



Tax Laws Amendment (2005 Measures No. 3) Bill 2005

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Law and Bills Digest Section

Contents

Purpose.	2
Background.	2
Individual measures.	2
Chapter 1—tax concessions for philanthropy	2
Background	2
Main Provisions of this measure.	3
Removal of the capital gains threshold for certain testamentary gifts	3
Distributions to charitable funds	3
Income tax exemptions for funds distributing to certain entities.	4
Refund of franking credits.	4
Comments	4
Chapter 2—profits derived from international shipping and airline operations.	4

Background	4
Main provisions	5
Comments	5
Schedule 3—Secrecy provisions	6
Background	6
Main provision	6
Comments	6
Schedule 4—fringe benefit tax – rebatable employer status of certain government institutions	7
Background	7
Main provisions	7
Comments	7
Schedule 5—Dependent child age criterion.	8
Background	8
Main provisions	9
Comments	9
Concluding comments	9
Endnotes.	9

Tax Laws Amendment (2005 Measures No. 3) Bill 2005

Date Introduced: 12 May 2005

House: House of Representatives

Portfolio: Treasury

Commencement: The measures contained in Schedule 1, 2 3 and 5 of the Tax Laws Amendment (2005 Measures No. 3) Bill 2005 (Bill) will commence on Royal Assent. The measures in Schedule 4 of the Bill will commence on 1 July 2005, immediately after the commencement of the measures contained in Schedule 10 of the *Tax Laws Amendment (2004 Measures No. 1) Act 2004*.

Purpose

The Bill contains a variety of measures which aim to make changes to:

- the tax concessions available for philanthropy
- the tax treatment of profits derived from international shipping and airline operations
- the secrecy provisions contained in the *Taxation Administration Act 1953*
- the availability of fringe benefit tax concessions for government institutions endorsed as charitable institutions, and
- the dependent child age criteria for certain tax offsets, including offsets for housekeepers, Medicare levy or Medicare Levy Surcharge.

Background

The proposed measures have different backgrounds which are briefly discussed in relation to each individual measure below.

Individual measures

Chapter 1—tax concessions for philanthropy

Background

In the Bills Digest prepared in relation to the Extension of Charitable Purpose Bill 2004, a previous digest, it has been noted that:

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Charities are important aspects of modern societies and they often provide essential services to the community such as looking after those in need. By assuming roles that have been Government responsibility, charities provide financial relief to governments. By providing various tax exemptions for charities as a form of subsidy, the Government has acknowledged this particular function charities assume.¹

Continuing this trend, the Bill proposes amendments to the tax law which are the result of [submissions](#) received by the Prime Minister's Community Business Partnership (PMCBP). The changes were announced by the former Minister for Revenue and Assistant Treasurer, Senator Coonan, in [Press Release](#) No 37 of 2004, dated 11 May 2004. These changes are outlined below.

Main Provisions of this measure

Removal of the capital gains threshold for certain testamentary gifts

Under the current law, gifts and other contributions to deductible gift recipients (DGRs) can be, in certain circumstances, tax deductible.² However, under section 30-15(2) testamentary gifts and bequests, that is gifts made under a will, are not tax deductible, unless the gift would qualify as cultural or heritage gift under the Government's Cultural Bequest Program.³ Further, under section 118-60 of the *Income Tax Amendment Act 1997* (ITAA 1997), testamentary gifts may be exempt from capital gains tax (CGT) if certain requirements set out in section 30-15 ITAA 1997 are met. However, by virtue of section 30-15(2) of the ITAA 1997, a CGT exemption will only be available to testamentary gifts which were valued by the Commissioner for Taxation (Commissioner) at more than \$5000.

Item 20 of Schedule 1 proposes to introduce a **new subsection 118-60(1A)** into the ITAA 1997 which will deem any property with a value less than \$5000 as having been valued by the Commissioner at a value of more than \$5000 for the purposes of the CGT exemption. By virtue of this deeming provision, property with a value of less than \$5000 will trigger the CGT exemption for testamentary gifts and bequests.

