



## Tax Laws Amendment (2006 Measures No. 1) Bill 2006

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Law and Bills Digest Section

### Contents

Glossary . . . . .	2
Purpose . . . . .	2
Background . . . . .	3
Main Provisions . . . . .	3
Schedule 1 — Foreign source income exemptions for temporary residents . . . . .	3
Background and history of the tax measures . . . . .	3
Context of the amendments . . . . .	4
Details of the amendments . . . . .	5
Exemption from foreign source income . . . . .	5
Exemption from certain record keeping obligations . . . . .	6
Exemptions in relation to capital gains tax and employee share schemes . . . . .	6
Exemption to capital gains tax—general principle . . . . .	6
Gains and losses of employee shares or rights: upfront taxation . . . . .	6
Exemptions from interest withholding tax liability . . . . .	9
Estimated costs of the measure . . . . .	9
Schedule 2 — Business related costs . . . . .	10
Current tax treatment of capital expenditure . . . . .	10
Is the expenditure a capital expenditure? . . . . .	10
Does the capital expenditure fall within current section 40-880 ITAA 1997? . . . . .	11
The proposed changes . . . . .	11

The basic principle . . . . .	12
Some comments in relation to the basic principle . . . . .	12
Pre-operation expenditures within the scope of this measure . . . . .	12
The temporal nexus of expenditure and commencement of business operations. . . . .	13
Does the business have to commence at all? . . . . .	13
Exceptions and limitations. . . . .	13
Further amendments relating to this measure . . . . .	14
Consolidation regime . . . . .	14
Non-commercial losses . . . . .	15
Capital expenditure to terminate lease . . . . .	16
Changes to the uniform capital allowances regime . . . . .	16
Amendments to the capital gains tax regime . . . . .	17
Schedule 3 — Promotion and implementation of schemes . . . . .	19
Background . . . . .	19
Exposure Draft – meaning of a ‘promoter’ . . . . .	20
Exposure draft – meaning of a ‘tax exploitation scheme’ . . . . .	20
The Bill - meaning of ‘promoter’ . . . . .	20
The Bill – Meaning of a ‘tax exploitation scheme’ . . . . .	21
Deterrence . . . . .	22
Changes as a result of the consultation process . . . . .	22
Comments by the Australian Labor Party . . . . .	22
Schedule 4 — Goods and services tax and vouchers – prepaid phone products . . . . .	22
Concluding Comments. . . . .	23
Endnotes. . . . .	24

## Glossary

ATO	Australian Taxation Office
Commissioner	Commissioner of Taxation
the Federal Court	Federal Court of Australia
GST	Goods and services tax
GST Act	<i>A New Tax System (Goods and Services Tax) Act 1999</i>
ITAA 1936	<i>Income Tax Assessment Act 1936</i>
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
TAA 1953	<i>Taxation Administration Act 1953</i>

## Tax Laws Amendment (2006 Measures No. 1) Bill 2006

**Date Introduced:** 16 February 2006

**House:** House of Representatives

**Portfolio:** Treasury

**Commencement:** Upon Royal Assent

## Purpose

The Bill implements a range of changes to the taxation legislation. The respective Schedules have different purposes which are discussed under their individual headings.

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## Background

Each Schedule of the Bill has a different background which, so far as necessary, will be discussed under each individual heading below.

## Main Provisions

### Schedule 1 — Foreign source income exemptions for temporary residents

#### Background and history of the tax measures

This is the third time the Government has introduced exemptions to the taxation of foreign source income earned by so-called temporary residents. Such exemptions were initially introduced as part of *Taxation Laws Amendment Act (No. 4) 2002* (2002 No. 4 Bill) which was amended in the Senate by deleting the provisions relating to temporary residents.<sup>1</sup> The House of Representatives agreed to the deletion of the measure. The reader is referred to the Library's [Bills Digest](#) for more information on the 2002 No. 4 Bill.

With minor changes, the measures were re-introduced into Parliament as part of the Taxation Laws Amendment Bill (No. 7) 2002 (2002 No. 7 Bill).<sup>2</sup> The [Bills Digest](#) to the 2002 No. 7 Bill summarises the background to the amendments and refers to the views of the business community. It also cites criticism, for example, the measure's potential to violate a fundamental tax principle: that equal income should attract equal taxation.<sup>3</sup> For more information in relation to the 2002 No. 7 Bill, the reader is referred to the Library's [Bills Digest](#) in relation to this Bill.

There are some significant differences between the measures that failed previously and the measures which have been introduced into Parliament with this Bill. Apart from creating a new individual category of taxpayers, the differences have been summarised by tax specialists at Deloitte as follows:

To summarize, the main differences between the original proposed reforms and the recently reintroduced reforms are:

- removing the four-year cap on the definition of a temporary resident;
- removal of time limits on various other exemptions;
- changes to the CGT treatment where temporary residents are now taxed like non-residents except in regards to employee share gains; and
- specific rules regarding the CGT treatment of employee share plan gains.<sup>4</sup>

Where necessary, the differences will be dealt with in more detail below.

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The measure was announced by the Treasurer on 16 February 2006, hailing it as giving Australia ‘one of the most competitive expatriate taxation regimes in the world’.<sup>5</sup> International Tax specialists with executive level clients welcome the measure: Fleur Anderson from the *Australian Financial Review* reported that the KPMG’s Head of Global International Executive Services commented:

“Thank goodness, it’s about time,” [...] “We generally have briefings with expats where it’s all bad news, and the expression on their faces is awful.”<sup>6</sup>

The Australian Business Council (ABC) also welcomed the proposal. The ABC’s Chief Executive, Katie Lahey, said:

[...] the measures, which include addressing capital gains tax and cross-border employee share scheme issues, would have a significant and positive impact on Australia’s ability to attract the best global talent.<sup>7</sup>

The Australian media commented that the tax measure is particularly favourable to Telstra Chief Executive Officer (CEO) Sol Trujillo. For example, the *Age* remarked that Trujillo:

[...] has finally got the present he wanted, with the Federal Government introducing legislation to scrap taxation of foreign income for temporary residents.<sup>8</sup>

But Trojillo is not the only CEO who can benefit from the new tax exemptions. The *Australian Financial Review* named as possible beneficiaries of the new measure:

[...] other high-flying imports, including National Australia Bank’s managing director and Scotsman John Stewart, BHP Billiton’s American chief executive Chip Goodyear, fellow American and Myer managing director Dawn Robertson, and Commonwealth Bank of Australia chief executive Ralph Norris who is a Kiwi.<sup>9</sup>

## Context of the amendments

Crucial to understanding this measure is that the criteria of residence of the taxpayer and the source of the income are central aspects of Australian taxation law. Until now, the Australian tax system distinguished two kinds of taxpayers: the resident taxpayer and the foreign resident. Under Australian tax law, in order to ascertain the residency status of a person, four different tests may be applied. These include:

- Primary test of residency—a test applying the ordinary concepts of residency, and
- Statutory tests—three tests provided by legislation including the ‘domicile/permanent place of abode’ test; the ‘183 days test’ and the ‘Commonwealth superannuation fund test’.

