



Tax Laws Amendment (2009 Budget Measures No. 1) Bill 2009

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Law and Bills Digest Section

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Tax Laws Amendment (2009 Budget Measures No. 1) Bill 2009

Date introduced: 27 May 2009

House: House of Representatives

Portfolio: Treasury

Commencement: Royal Assent

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The Bill has three main purposes. It amends:

- the *Income Tax Assessment Act 1936* (ITAA 1936) to refine the general exemption that currently applies to foreign employment income
- the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* (the Superannuation Co-contribution Act) to reduce the matching rate and maximum co-contribution for eligible personal superannuation contributions made in the 2009–10 to 2013–14 income years, and
- the *Income Tax Assessment Act 1997* (ITAA 1997) to reduce the concessional contributions cap.

Background and Main provisions

As the Bill has no central theme, the Digest deals simultaneously with the background and main provisions of each of the three schedules to the Bill.

Schedule 1—Exemption of income derived from foreign service

As noted above, the purpose of **Schedule 1** is to refine the general exemption found in section 23AG of the ITAA 1936 that currently applies to income earned in overseas employment. Currently, subsection 23AG(1) provides that where an Australian resident, who is a natural person and not a body corporate, has been engaged in foreign service for a continuous period of not less than 91 days, any foreign earnings derived by the person from that foreign service are exempt from tax.

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The Treasurer stated in a media release on 12 May 2009 that the new measure is designed to ensure ‘that workers who earn income overseas do not have an unfair advantage over workers who earn income and pay tax in Australia’.¹ The Government wishes to make the exemption fairer by ensuring that Australian resident taxpayers who work in low-tax jurisdictions pay the same rate of Australian tax as those taxpayers who work in Australia.

However, the Government also wishes to continue to exempt from tax any income earned by Australian residents who are employed in foreign service as aid or charitable workers, or in certain types of government employment such as defence or police deployment.² Specifically, under **proposed subsection 23AG(1AA)**, the foreign earnings mentioned in existing subsection 23AG(1) are not exempt from tax unless the continuous period of foreign service is ‘directly attributable’ to any of the following activities:

- (a) the delivery by the person’s employer of Australia’s official development assistance³
- (b) the activities of the person’s employer in operating a public fund where the employer has been declared to be an ‘international affairs deductible gift recipient’ under the relevant provisions of the ITAA 1997⁴
- (c) the activities of the person’s employer if the employer is either (i) a prescribed institution which is located outside Australia and is exempt from income tax in the country in which it is resident; or (ii) a prescribed institution that has a physical

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1. W Swan MP (Treasurer), ‘Better targeting the income tax exemption for Australians working overseas’, *media release*, no. 066, 12 May 2009, viewed 28 May 2009, <http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/066.htm&pageID=003&min=wms&Year=&DocType=0>
 2. W Swan MP (Treasurer), ‘Second reading speech: Tax Laws Amendment (2009 Budget Measures No. 1) Bill 2009’, House of Representatives, *Debates*, 27 May 2009, p. 8.
 3. Australian official development assistance is delivered through the Government’s overseas aid program, which is administered by the Department of Foreign Affairs and Trade (DFAT) and/or the Australian Agency for International Development (AusAID). The program ‘aims to reduce poverty and achieve sustainable development in developing countries, in line with Australia’s national interest’: Explanatory Memorandum, Tax Laws Amendment (2009 Budget Measures No. 1) Bill 2009, p. 13, paragraphs 1.19–1.22.
 4. See items 9.1.1 and 9.1.2 of the table in subsection 30–80(1) of the ITAA 1997. Item 9.1.1 refers to a public fund declared by the Treasurer to be a developing country relief fund; and item 9.1.2 refers to ‘a public fund established and maintained by a public benevolent institution solely for providing money for the relief (including relief by way of assistance to re-establish a community) of people in a country’ (other than Australia or a country declared by the Minister for Foreign Affairs to be a developing country) who are in distress as a result of a disaster.

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presence in Australia but which incurs its expenditure and pursues its objectives principally outside Australia⁵

- (d) the person's deployment outside Australia as a member of a 'disciplined force' by the Commonwealth, a State or a Territory (or by an authority of one of them),⁶ or
- (e) an activity of a kind specified in the regulations.

