) ensure that eligible annuity splits are treated in the same manner for tax purposes as superannuation pension splits (**items 29** to **38** of **Schedule 7)**.

The reader is referred to the Explanatory Memorandum for further details of amendments relating to the splitting of eligible annuities as well as amendments to correct minor anomalies in relation to how the taxation law applies when superannuation benefits are split on marriage breakdown.[28]

Application

Schedule 7 does not specify an application date. In the circumstances, **clauses 2** of the Bill means that the amendments in **Schedule 7** apply from the date the Act receives Royal Assent.

However, the amendments in relation to the splitting of annuities will depend on the commencement of the *Family Law Amendment (Annuities) Act 2004*, which is to commence on proclamation, which is yet to be made, or 15 June 2005 (whichever occurs first).

Schedule 8— FBT exemption: contributions to worker entitlement funds

Currently, certain contributions to approved worker entitlement funds, as defined in section 58PB of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA 1986), are exempt from fringe benefits tax (FBT) under section 58PA.

The transitional provisions in section 58PC, under which certain contributions made to existing worker entitlement funds were exempt from FBT, ended on 31 March 2005 and these funds were required to seek endorsement as approved worker entitlement funds for the purpose of qualifying for the FBT exemption under section 58PA.

In a press release on 1 April 2004, Senator Helen Coonan, the then Minister for Revenue and Assistant Treasurer, when announcing that the transitional period would be extended to 31 March 2005, foreshadowed that Government would consult with industry to find solutions to address concerns that the emerging interpretation of the law would deny many employers access to the FBT exemption.[29]

It would appear from the Explanatory Memorandum to the Bill that the measures in **Schedule 8** are intended to address the concerns of industry.[30]

As mentioned, section 58PA of the FBTAA 1986 sets out the conditions for contributions to an approved worker entitlement fund to qualify for the FBT exemption. The condition in paragraph 58PA(b) is as follows:

> (b) the person is required to contribute under an industrial instrument

'Industrial instrument' is defined in subsection 136(1) of the FBTAA 1986 as follows:

> 'industrial instrument' means a law of the Commonwealth or of a State or Territory or an award, order, determination or industrial agreement in force under any such law.

Thus currently, to qualify for the FBT exemption the contribution to an approved worker entitlement fund must be mandatory under an industrial instrument.

Item 1 of **Schedule 8** amends paragraph 58PA(b) by substituting the words 'the person is required to make the contribution' with 'the contribution is made'. The amended paragraph 58PA(b) will then read as follows:

> (b) the contribution is made under an industrial instrument

The Explanatory Memorandum in paragraphs 8.9 and 8.10 on page 67 attributes the need for this amendment to industrial instruments not always making it mandatory that leave or redundancy payments for employees be paid into approved worker entitlement funds to meet these employer obligations. Industrial instruments may give employers 'the option of meeting these obligations by providing for the payments themselves, or by way of making contributions to a worker entitlement fund'.[31]The proposed amendment will therefore meet the concerns of industry that under the current law, worker entitlement funds may not qualify for the FBT exemption if the employer can choose to make leave and redundancy payments direct to employees, even though the employer must do so under an industrial instrument.

Item 2 of **Schedule 8** amends sub-paragraph 58PA(c)(i) by omitting 'required' and substituting it with 'made'. The amended paragraph 58PA(c)(i) will read as follows:

> (c) the contribution is …
>
> (i) made for the purposes of ensuring that an obligation under the industrial instrument to make leave payments (including payments in lieu of leave) or payments when an employee ceases employment is met

The Explanatory Memorandum in paragraph 8.12 on page 67 states that the amendment allows related legal instruments to be used to determine the quantum and other relevant matters regarding the contributions to be made to meet an obligation under an industrial instrument.[32]

Application

Item 3 of **Schedule 8** states that the amendments made by this schedule apply in respect of the FBT year beginning on 1 April 2005 and in respect of all later FBT years.

Concluding Comments

Financial impact of measures in the Bill

The comments made in the Explanatory Memorandum on pages 3 to 7 as to the financial impact of the measures in the Bill are set out in the following table.[33]

Measures in the Bill	**Financial impact**
Schedule 1—Simplified imputation system	Nil
Schedule 2—CGT roll-over for transfer of assets to superannuation funds with licensed trustees	Nil
Schedule 3—Providing capital allowance deductions for certain telecommunications rights	These amendments are estimated to pose a cost to revenue of: 2004–05 $ 1.1 million 2005–06 $ 3.2 million 2006–07 $ 4.5 million 2006–07 $ 5.5 million
Schedule 4—Changing from annual to quarterly payment of PAYG	Nil
Schedule 5—Deductible gift recipients	The DGR listings have the following cost to revenue: • Rotary Leadership Victoria Australian Embassy for Timor-Leste

Measures in the Bill	Financial impact
	Fund Limited: $100,000 per year. • National Police Memorial: $100,000 for the life of the project. The cost to revenue of the remaining listings in unquantifiable but is likely to be insignificant.
Schedule 6—Goods and services tax and real property	These amendments are expected to result in an unquantifiable gain to revenue.
Schedule 7—Superannuation and family law	The cost to revenue over the forward estimates period is expected to be very small.
Schedule 8—Fringe benefits tax: worker entitlement funds	The financial impact is unquantifiable but expected to be insignificant.