A resident taxpayer is a taxpayer who fulfils one of the above tests.

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Schedule 1 of the Bill will create a new category of taxpayers: the so-called ‘temporary resident’.<sup>10</sup> It will provide certain exemptions available to this class of taxpayer where they have foreign source income. The exemptions will be in relation to, for example, withholding tax obligations or the taxation of share dividends. Importantly, the question whether a taxpayer is a temporary resident will not be answered on the basis of the residency tests referred to above but under these amendments, a person’s tax status will be connected to his or her migration status.

## Details of the amendments

Central to the proposed tax measure in **Schedule 1** of the Bill is a new category of taxpayer: the ‘temporary resident’. **Item 2** sets out a definition of ‘temporary resident’ which is proposed to be inserted into **section 995-1(1)** of the ITAA 1997. According to this definition, a taxpayer is considered to be a temporary resident if he or she:

- holds a temporary visa granted under the *Migration Act 1958* (Cth)
- is not an Australian resident within the meaning of the *Social Security Act 1991* (Cth), and
- does not have a spouse who is an Australian resident within the meaning of the *Social Security Act 1991* (Cth).

This test reflects the underlying policy of this measure, namely, that only persons remotely connected to Australia shall not be treated as an Australian taxpayer. To achieve this, the test is shaped in the form of a funnel: the initial layer of this test is very broad, making every temporary resident a potential temporary resident for tax purposes. Layers two and three of the test significantly reduce the scope of the category in order to avoid holders of temporary visas, who have significant connections to Australia (for example, because they are married to an Australian citizen) from coming within the scope of the exemptions intended for temporary residents. The threshold is the permanency, or likely permanency, of a person’s stay in Australia.

The following is a brief overview of the exemptions which will be available to temporary residents.<sup>11</sup>

### Exemption from foreign source income

Under the new measures, a temporary resident will be exempt from taxes on both, ordinary and statutory foreign source income such as rental income or income derived from dividends on shares (**item 1**, proposed **subsection 768-910(1)**).<sup>12</sup> An exception to this principle will apply with respect to ordinary and statutory income for employment or services provided which is derived from foreign sources whilst being a temporary resident (proposed **subsection 768-910(3)**). In other words, where an employee of a foreign company earns income for the employment undertaken in Australia and this employee is a

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temporary resident for tax purposes, the income is not exempt under proposed subsection 768-910(1). This exception was included:

[...] to prevent the exemptions from making the employment remuneration for temporary residents less costly than for other Australian residents.<sup>13</sup>

The policy rationale underlying this exception is to increase tax equality, a major stumbling block for the measures which were previously introduced but failed to secure passage through Parliament. However, whilst the employment remuneration of temporary residents is excluded, the existing laws applicable to foreign source employment income are intended to continue to apply.<sup>14</sup>

### Exemption from certain record keeping obligations

As a result of the above exemption, some of the record keeping obligations which apply to Australian residents will cease to apply to temporary residents. For example, if a temporary resident lets property in his or her home country to tenants and receives rent, the temporary resident will be relieved of record keeping obligations under Australian tax law. This will have the result of reducing the compliance costs for these taxpayers.

### Exemptions in relation to capital gains tax and employee share schemes

#### Exemption to capital gains tax—general principle

Under proposed **section 768-915**, capital gains or losses realised from assets outside Australia will be disregarded if:

- the taxpayer is a temporary resident, as outlined above, immediately before the capital gains tax (CGT) event occurs (proposed **section 768-915(a)**), and
- the gain or loss would not be taxable to a foreign resident (proposed **section 768-915(b)**).

This proposed provision is of broad application and will also apply to capital gains and losses stemming from employee shares or rights acquired under employee share schemes (ESS). Such shares or rights are usually acquired by employees at a discounted price, that is there is a difference between the market price of the share or right and the price at which the employee was able to acquire it. This discount is considered to be part of the employees' assessable income. The discount can be taxed either upfront upon acquisition or the taxation can be deferred until the share is, for example, sold (cessation time). Where a gain or loss arises at cessation time and the taxpayer is a temporary resident, proposed section 768-915 will ensure that gains and losses will be disregarded.

#### Gains and losses of employee shares or rights: upfront taxation

Where the taxation of a discount is not deferred, gains or losses which stem from employee shares or rights acquired under employee share schemes (ESS) are dealt with by

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proposed **sections 768-920 to 768-945**. The regime devised under these provisions (the regime) aims at ensuring that the CGT exemption under proposed section 768-915 will only apply to gains and losses which relate to income not connected to Australia. As soon as the temporary resident engages in employment or renders services which affect the holding or acquisition of such shares or rights, the regime will operate to determine which proportion of the gains or losses should not be disregarded.

Proposed **subsections 768-920(1) and (2)** stipulates the threshold relevant to determine the applicability of the employee share gains or losses regime. Proposed subsection 768-920(1) will set the threshold requirements for shares and rights, proposed subsection 768-920(2) those for so-called 'derived shares'.<sup>15</sup> Importantly, the requirements specify that the *share or right* or *derived share* must not have the necessary connection with Australia (share or right: proposed **paragraph 768-920(1)(c)**; derived share: proposed **paragraph 768-920(2)(d)**). For example, where a temporary resident holds employee shares in an Australian private company, the necessary connection is established and the employee shares gains or losses would be taxed according to the normal CGT rules. Where the temporary resident holds shares in a foreign company, the rules governing the employee share gains or losses regime would be triggered.

The employee share gains or losses regime is intended to ensure that only gains or losses relating to the temporary resident's employment will be subject to CGT. Proposed **subsections 768-920(4) and (5)** clarify that this is the case despite the exemption provided to temporary residents under proposed section 768-915.

Proposed **subsections 768-920(6) and (7)** stipulate how the amount of capital gains and losses are to be calculated. The employee share gains or losses regime distinguishes between the calculation with respect to gains and losses for temporary and foreign residents as well as Australian residents.

#### *Temporary and foreign residents*

Under new subsection 768-920(6), for temporary and foreign residents the amount is the 'adjusted notional gain or loss'. The term 'adjusted notional gain or loss' is a composite term comprised of 'adjusted' and 'notional gain or loss' (**proposed subsection 768-920(9)**). In other words, the proposed scheme stipulates a two-step calculation to determine the amount of tax-relevant gains or losses.

The component 'notional gain or loss' is calculated on the basis of proposed **section 768-925**. The [Explanatory Memorandum](#) explains:

[The notional gain or loss] is the capital gain or loss that would have arisen for a permanent resident from the time of acquisition of the shares or rights, or the original right in the case of derived shares, until the time of the CGT event.<sup>16</sup>

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Proposed **subsections 768-925(2) and (3)** stipulate how the time of acquisition and the time of the CGT event are determined. The reader should note that the determination of the time of acquisition will depend upon whether the employee holds shares or rights or so-called *derived shares*.