For practical examples of whether a taxpayer will be eligible for the exemption in **proposed subsection 23AG(1AA)**, the reader is referred to the Explanatory Memorandum for the Bill.⁷

The amendment was first raised by the Rudd Government in the 2009–10 Budget as part of its revenue measures aimed at improving fairness and integrity in the tax system. The Government explained that the original intent of section 23AG was 'to relieve double taxation, however, in practice little foreign tax may actually be paid on the foreign income concerned'.⁸

If an individual is no longer exempt from paying tax on foreign earnings as a result of the operation of **proposed subsection 23AG(1AA)**, he or she will be eligible to claim a non-refundable foreign tax offset under Division 770 of the ITAA 1997 for any foreign income tax paid on the earnings.⁹

Further, if an individual is no longer exempt from paying tax on foreign earnings as a result of **proposed subsection 23AG(1AA)**, his or her employer will be required to comply with the pay-as-you-go (PAYG) withholding rules in Division 12 of the *Taxation Administration Act 1953*.¹⁰ Additionally, the employer will need to comply with the *Fringe Benefits Tax Assessment Act 1986* in relation to any fringe benefits provided to the employee.¹¹

5. See paragraphs 50–50(c) and (d) of the ITAA 1997.

6. The term 'disciplined force' is not currently defined in the ITAA 1997. Currently, the only Commonwealth Act in which the term is used is the ITAA 1936 (section 23AG), but it is not defined there. The plain and ordinary meaning of 'discipline' is 'training', usually in the context of the military. See the *Macquarie Encyclopaedic Dictionary*, 1990, pp. 262–263.

7. See pp. 13–17.

8. *Budget Measures 2009–10*, Budget Paper No. 2, p. 19.

9. *Budget Measures 2009–10*, Budget Paper No. 2, p. 19. See also Explanatory Memorandum, p. 11, paragraphs 1.13–1.14.

10. Explanatory Memorandum, p. 7.

11. Explanatory Memorandum, p. 7.

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Application

The amendment made by Schedule 1 applies to foreign earnings derived on or after 1 July 2009 from foreign service performed on or after this date.¹² Even if the foreign income of an Australian resident is not exempt from tax under **proposed subsection 23AG(1AA)** from 1 July 2009, the exemption in existing subsection 23AG(1) continues to apply to foreign income earned before this date. Further, even if the foreign income earned after 1 July 2009 is no longer exempt from Australian income tax, employment after this date will still be included in the calculation of the period of continuous foreign service.¹³

Financial implications

The measure in **Schedule 1** is expected to provide an additional \$675 million over the forward estimates period.¹⁴ Together with the savings made by the measures in Schedules 2 and 3 of the Bill, the savings provided by Schedule 1 will enable the Government to lift the base rate of the pension in the 2009 Budget.¹⁵

Schedule 2—Government Co-contribution for Low Income Earners

As mentioned above, the purpose of the amendments to the Superannuation Co-contribution Act is to reduce the matching rate and maximum co-contribution for eligible personal superannuation contributions made in the 2009–10 to 2013–14 income years.

Currently, the Government not only matches, but pays 150 per cent of a low income earner's eligible personal superannuation contribution.¹⁶ This figure is known as the 'matching rate'. Currently, the maximum co-contribution payable is \$1500. This sum is reduced by 5 cents in the dollar for every dollar by which the individual's total income for

12. **Sub-item 2(1)** of Schedule 1 to the Bill.

13. **Sub-items 2(2) and (3)** of Schedule 1 to the Bill. See also Explanatory Memorandum, pp. 17–18.

14. Explanatory Memorandum, p. 7.

15. W Swan MP (Treasurer), 'Second reading speech', p. 8.

16. The term 'eligible personal superannuation contribution' is defined in section 7 of the Superannuation Co-contribution Act to mean a contribution to a complying superannuation fund or a retirement savings account and the contribution was or is made for the purpose of providing superannuation benefits for the person. The personal contribution may not be roll-over superannuation benefit; a superannuation lump sum that is paid from a foreign superannuation fund; a directed termination payment; or any other payment listed in paragraph 7(1)(c) of that Act. Further, under subsection 7(2), the contribution is an 'eligible personal superannuation contribution' only to the extent that the Commissioner has not allowed the contribution as a deduction for the person.

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the relevant income year exceeds the lower co-contribution income threshold.¹⁷ The lower income threshold is \$31 920 for 2009–10.¹⁸ In 2008–09, it was \$30 342.¹⁹

According to the ATO, there were 1 032 324 beneficiaries of the Government's co-contribution between 1 October 2008 to 31 December 2008.²⁰ The total amount of superannuation co-contribution entitlements made during the quarter was \$879 985 000.²¹ To be eligible for the co-contribution, these beneficiaries earned between \$30 342 and \$60 342 for the 2008–09 income year.²²

The measure contained in **Schedule 2** is a temporary reduction that applies only to the next five income years. For the next three income years (2009–10, 2010–11 and 2011–12), the Government has reduced its co-contribution by one-third (from a matching rate of 150 per cent to 100 per cent). For the two income years after then (2012–13 and 2013–14), the co-contribution will be higher than in 2009–12 (a matching rate of 125 per cent compared with the matching rate of 100 per cent, but it will still be lower than it is today (125 per cent compared with the current 150 per cent).²³ In 2014–15, the matching rate should return to its current level (150 per cent).²⁴