Distributions to charitable funds

Currently, the income of certain charitable funds may be exempt from income tax if they provide money, property and/or other benefits either solely to:

- charities located in Australia which pursue their purposes in Australia, or
- charities which have been accepted and registered by the Australian Tax Office (ATO) as DGRs.⁴

However, under the current regime it is not possible to claim an income tax exemption if the charity distributes funds to a combination of both types of charities.

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The proposed changes will remove this problem. **Item 13 of Schedule 1** will repeal the current subsections 50-60(c) and (d) of the ITAA 1997 in order to substitute **new subsections 50-60(c) and (d)**. These proposed new subsections will have the effect that the income tax exemption will become available to charitable funds which make distributions to a combination of funds, regardless of whether they are charities or not.⁵

Income tax exemptions for funds distributing to certain entities

Entities which are accepted and registered by the ATO as DGRs may not be endorsed as charities within the meaning of the law. Good examples for DGRs which are not considered to be charitable are public ambulance services. However, under the current tax regime, ancillary funds and prescribed private funds, which are expressly prescribed in the Income Tax Assessment Regulations 1997, are not able to claim an income tax exemption if they distribute funds to DGRs which are not endorsed as charities. The proposed changes aim at removing this anomaly.⁶

Item 7 of Schedule 1 will insert proposed **new section 50-20** of the ITAA 1997 which, in effect, will permit ancillary and prescribed private funds to have access to the income tax exemption regardless of whether they distribute funds to DGRs which are endorsed as charities or not.

Refund of franking credits

Unlike prescribed charitable prescribed funds which are endorsed by the ATO as an income-tax exempt charity, non-charitable prescribed private funds are not automatically entitled to a refund of franking credits. **Items 21 and 22 of Schedule 1** will make changes to the ITAA 1997 which will entitle non-charitable prescribed private funds to the refund on the same basis as charitable prescribed private funds.

Comments

The financial impact and the compliance costs anticipated for this measure will be, according to the [Explanatory Memorandum](#), insignificant.

The amendments will take effect with Royal Assent and become applicable to the income year in which the Bill receives Royal Assent and each later income year.

Chapter 2—profits derived from international shipping and airline operations

Background

The proposed changes are technical amendments to the *Income Tax Assessment Act 1936* (ITAA 1936) which became necessary as the result of certain tax measures enacted under the *New International Tax Measures (Participation Exemption and Other Measures) Act*

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2004.⁷ These measures had the unwanted effect that Australian companies which were involved in the international operation of ships and aircraft escaped taxation: these companies would neither be taxed in Australia nor in the country in which the company operated.

The proposed measure was announced in the Minister for Revenue and Assistant Treasurer's [Press Release](#) No. 4 of 2005. In this press release, the Minister was cited saying:

Generally, under its tax treaties with other countries, Australia has exclusive taxing rights over Australian companies in respect of their profits from the operation of ships or aircraft in international traffic. If such profits are not taxed in Australia, neither treaty partner country would tax this income.

A change will be made to the tax law to ensure that the expanded exemption for foreign branch income does not apply to companies operating ships or aircraft in international traffic [...] This will ensure those amounts continue to be taxed in Australia, consistently with Australia's policy in negotiating its tax treaties.⁸

Main provisions

Most income and capital gains derived by a foreign branch of a resident company after 1 July 2004 are exempt from income tax as they are treated as non-assessable non-exempt income under section 23AH of the ITAA 1936.⁹ **Item 2 of Schedule 2** will insert **new subsections 23AH(14A)** and **(14B)** which will stipulate that this exemption will not apply to income and capital gain or losses which were derived from the operation of ships or aircraft in international traffic (proposed **new paragraph 23AH(14A)(a)**) or things ancillary to the operation of such aircraft and ships (proposed **new paragraph 23AH(14A)(b)**).