This distinction is also relevant in relation to the calculation of the adjustments (proposed **section 768-930**). In relation to shares or rights, proposed **subsection 768-930(2)** stipulates that the adjustment in relation to shares or rights must be calculated by:

- first—by multiplying the notional gain or loss with a factor worked out pursuant to **proposed section 768-935(1), (2) or (3)** (see below), and,
- second—by multiplying the result of the first multiplication with the factor worked out under **proposed section 768-935(4)**.

In relation to *derived shares*, proposed **subsection 768-930(1)** stipulates that the adjustment in relation to shares or rights must be calculated by:

- first, multiplying the notional gain or loss with a factor worked out pursuant to **proposed section 768-940(1), (2) or (3)** (see below), and,
- second, by multiplying the result of the first multiplication with the factor worked out under **proposed section 768-940(4)**.

The specific steps to determine the factors necessary to calculate the adjustments are stipulated under proposed sections 768-935 and 768-940.

#### *Australian residents*

The provisions relating to Australian residents are devised to capture situations where a temporary resident becomes an Australian resident before the CGT event occurs. In this instance, the calculation of the tax-relevant gains or losses must be modified to account for the taxpayer's changed residency status. The [Explanatory Memorandum](#) notes:

[Where a person is an Australian resident] a proportion of the gain or loss that has accrued up to the time the person became a permanent resident must be added to a capital gain or loss that would otherwise be recognised.<sup>17</sup>

According to proposed **paragraphs 768-920(7)(a) and (b)**, Australian residents will be required to calculate their 'adjusted notional gain or loss' which is then added to the capital gain or loss which would have occurred if not for proposed section 768-920.

The notional gain or loss is calculated pursuant to proposed **section 768-925**. However, the notional gain requires a modification because the cost base and reduced cost base for the shares or rights or derived shares changes.

Generally, the rules governing the calculation of the cost base and reduced cost base for shares or rights acquired under an ESS are set forth in Division 130-D of the ITAA 1997.

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Relevantly, under subsection 130-80(2), the first element of the cost base and reduced cost base of the share or right, that is the asset's acquisition costs, is its market value at the time it was acquired.<sup>18</sup> Proposed **section 768-955** will modify this rule. Under **subsection 768-955(2)**, the acquisition cost for an asset (this includes shares and rights and derived shares) will be its market value at the time the taxpayer becomes an Australian resident.

This change to the notional gain or loss for Australian residents is reflected in the proviso stipulated by proposed **subsection 768-925(4)**.

The notional gain or loss is then adjusted. The adjustment follows similar steps to those described above and is governed by proposed section 768-930. The main difference lies in the calculation method to determine the value of the factors. Proposed **subsections 768-935(2)** and **768-940(2)** stipulate the calculation of the factors is linked to the period between the acquisition of the asset and the day the taxpayer ceased to be a temporary resident and became an Australian resident.

#### *Prolonged period to amend assessments*

Proposed **section 768-945** will, under certain circumstances, allow taxpayers an extended period to amend their income tax assessment. This will account for possible uncertainties relating to the temporary resident's employment in Australia. The amendment will be possible for four years after the income year in which the employment ended to which the acquisition of shares, rights or original rights ended (proposed **subsections 768-945(4)** and **(5)**).

#### **Exemptions from interest withholding tax liability**

Under proposed **section 768-980(a)**, the temporary resident is exempt from paying interest withholding tax to any non-resident. In turn, the interest a foreign resident receives from a temporary resident will non-assessable non-exempt income but only if the interest is not derived from carrying on a business at or through a permanent establishment in Australia (proposed **section 768-980(b)**).

#### **Estimated costs of the measure**

It is estimated that the measure will have revenue implications of around \$75 million. Compliance costs are expected, but it is envisaged that they will be reduced.

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## Schedule 2 — Business related costs

### Current tax treatment of capital expenditure

As a general principle, under current Australian tax law, capital expenditure is not deductible. However, some business related capital expenditures are excepted from this rule (section 40-880 ITAA 1997).

Whether a particular expenditure can be deducted depends on two preliminary assessments: first, is the expenditure a capital expenditure within the meaning of established case law, and, second, does the capital expenditure fall within one of the categories set forth in subsection 40-880(1) of the ITAA 1997.

### Is the expenditure a capital expenditure?

Whether a particular expenditure constitutes a capital expenditure must be assessed on the basis of established case law. The main issues, as canvassed in the CCH Australian Master Tax Guide of 2006 can be summarised as follows:

- the test whether an expenditure is a capital expenditure is set out in the decision in *Sun Newspaper Ltd v Federal Commissioner of Taxation* (1938) 61 CLR 357 and has three elements:
  - the nature of the advantage sought
  - the way the advantage is to be used, and
  - the means adopted to get the advantage.
- the more enduring the advantage sought is, or the more often the expenditure occurs, the more likely it is that the expenditure is a capital expenditure in nature
- outlays to improve the competitiveness of a business or expand its operations are not considered to be of a capital nature.
- in order to determine the character or nature of an outlay, the courts will look behind the transaction

The CCH Australian Master Tax Guide 2006 lists a number of examples of outlays which have and which have not qualified as capital expenses.

If the expenditure is found to be a capital expenditure, this outlay is, *prima facie*, not deductible. However, it may be exempt from this principle if it falls within the scope of section 40-880 ITAA 1997.

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## Does the capital expenditure fall within current section 40-880 ITAA 1997?

Subsection 40-880(1) of the ITAA 1997, in its current form, provides an exemption from the non-deductibility for certain capital expenditures. Specifically, the provision considers the following business-related expenditures to be tax-deductible:

- expenditure to establish a business structure (eg incorporation costs)
- expenditure for restructuring
- expenditure to raise equity for a business (issuing shares)
- expenditure to defend your business against a takeover
- costs to a business of unsuccessfully attempting a takeover
- costs of liquidating a company that carried on a business and of which the taxpayer is a shareholder, and
- costs to stop carrying on a business.

These prescribed categories have been subject to a considerable amount of disagreement and uncertainty and many of the items must be read subject to Interpretative Decisions (ID) issued by the Australian Tax Office (ATO).

Where a capital expenditure is found to fall into a particular category, subsection 40-880(2) ITAA 1997 permits the taxpayer to deduct 20 percent of the expenditure every year for a period of five years. The capital expenditure is only deductible to the extent that it relates to a business which was, is or will be carried on for a taxable purpose. ID 2005/317 explains that:

[...] taxable purpose means the purpose of producing assessable income (subsection 40-25(7) of the ITAA 1997). Something is done for the purpose of producing assessable income if it is done for the purpose of gaining or producing assessable income or in carrying on a business for the purpose of gaining or producing assessable income (subsection 995-1(1) of the ITAA 1997). A deduction under subsection 40-880(1) is therefore available to the extent that the business is, was or will be carried on for the purpose of gaining or producing assessable income.<sup>19</sup>

In other words, the taxpayer must be able to establish a nexus between the capital expenditure and the business.