Similarly, the maximum government co-contribution for the 2009–10 to 2011–12 income years is reduced in **Schedule 2** from the current maximum of \$1500 to \$1000 (with this figure being reduced by 3.333 cents for every dollar that the person's total income exceeds the lower income threshold for the relevant income year).²⁵ For the 2012–13 and 2013–14 income years, the maximum government co-contribution is \$1250 (with this figure also

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17. Australian Taxation Office (ATO), 'Super Co-contributions', 28 August 2008, viewed 28 May 2009, <http://www.ato.gov.au/individuals/content.asp?doc=/Content/42616.htm>. Note that this document refers only to the 2008–09 and earlier income years. It does not mention any figures for the 2009–10 income year.
 18. Explanatory Memorandum, p. 21.
 19. ATO, 'Super co-contribution thresholds', 28 August 2008, viewed 28 May 2009, <http://www.ato.gov.au/individuals/content.asp?doc=/Content/42616.htm&page=4&H4>
 20. ATO, 'Super Co-contributions Quarterly Report', 1 October 2008–1 December 2008, as transmitted to the Minister for Superannuation and Corporate Law, 26 February 2009, viewed 1 June 2009, p. 3, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fjrnart%2F74OT6%22>
 21. ATO, 'Super Co-contributions Quarterly Report', p. 3.
 22. ATO, 'Super co-contribution thresholds'.
 23. See **item 3** of Schedule 2—proposed changes to section 9 of the Superannuation Co-contribution Act.
 24. See **item 3**—**proposed paragraph 9(1)(e)**.
 25. See **item 5** of Schedule 2—**proposed subsection 10(1B)**.

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being reduced by 4.167 cents for every dollar that the person's income exceeds the lower income threshold for the relevant income year).²⁶ The lower income thresholds will continue to be indexed 'in line with rises in wages'.²⁷

The Government is of the view that these reductions 'will still provide a very generous incentive for those low- and middle-income earners to save towards their retirement'.²⁸

Application

The amendments made by **Schedule 2** apply to the 2009–10 income year and later income years.²⁹

Financial implications

The measure in **Schedule 2** is expected to save \$1.395 billion over the forward estimates period.³⁰ The breakdown of this figure, as set out in the Explanatory Memorandum, is as follows:

2008-09	2009-10	2010-11	2011-12	2012-13
Nil	\$385m	\$395m	\$410m	\$205m

Schedule 3—Excess contributions tax

Schedule 3 reduces the cap on concessional superannuation contributions.

The ATO explains that caps apply to contributions made to a person's superannuation fund, and that any contribution over the cap amount is subject to extra tax. The cap amount and how much extra tax you pay once you exceed it depends on whether the contributions are 'concessional' or 'non-concessional'.³¹ Generally a 'concessional contribution' is a before-tax 'contribution that is made by or for you to a complying super fund that is assessable income of the fund' and 'assessable income' is 'income that is

26. See **item 5** of Schedule 2—**proposed subsection 10(1C)**.

27. Senator N Sherry (Minister for Superannuation and Corporate Law), 'Improving equity in retirement', *media release*, no. 56, 12 May 2009, viewed 1 June 2009, <http://minscl.treasurer.gov.au/DisplayDocs.aspx?pageID=003&doc=../content/pressreleases/2009/056.htm&min=njs>

28. W Swan MP (Treasurer), 'Second reading speech', p. 8.

29. **Item 7** of Schedule 2.

30. Explanatory Memorandum, p. 8.

31. ATO, 'Super contributions - too much super can mean extra tax', 28 January 2009, viewed 1 June 2009, <http://www.ato.gov.au/superfunds/content.asp?doc=/content/00106372.htm>

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subject to tax'.³² Examples of concessional contributions to a superannuation fund include employer contributions (including those made under a salary sacrifice arrangement); personal contributions by an eligible person (such as a self-employed person) that are allowed as an income tax deduction; and notional contributions for defined benefit interest schemes.

Currently the concessional contribution cap is \$50 000, but **item 1 of Schedule 3** to the Bill seeks to reduce this figure to \$25 000 for the 2009–2010 financial year (and to index that amount for the 2010–11 and later financial years).³³ The non-concessional cap (which generally applies to 'after tax' contributions made by or for you to a complying super fund that are not included in your fund's assessable income) is currently set at three times the concessional contributions cap. **Item 2** seeks to increase this figure to six times the concessional contributions cap (that is, a total of \$150 000) for the 2009–10 and later financial years.³⁴

Notably, **item 4** inserts **proposed subsections 292–170(8) and (9)** to provide a separate arrangement that applies to concessional contributions made to defined benefit interests, including payments made by politicians who are members of the 'old' parliamentary defined benefit scheme.³⁵ The Explanatory Memorandum says that the separate arrangement is necessary 'because employer contributions into these interests are not always attributable to individual members'.³⁶ In the case of such defined benefit interests held at 12 May 2009, the notional taxed contributions will be taken to be at the maximum level of the concessional contributions cap (that is, \$25 000 for the 2009–10 financial year), even if the notional contribution was in fact greater than this amount.