Capital allowance incentive for domestic telecommunications cable systems

Broadband communications services are a driver of cable provision for the distribution of high volume, digital information, be it voice, data or multimedia. With broadband access a vital factor in economic growth, the provision of support infrastructure is crucial as high-speed use of the Internet in particular spreads. Fibre-to-the-home provision will most likely be the best technology for metropolitan areas.

However, this requires telecommunications carriers, cable operators and other service providers to commit themselves to providing suitable infrastructure at a reasonable price to users. Experience to date in this regard has been piecemeal, with for instance a long stalled rollout of fibre-to-the-home in major cities and, instead, reliance by carriers on the dated copper wire based public switched telecommunications network.

While inner-city areas may have much cable in the ground, access to it is hampered by lack of competition to drive innovative new services to businesses, and a lack of proper interconnect arrangements between the incumbent provider and network competitors.[34] In this respect, cable rollout may be viewed as a natural monopoly and there are arguments that all service providers should have access rights to single cable systems. Such infrastructure sharing appears to be an intention of this Bill.

Note that the cost of installing a new wire or cable link to a building, including the neighbourhood linkage and actual connection, averages around $1500 per location.

It is a policy decision for the Government to determine whether telecommunications carriers and service providers should be provided the effective taxation deduction enabled by this legislation, given their past history of slow cable system rollout. There is a public policy argument in that, as long as the bulk of the population is denied affordable broadband access, carriers should be encouraged to quickly provide quality communications infrastructure.

Endnotes

1 Explanatory Memorandum to the Tax Laws Amendment (2005 Measures No. 2) Bill 2005. This Bills Digest draws extensively from the Explanatory Memorandum.

2 ibid., p. 3.

3 ibid.

4 ibid., p. 4.

5 ibid.

6 ibid., p. 5.

7 ibid., p. 6.

8 ibid.

9 ibid., p. 7.

10 The Hon Peter Costello MP, the Treasurer and the Hon Joe Hockey, the then Minister for Small Business, 'Small Business Tax Simplification', Press Release No. 036, 11 May 2004.

11 Australian Taxation Office, *Simplified imputation: franking a distribution* (NAT 7134); *Simplified imputation: the benchmark and anti-streaming rules* (NAT 7135); *Simplified imputation: the franking account* (NAT 7136).

12 Australian Prudential Regulation Authority, *Explanatory guide on licensing and registration*, (July 2004).

13 Senator the Hon Helen Coonan, the then Minister for Revenue and Assistant Treasurer, 'Capital Gains Tax Improvements', Press Release CO29/04 ,11 May 2004.

14 Australian Taxation Office, Consolidation: in brief.

15 Budget Measures 2004–05, Budget Paper No. 2, p. 34.

16 Explanatory Memorandum to the Bill, p. 32.

17 The Hon Mr Mal Brough, the Minister for Revenue and Assistant Treasurer, 'Second Reading Speech: Tax Laws Amendment (2005 Measures No. 2) Bill 2005', House of Representatives, *Debates* , 17 March 2005, p. 5.

18 Explanatory Memorandum, pp. 35 and 36, paragraphs 6.2 to 6.10.

19 ibid., p. 35, paragraph 6.2.

20 Australian Taxation Office, GSTR 2002/5 ruling - Goods and services tax: when is a 'supply of a going concern' GST-free?

21 Australian Taxation Office, Property and Construction Industry Partnership - Issues Register - Section 06 - Farm Land.

22 Australian Taxation Office, GST groups - Fact Sheet..

23 Australian Taxation Office, GST joint ventures - Fact Sheet.

24 Australian Taxation Office, GST and the margin scheme - real property acquired before 1 July 2000 (last modified 29 November 2004).

25 Australian Taxation Office, GST and the margin scheme – real property acquired on or after 1 July 2000 (last modified 30 November 2004).

26 Entities with common ownership often operate as a group. A GST group of such entities is treated as one entity for GST purposes. In consequence, a transaction within the group, between group members, is ignored for GST purposes.

27 Morag Donaldson, Family Law Amendment (Annuities) Bill 2004, *Bills Digest*, no. 39, Parliamentary Library, Canberra, 2004–05.

28 Explanatory Memorandum, pp 55 to 63, paragraphs 7.1 to 7.39.

29 Senator the Hon Helen Coonan, the then Minister for Revenue and Assistant Treasurer, 'One more year for transition to FBT exemption for payments to worker entitlement funds ', Press Release CO19/04, 1 April 2004.

30 Explanatory Memorandum to the Bill, p. 7.

31 ibid., p. 67, paragraph 8.10.

32 ibid., p. 67, paragraph 8.12,.

33 ibid., extracted from pages 3 to 7.

34 Paul Budde Communication, 2004 Global Broadband Market Report, 8th Edition, p. 30.

Members, Senators and Parliamentary staff can obtain further information from the Information and Research Services on (02) 6277 2469.