## The proposed changes

Central to the proposed changes is the repeal of current section 40-880 ITAA 1997 and its substitution with proposed **section 40-880 (item 30, Schedule 2)**. According to the [Explanatory Memorandum](#), this proposed section will provide a 'systematic solution' when compared to the current version of the provision.<sup>20</sup>

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### The basic principle

The basic principle is contained in proposed **subsection 40-880(2)**. It stipulates that a taxpayer will be able to deduct capital expenditure incurred *in relation to*:

- the taxpayer's business (proposed **paragraph 40-880(2)(a)**)
- the taxpayer's past or proposed business (proposed **paragraph 40-880(2)(b)** and **(c)**), or
- the liquidation or deregistration of companies, partnerships or trusts in which the taxpayer has been a member, partner or beneficiary (proposed **paragraph 40-880(2)(d)**).

### Some comments in relation to the basic principle

The basic principle warrants some further examination, particular whether an expenditure:

- was a capital expenditure—this will still be assessed on the basis of established case law (see discussion above). If the expenditure comes within the scope of this provision, then it will continue to be deductible in equal portions of 20 percent for five income years (proposed subsection 40-880(2)).<sup>21</sup>
- was in relation to the current, past or proposed business—this will stipulate the required nexus between the expenditure and the business.

### Pre-operation expenditures within the scope of this measure

The deductibility of expenditure in relation to proposed business raises the question which kind of pre-operation expenditures may be deductible under this proposed measure. The [Explanatory Memorandum](#) provides the following examples as guidance:

- expenditures to investigate the viability of a business (including feasibility studies or market research)
- establishment costs (including costs associated with the establishment of the business structure), or
- necessary precedent costs to the business being carried on (including market testing or putting a tender).<sup>22</sup>

It should be noted that the item 'establishment costs' is already included in the current section 40-880 (paragraph 40-880(1)(a)). The current understanding of the term is not exhaustive and there is room to increase the scope of this measure. Ultimately, it is likely to be a question of which kind of expenditure will be accepted by the Commissioner of Taxation (Commissioner).

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The temporal nexus of expenditure and commencement of business operations

Under proposed **subsection 40-880(7)**, the expenditure must be incurred within a 'reasonable time' before business operations commence (temporal nexus).<sup>23</sup>

The High Court has dealt with a temporal nexus requirement in a similar context in *Steele vs The Deputy Federal Commissioner of Taxation* (1999) 197 CLR 459. In this case, the Court seemingly relaxed this requirement.<sup>24</sup> However, the Commissioner has limited the applicability of this case and, in relation to the temporal nexus between an outlay and income generation in later income years, the Commissioner will consider whether:

- an outlay is not too preliminary or too soon, and
- the connection between outlay and income generation is not lost due to the length of time between them.<sup>25</sup>

What constitutes 'reasonable time' will have to be ascertained on a case-to-case basis.

Does the business have to commence at all?

For the expenditure to be deductible, there seems to be no requirement that the proposed business, in relation to which the expenditure did occur, must commence operations at some stage in the future. As a result, it seems at least feasible that costs may be incurred for the purpose of income-minimisation rather than in preparation for a genuine business. In the past, the Commissioner queried whether in relation to the connection of outlays and future income:

- the outlay was incurred with a view of gaining income, and
- there are continuous efforts in the pursuit of gaining the income as envisaged.<sup>26</sup>

This is *prima facie* a test inquiry into the subjective intentions of the taxpayer which is difficult to prove. To avoid such problems, the [Explanatory Memorandum](#) notes that the taxpayer will be required:

to demonstrate a commitment of some substance to commence the business and sufficient identity about that business that is proposed to be carried on.<sup>27</sup>

This requirement would dispose of the need to inquire into the intentions of the taxpayer, although it is unclear just how much commitment must be shown. Again, this will have to be assessed on a case-by-case basis, considering all the relevant circumstances.

### Exceptions and limitations

Proposed **subsections 40-880(3) to (9)** contain various limitations and exceptions to the above principle. Proposed **subsection 40-880(3)** reiterates that the deductibility of the expenditure will depend upon its relationship to a currently operating business, one which has been carried on in the past or which is proposed to be carried on in the future. This

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subsection further stipulates that the business must be carried on for a taxable purpose (see discussion above).

The principle implemented by this measure is generally applicable for expenditures incurred by the taxpayer in relation to *the taxpayer's* current, former or prospective business. In certain circumstances, however, the taxpayer may expend money in relation to a business which is, has been or will be carried on *by another business*. Proposed **subsection 40-880(4)** specifies the circumstances in which this expenditure by the taxpayer will still be deductible, but it is important to note that the exception will only be available where the taxpayer derives assessable income from this business.

Proposed **subsection 40-880(5)** contains a list of exclusions which regulate the interaction of this measure with the remainder of the tax law. A similar list is already contained in the current section 40-880. The relevant details to each exclusion and examples are set out in the [Explanatory Memorandum](#) to which the reader is referred.<sup>28</sup>

Proposed **subsections 40-880(8)** and **(9)** contain two further exceptions. Under proposed **subsections 40-880(8)**, it will be not possible to deduct any amount which has been excluded by operation of market value substitution rules from the costs of a depreciating asset or the cost bases of a capital gains tax asset. Proposed subsection 40-880(9) provides an exclusion for certain amounts which are the returns of amounts which have been received by the taxpayer previously. The [Explanatory Memorandum](#) gives as examples dividends paid by companies, distributions to trustees or repayments on loan principals.<sup>29</sup>

## Further amendments relating to this measure

### Consolidation regime

Based on the single entity rule in section 701-1 ITAA 1997, intra-group transactions of intra-group assets in consolidated groups are ignored for tax purposes.<sup>30</sup> This includes, for example, the payment of dividends amongst members of a group.<sup>31</sup> Non-intra group assets may also be transferred but will have tax implications.

The amendments proposed in Schedule 2 will have an impact on the treatment of intra- and non-intra-group assets. In relation to:

- *intra-group assets*—where the expenditure in relation to an intra-group asset has been incurred for the purpose of carrying on a business, the expenditure can be dealt with under proposed section 40-880 as discussed above, and
- *non-intra-group assets*—proposed **subsections 110-35(1)** and **(10) (Schedule 2, items 39, 41)** will stipulate that expenditure which is incurred in relation to capital gains tax (CGT) non-intra-group assets held by the head company are recognised as an incidental costs in the cost and reduced cost bases.

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The [Explanatory Memorandum](#) provides examples in relation to the above amendments. The reader is referred to pages 58 to 60 for the details.<sup>32</sup>

#### Non-commercial losses

Where taxpayers have income from both, carrying on a business and, for example, salaried employment, the taxpayer may be entitled to set-off the losses incurred from the business activities against the other assessable income.<sup>33</sup> Division 35 ITAA 1997 regulates how such losses may be offset.