Comments

According to the [Explanatory Memorandum](#), the measure's financial impact and anticipated compliance costs will be nil.

The measure will come into force with Royal Assent given to the Bill, but will have a retrospective application to transactions falling into the income years starting on 1 July 2004. This is necessary to align this measure with the measures implemented through the *New International Tax Measures (Participation Exemption and Other Measures) Act 2004*.¹⁰

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Schedule 3—Secrecy provisions

Background

The proposed amendments are changes necessary to permit the disclosure of information collected by the Commissioner to the newly established Corruption and Crime Commission of Western Australia (WA Commission). The WA Commission was established under the Western Australian *Corruption and Crime Commission Act 2003*. According to the [Explanatory Memorandum](#), the WA Commission has all the powers and functions as its predecessor, the Anti-Corruption Commission, plus the powers of the Police Royal Commission.

This change in Western Australian law requires the amendment to existing taxation legislation on Commonwealth level to allow the Commissioner under section 3E of the *Taxation Administration Act 1953* (TAA) to provide the new WA Commission with relevant information where the Commissioner is satisfied that the information is relevant to:

- establishing whether a serious offence has been, or is being, committed; or
- the making, or proposed or possible making, of a proceeds of crime order.

The proposed changes have not been announced previously.

Main provision

Items 1 and 2 of Schedule 3 will make the relevant changes to section 2(1) of the TAA by including the WA Commission as eligible recipient of relevant information collected by the Commissioner.

Comments

It is anticipated that the measure's financial impact as well as its compliance costs will be nil.¹¹

The provisions will become effective with the Bill receiving Royal Assent. The measure will not apply retrospectively: **item 3 of Schedule 3** expressly provides that the changes will only apply to disclosures after the day the changes commence.

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Schedule 4—Fringe benefit tax – rebatable employer status of certain government institutions

Background

The amendments proposed in this Schedule aim at curtailing the scope of a tax measure introduced in the *Tax Laws Amendment (2004 Measures No. 1) Act 2004*.¹² With this Act, Parliament introduced measures allowing the Commissioner to endorse, under certain circumstances, charities, public benevolent institutions and health promotion charities to gain fringe benefits tax rebatable employer status under subsection 65J(1) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA). Endorsed employers are currently able to claim a tax rebate of 48 cents per dollar.

However, when introduced, the provisions were broad enough to allow Government bodies of the Commonwealth, the states or territories to become eligible for the rebate from 1 July 2005 onwards if they were accepted as a charity at law.

The proposed measure will align the changes made by the *Tax Laws Amendment (2004 Measures No. 1) Act 2004* with established legal principle, namely that institutions which can be characterised as an emanation of government cannot fall within the established meaning of charity at law and will continue to be unable to claim the rebate.¹³

The proposed measure has not been announced previously.

Main provisions

Item 1 of Schedule 4 will insert an express clarification that charitable institution within the meaning of the FBTAA will not include institutions of the Commonwealth, a state or a territory.

Comments

The Explanatory Memorandum notes that whilst the implementation of this measure will have a financial impact of nil, the failure to implement this measure would cost an estimated \$80 to \$90 million per annum over the forward estimates period. Also, it is expected that there are no compliance costs associated with this proposal.

The measure will become effective immediately after the commencement of Schedule 10 of the *Tax Laws Amendment (2004 Measures No. 1) Act 2004*, that is on 1 July 2005.

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Schedule 5—Dependent child age criterion

Background

The measure aims at harmonising the age criteria for dependent children. This measure has been announced by the then Minister for Revenue and Assistant Treasurer, The Hon. Senator Helen Coonan, in Press Release C36 of 2004, dated 11 May 2004. In this release, the Minister explained that:

The Government will standardise the dependent child age criteria used to determine a taxpayer's entitlement to the housekeeper, child-housekeeper, medical expenses and zone tax offsets, as well as the Medicare levy and Medicare levy surcharge, [...and further:] "Currently, the dependent child age criteria vary across these entitlements. For example, a taxpayer may be able to take a child into account when claiming a medical expenses tax offset but not being [sic] able to take the same child into account for the purposes of the Medicare levy and Medicare levy surcharge,"[...].