Section 35-5 stipulates that the object of this Division is to 'is to improve the integrity of the taxation system by preventing losses from non-commercial activities that are carried on as businesses by individuals (alone or in partnership) being offset against other assessable income'.

Under the Division, taxpayers maybe permitted to carry forward losses incurred from non-commercial business activities which cannot be offset against other income in the year in which they arise 'to be offset in a future year when there is a profit from the non-commercial activity'.<sup>34</sup> It is also possible to offset this loss against other income, however, this will only be possible if one of the tests set out in this Division (ss 35-30 to 35-45 ITAA 1997) can be satisfied or the Commissioner exercises the discretion granted under section 35-55 ITAA 1997. The tests to be applied are:

- Assessable income test (section 35-30 ITAA 1997)
- Profits test (section 35-35 ITAA 1997)
- Real property test (section 35-40 ITAA 1997), and
- Other assets test (section 35-45 ITAA 1997).

The proposed amendments relating to non-commercial losses aim at harmonising the measure in Division 35 with the proposed measure in proposed section 40-880 (as discussed above). In particular, they will prevent certain post-business expenditures incurred by individual taxpayers in relation to non-commercial business activities to become deductible under proposed section 40-880 unless:

- one of the above tests will be fulfilled
- the Commissioner exercises the discretion under section 35-55, or
- the business was a primary production or professional arts business and the other income was not more than \$40 000 (**item 5, proposed subsection 35-10(2A)**).

In relation to pre-business expenditures deductible under proposed section 40-880, **Schedule 2, item 5, proposed subsection 35-10(2B)** stipulates that the deduction will only be possible from the income year onwards in which the business activity will be carried on. The deduction will be five equal shares of 20 per cent per annum. Should the

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business cease operations prior to the consumption of the deductible amount, the taxpayer will be prevented from deducting the remainder.

Items 6 and 7 as well as 9 to 16 will make consequential amendments, including, for example, modifications to the tests referred to above (**items, 7, 9-16**) and the Commissioner's grant of discretion (**item 18, proposed subsection 35-55(2)**).

#### Capital expenditure to terminate lease

Under the current tax regime, expenditure relating to the termination of leases is not tax relevant, for example, in the form of set-offs or deductions. The proposed amendments will change this situation, allowing the deduction of 20 per cent of the expenditure to terminate a lease for the year in which the termination occurs and the following four income years (**item 2, proposed subsection 25-110(2)**). The measure will, however, only provide for deductibility if the lease is in fact terminated: until the lease's termination, the expenditure will be quarantined.

The [Explanatory Memorandum](#) explains that the term lease will include authorities, quotas and permits.<sup>35</sup> However, under **proposed subsection 25-110(3)**, this measure will not be applicable to finance leases as defined under the [Australian Accounting Standard AASB 117 'Leases'](#).<sup>36</sup>

**Proposed subsection 25-110(4)** will introduce a market value substitution rule, whilst **proposed subsection 25-110(5)** will prevent deductibility where the termination payment was made for the purpose of entering into another lease agreement with the same party.

#### Changes to the uniform capital allowances regime

Under the uniform capital allowance regime (UCAR), contained in Division 40 of the ITAA 1997, taxpayers may be allowed to deduct certain amounts for the decline in value of depreciating assets or pooled assets. The deductions are available to the extent that the assets are used for taxable purposes. The deductible amounts are generally calculated based on the effective life of the assets, but in some instances, the expenditure can be deducted immediately (for example, in relation mining explorations).<sup>37</sup>

The CCH Australian Master Tax Guide 2006 notes that '[t]he decline in value of a depreciating asset is calculated on the basis of the "cost" of the asset to the particular taxpayer.'<sup>38</sup> This cost to the taxpayer is comprised of two elements (section 40-175 ITAA 1997):

- the first cost element (section 40-180 ITAA 1997)—the cost incurred by the taxpayer for holding the depreciating asset. The cost is determined at the time of holding the asset (subsection 40-180(1)), and

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- the second cost element (section 40-190)—the cost incurred to ‘bringing the asset to its present condition and location from time to time since [the taxpayer] started to hold the asset’ (subsection 40-190(2)).

The proposed amendments will expand this basis by modifying the first and second cost element:

- the first cost element—**item 20** proposes to add **subsections 40-180(3) and (4)**. Under proposed subsection 40-180(3), a nexus will be required between the expenditure and commencing to hold the asset. Proposed section 40-180(4) provides that no amount which falls within the second element can be used in relation to the first cost element, and
- the second cost element—**item 24** proposes to repeal the current provision, substituting **proposed subsection 40-190(2)**. The amendment retains the current provision as first limb of a two-pronged test. It will add a second limb, stipulating that expenditure reasonably relating to a balancing adjustment event be taken into account where for the purpose of ascertaining the second cost element. A balancing adjustment event occurs according to section 40-295, for example, where the taxpayer stops to hold the asset because the asset was destroyed or sold (this section specifies further balancing adjustment events). Where, for example, the taxpayer incurred costs for the destruction of the asset, a balancing adjustment event occurs and the cost can be included into the second cost element (see the Example to be inserted by **item 26**, Example 2 to subsection 40-190(2)).

Amendments to the capital gains tax regime

The Bill proposes to make amendments to the calculation of cost and reduced cost base as well as further aspects of the capital gains tax (CGT) regime.

The cost base of an asset is used to ascertain whether the asset made a capital gain, the reduced cost base to determine whether the asset made a capital loss. Cost base and reduced cost base are calculated considering five separate elements. For the cost base they are:

- Element 1—Acquisition costs (section 110-25(2) ITAA 1997)
- Element 2—Incidental costs (section 110-25(3) ITAA 1997)
- Element 3—Non-capital costs (section 110-25(4) ITAA 1997)
- Element 4—Enhancement costs (section 110-25(5) ITAA 1997)
- Element 5—Title costs (section 110-25(6) ITAA 1997)

For the reduced cost base, Elements 1, 2, 4 and 5 are identical, but Element 3 differs in that it is concerned with balancing adjustments (section 110-55(3) ITAA 1997).<sup>39</sup>

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### ***Changes to Element 2—Incidental costs***

**Items 34, 39 to 41 and 49** will make changes to Element 2, incidental costs which were incurred to acquire a particular asset. The proposed amendments will broaden the base of costs which become relevant for CGT purposes: under item 41, proposed **subsections 110-35(7) to (10)**, taxpayers will be able to include costs relating to search fees, loan application and mortgage discharge fees into the cost base. This amendment will also ensure that certain costs incurred by a head company of a consolidated group will become relevant for the cost and reduced cost base despite being the result of an intra-group transaction.

### ***Changes to Element 3— Non-capital costs***

**Item 35** will expand Element 3 to remove the limitation that only non-capital costs may be considered for the purpose of ascertaining the cost base of an asset.

### ***Changes to Element 4—Enhancement costs***

There will be four changes to the cost and reduced base Element 4. These include that:

- it will no longer be necessary that the expenditure actually increased the value of the asset, but rather that the purpose or the expected effect of the expenditure was to increase or preserve the value of the asset (**item 36**, proposed **paragraph 110-25(5)(a)**)
- the expenditure no longer has to be reflected in the state or nature of the asset at the time of the CGT event (**item 36**, repeal of current subsection 110-25(5))
- capital expenditure relating to the installing or moving the asset is now included in the cost and reduced cost base (**item 36**, proposed **paragraph 110-25(5)(b)**), and
- capital expenditures in relation to good will is excluded from Element 4 (**item 36**, proposed **subsection 110-25(5A)**).

Finally the proposed amendments will introduce several exclusions from the application of the above Elements to certain expenditure, including:

- entertainment costs (**item 44**, proposed **subsection 110-38(3)**)
- penalties (**item 44**, proposed **subsections 110-38(4)**), and
- bribes (**item 44**, proposed **subsections 110-38(2)**).

The latter, however, is limited to bribes paid to foreign and public officials.

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### Schedule 3 — Promotion and implementation of schemes

This schedule amends the *Taxation Administration Act 1953* (TAA 1953). The purpose of the amendments is to deter the promotion of tax avoidance and tax evasion schemes. The amendments make individuals liable for large monetary penalties if they have a substantial role in the implementation of tax exploitation schemes.<sup>40</sup> The schedule introduces a civil penalty regime.

Currently, there are no civil or administrative penalties for the promotion of these schemes. This means that promoters can reap profits while investors may be subject to penalties under the TAA 1953.<sup>41</sup> In addition the Commissioner cannot currently take legal action to stop the promotion of tax schemes.<sup>42</sup>

The amendments allow the Commissioner to:

- seek large civil penalties
- seek an injunction to stop the promotion of a tax exploitation scheme, and
- enter into voluntary undertakings with promoters or implementers that address concerns about the way in which a scheme is promoted.<sup>43</sup>

#### Background

The promoter penalty rules were foreshadowed by the Government in December 2003. In August 2005, the Department of the Treasury released for public comment draft legislation for the deterrence of promoters of tax exploitation schemes. The draft legislation proposes the introduction of a new division into the TAA 1953. The draft Bill was proposed to apply to an individual or entity ‘promoting’ a tax exploitation scheme. It may also apply to an individual or entity implementing a scheme that has been promoted on the basis of conformity with a product ruling in a way that is materially different from that described in the product ruling.<sup>44</sup>

Civil penalties, statutory injunctions and voluntary undertakings are measures currently available to the Australian Securities and Investments Commission (ASIC) for deterring breaches of the requirement of the ‘continuous disclosure’ regime.<sup>45</sup> Civil penalties were extended to continuous disclosure provisions by the *Financial Services Reform Act 2001*. ASIC is also able to seek an injunction under section 1324 of the *Corporations Act 2001* (Corporations Act), and to accept an undertaking from a disclosing entity under section 93AA of the *Australian Securities and Investments Act 2001* (ASIC Act).

There are some significant changes between the exposure draft version and the final version of the Bill introduced in the Parliament.

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### Exposure Draft – meaning of a ‘promoter’

Under the Exposure Draft to the Bill, it was envisaged that an individual was to be a ‘promoter’ of a tax exploitation scheme:

if the individual promotes the scheme by implementing it, advancing it or encouraging its growth or interest in it...and the individual or an associate...receives consideration in respect of the scheme; and...having regard to all relevant matters, including the extent of the individual’s participation in the management of the scheme, it is reasonable to conclude that the individual has a substantial role in promoting the scheme.

### Exposure draft – meaning of a ‘tax exploitation scheme’

Under the Exposure Draft, a scheme would have been a tax exploitation scheme if:

...it is reasonable to conclude that an entity that...entered into or carried out the scheme, or part of it, did so with the sole or dominant purpose of...getting a scheme benefit from the scheme; and... the scheme benefit is not available at law.

Under this definition, the individual would have been liable *even if there has been no adverse assessment of the entity* that entered into the scheme - if the prosecutor could establish ‘the scheme benefit is not available at law.’<sup>46</sup> It was theoretically possible that an individual could be liable for a civil penalty in respect of a scheme the validity of which is later upheld by another court.<sup>47</sup>

### The Bill - meaning of ‘promoter’

Proposed **section 290-60** provides a re-drafted definition of a ‘promoter’, according which:

- (1) An entity is a **promoter** of a tax exploitation scheme if:
  - (a) the entity markets the scheme or otherwise encourages the growth of the scheme or interest in it; and
  - (b) the entity or an associate of the entity receives (directly or indirectly) consideration in respect of that marketing or encouragement; and
  - (c) having regard to all relevant matters, it is reasonable to conclude that the entity has had a substantial role in respect of that marketing or encouragement.
- (2) However, an entity is not a **promoter** of a tax exploitation scheme merely because the entity provides advice about the scheme.
- (3) An employee is not to be taken to have had a substantial role in respect of that marketing or encouragement merely because the employee distributes information or material prepared by another entity.

A change from the exposure draft version of the Bill and the current Bill concerns the definition of a promoter. An employee is not taken to have had a substantial role merely because he or she distributes information prepared by another entity.<sup>48</sup> An entity is not a

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promoter of a tax exploitation scheme ‘merely because the entity provides advice about the scheme.’<sup>49</sup> This would apply to lawyers and accountants who advise on the tax consequences of investments as long as they are not involved in mass promotion. The point at which an adviser crosses the line from ‘advice’ to ‘promotion’ is unclear.<sup>50</sup>

The Institute of Chartered Accountants in Australia (ICAA) was concerned about several features of the Exposure Draft. This included the scope of the definition of ‘promoter’ as well as that the exclusions and limitations of the definitions of promoter and tax exploitation scheme set out in the explanatory material rather than in the words of the legislation.<sup>51</sup>

The ICAA argued that:

an in-house lawyer, accountant or taxation adviser will be substantially involved in the formulation and implementation of transactions so that, if any part of their remuneration could be said to be indirectly “in respect of” a scheme (contrary to comments in the explanatory material), they could be regarded as a promoter.<sup>52</sup>

### The Bill – Meaning of a ‘tax exploitation scheme’

Proposed **section 290-65** provides the following definition of a ‘tax exploitation scheme’:

(1) A scheme is a **tax exploitation scheme** if, at the time of the conduct mentioned in subsection 290-50(1):

(a) one of these conditions is satisfied:

(i) if the scheme has been implemented—it is reasonable to conclude that an entity that (alone or with others) entered into or carried out the scheme did so with the sole or dominant purpose of that entity or another entity getting a scheme benefit from the scheme;

(ii) if the scheme has not been implemented—it is reasonable to conclude that, if an entity (alone or with others) had entered into or carried out the scheme, it would have done so with the sole or dominant purpose of that entity or another entity getting a scheme benefit from the scheme; and

(b) one of these conditions is satisfied:

(i) if the scheme has been implemented—it is not reasonably arguable that the scheme benefit is available at law;

(ii) if the scheme has not been implemented—it is not reasonably arguable that the scheme benefit would be

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available at law if the scheme were implemented.