The following table contains the currently applicable age criteria (white) and the age criteria proposed in the Bill (light grey):

Off sets for:	Age criteria (not being a student)	Age criteria (full time student)	Age criteria (not being a student)	Age criteria (full time student)
Housekeeper, child house keeper, zone and overseas defence forces	16 years	25 years	21 years	25 years
Medicare levy and Medicare levy surcharge	16 years	25 years	21 years	25 years
Medical expenses tax offset	Child of taxpayer: 21 years		21 years	25 years
	Child: 16 years	25 years		
Family tax benefit Part A	21 years	25 years	21 years	25 years

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Main provisions

The Bill proposes to make changes to the ITAA 1936. Items 1 to 3 of Schedule 5 propose to omit the age ‘16’ and to replace it with the age ‘21’ where necessary to reflect the proposed changes.

Comments

According to the explanatory notes, the anticipated financial impact of this measure will be:

Financial year:	2005-2006	2006-2007	2007-2008
Financial impact	Insignificant	\$3million	\$3million

The compliance costs in relation to this measure are expected to be minimal.

The proposed amendments will commence applying to income tax assessments for the 2005-2006 income year.

Concluding comments

Overall, the financial impact of, and the compliance costs for, all proposed measures is said to be minimal.

The proposed amendments contained in this Bill do not appear to be controversial. Schedules 2, 3 and 4 will make amendments which clarify the law or rectify unwanted results caused by previous amendments. Schedule 1 inserts a number of measures which aim at providing more flexibility to the charitable sector. Schedule 5 will provide more transparency for taxpayers in that it is aimed at providing uniform age criteria for dependent children.

Endnotes

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1. T. John, ‘Extension of Charitable Purpose Bill 2004’, [Bills Digest](#), No. 164, Department of Parliamentary Services, Canberra, 2003-2004, p. 1.
 2. See generally R. L. Deutsch, M. L. Friezer, I. G. Fullerton, M. M. Gibson, P. J. Hanley, T. J. Snape, *Australian Tax Handbook*, Thomson ATP, Sydney, 2005, pp. 521–522.
 3. For details, especially the requirements for such gifts, see Deutsch et al, *ibid.*, p. 532.

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- 4 The exemption can be invoked—by funds to property was added to a pre-1 July 1997 by will or gift on or after 1 July 1997, and—by funds established in Australia for public charitable purposes by will or instrument of trust. Section 50-5, items 1.5A and 1.5B of the ITAA 1997.
- 5 Deutsch et al., op. cit., p. 259, which includes an overview of further requirements before an income tax exemption may be available to a fund referred to in footnote 4.
- 6 [Explanatory Memorandum](#) to the Tax Laws Amendment (2005 Measures No. 3) Bill 2005, p. 10.
7. B. Pulle, ‘New International Tax Measures (Participation Exemption and Other Measures) Bill 2004’, [Bills Digest](#), No. 133, Department of Parliamentary Services, Canberra, 2003-2004.
8. The Hon. M. Brough, Minister for Revenue and Assistant Treasurer, *Taxation of foreign branch amounts*, [press release](#), 19 January 2005.
- 9 Deutsch et al., op. cit., p. 1390. The measures introduced with the *New International Tax Measures (Participation Exemption and Other Measures) Act 2004* became effective on 1 July 2004.
10. Pulle, op. cit., p. 13.
- 11 [Explanatory Memorandum](#), op. cit., p. 4.
12. B. Pulle, ‘Tax Laws Amendment (2004 Measures No. 1) Bill 2004’, [Bills Digest](#), No. 117, Department of Parliamentary Services, Canberra, 2003-2004, pp. 13–14.
13. For an instructive discussion of this issue see: *Ambulance Service of NSW v Federal Commission of Taxation* [2003] FCAFC 161.

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