(2) In deciding whether it is reasonably arguable that a scheme benefit would be available at law, take into account any thing that the Commissioner can do under a taxation law.

### Deterrence

There will be civil fines up to a maximum of \$550 000 or twice the fees a promoter earns from the scheme. It is 5 000 penalty units, and a penalty unit is \$110 per unit.<sup>53</sup>

### Changes as a result of the consultation process

The meaning of ‘promoter’ now focuses on the marketing role of the promoter. In addition, a ‘tax exploitation scheme’ does not arise where it is reasonably arguable that the scheme benefit is available at law. The Federal Court is able to require the Commonwealth to give an undertaking as to damages as a condition of granting an interim injunction.<sup>54</sup>

### Comments by the Australian Labor Party

It appears that the Australian Labor Party has taken a generally favourable position in relation to the general intent of the Bill. Commenting on tax exploitation schemes and the role of promoters in encouraging their proliferation, Mr Wayne Swan MP commented that:

The bill also includes measures to deter the promotion of schemes to avoid or evade tax. These measures are welcome, though I note that the problem of promoting tax avoidance has been around for a long time and has done a lot of damage to the integrity of the tax system, and it has taken the government years to do anything about it. There is also a minor amendment to the tax treatment of prepaid phone vouchers.<sup>55</sup>

## Schedule 4 — Goods and services tax and vouchers – prepaid phone products

**Schedule 4** amends the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) to ensure that prepaid phone cards or facilities are treated as ‘vouchers’ for purposes of that Act.

The Bill amends the GST Act in line with a 2005-06 Budget commitment to ensure that pre-paid phone products (vouchers) are treated as ‘eligible vouchers’ for goods and services tax (GST) purposes.<sup>56</sup> The amendment has effect from 1 July 2000.<sup>57</sup>

The GST voucher provisions operate so that GST is remitted when the voucher is *redeemed* for goods and services and *not on the sale of the voucher*. This is because at the time the voucher is issued, the GST status of the underlying supply may not be known and cannot be determined until the voucher is used to obtain goods and services.<sup>58</sup>

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Some pre-paid phone vouchers do not qualify as a GST Division 100 voucher. Amending the law to treat pre-paid phone vouchers consistently is consistent with the original policy intent of the GST Act. That is, GST applies to products when they are *used* - not when they are originally purchased. The GST will be remitted on the face value of a voucher (monetary value stated on a voucher) at the time it is redeemed, rather than on the price received by the supplier. The date of effect of the amendments will be 11 May 2005.

## Concluding Comments

The aim of the measure in Schedule 1 is to create a tax regime which is open to a highly mobile, skilled workforce. The impact of such skilled migration has been analysed and assessed by the *Organisation for Economic Co-operation and Development* (OECD) in 2002, pointing towards the benefits of, but also the risks associated with, skilled migration.<sup>59</sup>

Measures which exempt temporary residents from tax liability are currently popular: similar regimes are implemented worldwide. The [Explanatory Memorandum](#) refers to the UK, Singapore and Japan.

The measure is probably not free from risks for migrants. It will interlink a person's tax status with Australia's migration system. In the future, temporary residents would be required to examine their respective migration and tax status together. Further, it will require migrants to consider carefully any decision to become a permanent resident in Australia. The tax implications flowing from such decisions will be significant in the future. This measure may also deter people from staying in Australia on a more permanent basis because of possible negative tax implications once they become resident taxpayers.

Finally, the measure adds an entire new class of taxpayers as well as a further layer of exemptions, adding to the complexity of Australian tax laws. Adding further layers of exemptions restricts the general tax-base in Australia.

Schedule 2 will provide measures to close what has been described as the tax law's 'twilight zone' – black hole expenses.<sup>60</sup> This has been recommended in the Ralph Review in 1999 and was lobbied by business and tax experts since then.<sup>61</sup> But it has also been noted that the changes will not be comprehensive enough, suggesting short-comings, for example, in relation to 'write-offs for goodwill acquisitions, as allowed in the US and the UK'.<sup>62</sup> Another critique that has been floated is that the measure is aimed solely at large business, ignoring the needs of the small business sector.<sup>63</sup>

The Schedule 3 amendments are designed to deter the promoters of tax exploitation schemes by introducing a combination of civil penalties, voluntary undertakings and injunctions. The Commissioner may seek court-ordered fines and injunctions.

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It has been noted that ASIC has three additional enforcement mechanisms available to it, which are not granted to the Commissioner under the Bill. These are: the ability to seek compensation for persons affected by a contravention of the provisions; the ability to seek public orders; and the ability to issue infringement notices.<sup>64</sup> Further, it has been suggested that the Commissioner is unlikely to require a compensation power on the basis that a taxpayer investing in a tax exploitation scheme is ‘culpable to some extent’.<sup>65</sup> Also infringement notices intended for minor breaches of law are unlikely to be relevant where ‘evasion or aggressive tax planning’ are involved – they would be difficult to characterise as a minor breach.<sup>66</sup>

Finally, it has been argued that it may have been advantageous for the Bill to enable the Commissioner to seek court approval for public orders. Whilst the promoter and the Commissioner can enter into a voluntary undertaking by which the promoter agrees to publicly admit wrongdoing, the usefulness of undertakings is limited by the extent to which the Commissioner considers that the undertaking will be complied with.

The Schedule 4 amendments are beneficial. The amendments make it clear that GST should be remitted on the face value of a voucher (monetary value stated on a voucher) *at the time it is redeemed*, rather than at the time it is purchased from the supplier. The measure is aimed at ensuring consistent GST treatment of pre-paid phone cards.

Concluding Comments

## Endnotes

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- 1 The reader is referred to C Field, ‘Tax Laws Amendment (2002 Measures No. 4) Bill 2002’, [Bills Digest](#), No. 179, Parliamentary Library, Canberra, 2001-2, pp. 3 – 4.
- 2 The reader is referred to P Prince, ‘Tax Laws Amendment (2002 Measures No. 7) Bill 2002’, [Bills Digest](#), No. 68, Parliamentary Library, Canberra, 2002-3, pp. 2 – 5.
- 3 H I Lazerow, ‘Criteria of international tax policy’, The University of San Diego Law School, Legal Studies Research Paper Series, Research Paper No. 06-08, April 2005, pp. 7 – 10.
- 4 [Deloitte IAS NewsFlash](#), ‘Australia – Temporary Resident Exemption’, published 22 February 2006, p. 4.
- 5 P Costello (Treasurer), *Enhancing the foreign income tax arrangements for temporary residents*, [media release](#), No. 005, Canberra, 16 February 2006
- 6 F Anderson, ‘Expats face less taxing times’, *The Australian Financial Review*, 17 February 2006, p. 4.
- 7 K Lahey, *Improvements to tax system welcome: BCA*, [media release](#), Business Council of Australia, Melbourne, 16 February 2006.

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8. T Colebatch, 'Tax break for temporary residents', *The Age*, 17 February 2006, p. 2. a similar comment was made by F Anderson, op. cit..
9. F Anderson, op. cit., p. 4.
10. Unless otherwise indicated, the term 'temporary resident' is used within the meaning of the proposed amendments examined in this Digest. It is not a direct reference to the concepts of temporary residency under the Australian migration laws although it is appreciated that a link between these terms exists.
11. The overview is based on the table comparing the key features of the new and the current law. [Explanatory Memorandum](#) to the Bill, pp. 13-4.
12. Ordinary income denotes income according to traditional common law income concepts, statutory income concerns income which is not traditionally accepted and therefore ordinary income, but is deemed to be income under law. Examples include income derived from fringe benefits or capital gains.
13. [Explanatory Memorandum](#), op. cit., p. 16.
14. Under section 23AG of the ITAA 1936, foreign earnings derived by Australian resident taxpayers from at least 91 days of continuous employment in a foreign country will general be income tax exempt. CCH Australia (eds.), 'Australian Master Tax Guide 2006', CCH Australia, Sydney, 2006, pp. 277-8.
15. Derived shares are shares which were acquired by exercising an original right which was conferred upon the employee.
16. [Explanatory Memorandum](#), op. cit., pp. 22-3.
17. *ibid.*, p. 24.
18. There are five elements of cost bases and reduced cost bases. See discussion below.
19. ATO, Interpretative Decision No. 2005/310, handed down 18 August 2005.
20. [Explanatory Memorandum](#), op. cit., p. 40.
21. This period will start with the income year in which the business related capital expenditure was incurred.
22. [Explanatory Memorandum](#), op. cit., p. 45.
23. See generally G S Cooper, R E Krever, R J Vann, C Rider, *Income Taxation – Commentary and Materials*, Thomson Legal and Regulatory Limited, 5<sup>th</sup> edition, 2005, p. 377-9.
24. *ibid.*, p. 378.
25. *Australian Master Tax Guide 2006*, op. cit., p. 1054.
26. *ibid.*
27. [Explanatory Memorandum](#), op. cit., p. 46.
28. *ibid.*, pp. 53-7.
29. *ibid.*, p. 57.

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30. Taxation Ruling 2004/11.
31. The Treasury explains: 'An intra-group asset is an asset of a joining entity that corresponds to a liability of either the head company or another subsidiary member of the group. The most common example would be a loan from one subsidiary member to another group entity.' The Treasury, [Consolidation: ensuring that allocable cost amount is allocated to intra-group assets](#), Canberra, 4 December 2003. Intra-group assets can include, for example, a new subsidiary company which was purchased by the group. Any costs related to the purchase of the group would be deductible under proposed section 400-880 over a period of five years. See [Explanatory Memorandum](#), op. cit., p. 59.
32. [Explanatory Memorandum](#), op. cit., pp. 58-60.
33. For examples, see Tax Ruling TR 2001/14 Division 35 – non-commercial business losses, [Examples](#).
34. CCH, op. cit., pp. 944-945.
35. [Explanatory Memorandum](#), op. cit., p. 65.
36. A finance lease is defined as a 'lease that transfers substantially all the risks and rewards incidental to ownership of an asset.' Australian Accounting Standards Board, [Accounting Standard AASB 117 'Leases'](#), Melbourne, July 2004.
37. The effective life of an asset can be (1) self-assessed by the taxpayer; (2) assessed by the Commissioner for Taxation; or (3) prescribed by legislation. CCH., op. cit., p. 1084.
38. *ibid.*, p. 1097.
39. For more detail in relation to the cost and reduced cost base elements, see CCH, *ibid.*, pp. 669-675.
40. M. Bersten , 'Deterring promotion of tax exploitation schemes Exposure Draft legislation - red in tooth and claw?', PriceWaterhouseCoopers Legal website, <http://www.pwclegal.com.au/legal/pwclegal.nsf/pages/5A7423196F689D9BCA25708A00802F7D> accessed 23 February 2006.
41. [Explanatory Memorandum](#), p. 79.
42. *ibid.*
43. See new clause 290-50 (civil penalties); new clause 290-125 (injunctions); new clause 290-200 (voluntary undertakings).
44. R. Tooma, 'Deterring promoters of tax exploitation schemes: lessons from continuous disclosure', (2006) 34 *Australian Business Law Review* 58 at p. 58.
45. *ibid.*
46. *ibid.*
47. *ibid.*
48. Institute of Chartered Accountants of Australia website, 'Promoter penalty legislation introduced', <http://www.icaa.org.au/tech/index.cfm?menu=289&id=A115885407>, <http://www.icaa.org.au>, accessed 27 March 2006.

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49. *ibid.*
50. A. Fabro, 'Tax reform spares advisers', *Australian Financial Review*, 25 February 2005, p. 18.
51. Institute of Chartered Accountants in Australia (ICAA), 'Exposure Draft Bill – Framework to deter promotion of tax exploitation schemes', Submission from ICCA to Treasury, 2 September 2005, [http://www.icaa.org.au/upload/download/Submission\\_2092005.pdf](http://www.icaa.org.au/upload/download/Submission_2092005.pdf), accessed 27 March 2006, p. 3.
52. *ibid.*
53. Mr Don Randall MP, House of Representatives, *Debates*, 2 March 2006, pp. 60-61.
54. Institute of Chartered Accountants in Australia (ICAA), 'Exposure Draft Bill – Framework to deter promotion of tax exploitation schemes', Submission from ICCA to Treasury, 2 September 2005, [http://www.icaa.org.au/upload/download/Submission\\_2092005.pdf](http://www.icaa.org.au/upload/download/Submission_2092005.pdf), accessed 27 March 2006, p. 2.
55. Mr Wayne Swan, MP, House of Representatives, *Debates*, 2 March 2006, pp.57-8.
56. [Budget Paper No. 3](#) , Appendix A: GST Revenue Measures, <http://www.budget.gov.au/2005-06/bp3/html/index.htm> , accessed 23 February 2006.
57. *ibid.*
58. *ibid.*
59. OECD, International Mobility of the Highly Skilled, *Policy Brief*, Paris, 2002.
60. M Newnham, 'Fixing up a leased premises? You have just entered the tax act's twilight zone,' *The Age*, 17 June 2005, p. 8.
61. F Buffini, 'Firms to be spared from black hole costs', *The Australian Financial Review*, 11 May 2005, p. 20.
62. *ibid.*
63. M Newnham, 'New 'black hole' rules benefit going concerns, but start ups remain the final frontier', *The Age*, 11 May 2005, p. 16.
64. R. Tooma, *op. cit.*, p. 74.
65. *ibid.*
66. *ibid.*

**Warning:**

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