The Government considers that the measure contained in **Schedule 3** is necessary to ensure that 'Australia's income system remains sustainable into the future'.³⁷ Apparently,

32. ATO, 'Super contributions - too much super can mean extra tax'.

33. **Item 1** amends section 292–20 of the ITAA 1997. Note that if you are over 50, the concessional cap is \$100,000. See ATO, 'Super contributions - too much super can mean extra tax' under the sub-heading 'What is the current concessional contributions cap?', <http://www.ato.gov.au/superfunds/content.asp?doc=/content/00106372.htm&page=2&H2>, viewed 1 June 2009.

34. **Item 3** amends section 292–85 of the ITAA 1997. See also section 292–90, which sets out how to calculate your non-concessional contributions for a financial year. The figure will increase when the concessional cap of \$25,000 is indexed in the 2010–11 and later financial years—see item 1 of Schedule 3.

35. G Milne, 'MPs keep super roort', *Sunday Telegraph*, 31 May 2009, p. 8, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p?query=Id%3A%22media%2Fpressclp%2FSQOT6%22>

36. Explanatory Memorandum, p. 30.

37. Senator N Sherry (Minister for Superannuation and Corporate Law), 'Improving equity in retirement'.

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only 1.8 per cent of individuals making contributions will be affected by the measure, which is targeted to reduce ‘the disproportionate benefits to high-income earners who can afford to make large concessional contributions’.³⁸

Application

Schedule 3 will apply to all superannuation concessional contributions made from the 2009–10 financial year.

Financial implications

Schedule 3 will result in a saving of \$2.81 billion over the forward estimates period, as follows:

<i>2008-09</i>	<i>2009-10</i>	<i>2010-11</i>	<i>2011-12</i>	<i>2012-13</i>
Nil	\$625m	\$640m	\$720m	\$825m

Source: Explanatory Memorandum, p. 8.

The passage of the Bill through Parliament

House of Representatives

The Bill was introduced into the House of Representatives by the Treasurer, Wayne Swan MP, on 27 May 2009. Following the Treasurer’s second reading speech, debate was adjourned until 1 June 2009.³⁹ On that date, three members spoke to the Bill:

- Chris Pearce MP (Liberal Party, Member for Aston, Shadow Minister for Financial Services, Superannuation and Corporate Law)
- Shayne Neumann MP (ALP, Member for Blair), and
- Chris Bowen MP (ALP, Member for Prospect, Minister for Competition Policy and Consumer Affairs and Assistant Treasurer).⁴⁰

The Bill was then read a third time.⁴¹

38. W Swan MP (Treasurer), ‘Second reading speech’, p. 8.

39. W Swan MP (Treasurer), ‘Second reading speech’, p. 8.

40. C Pearce MP, ‘Second reading speech: Tax Laws Amendment (2009 Budget Measures No. 1) Bill 2009’, House of Representatives, *Debates*, 1 June 2009, pp. 56–58; S Neumann MP, ‘Second reading speech: Tax Laws Amendment (2009 Budget Measures No. 1) Bill 2009’, House of Representatives, *Debates*, 1 June 2009, pp. 59–61, and C Bowen MP, ‘Second reading speech: Tax Laws Amendment (2009 Budget Measures No. 1) Bill 2009’, House of Representatives, *Debates*, 1 June 2009, p. 61.

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It is unnecessary at this point to state the position of the two speakers from the ALP (representing as they do, the position of the Government that introduced the Bill).

The position of the Opposition, as evidenced by Mr Pearce's speech, is that the Bill should be the subject of a Senate inquiry 'to assess any unintended consequences of the government's budget measure'.⁴² In summary, Mr Pearce was concerned about the long-term effect of the Government saving \$4.3 billion in the short term, and was concerned about the 'temporary' nature of the cuts to the superannuation co-contribution scheme.⁴³ More importantly, he was concerned about changes to both the superannuation co-contribution scheme and the reduction in the concessional contribution cap because, in his view, for the first time in many years, they discourage people to save more (via personal superannuation contributions) for their retirement.

Senate

As at the date of writing, the Bill is yet to be introduced into the Senate.

Under the Senate Order of 14 May 2009, the provisions of the Bill were referred to the Senate Economics Legislation Committee upon the introduction of the Bill into the House of Representatives on 27 May 2009.⁴⁴ On 1 June 2009, the Selection of Bills Committee resolved to refer the provisions to that same Committee, albeit on different terms. The Senate Economics Committee is now to inquire and report on the provisions of the Bill no later than 22 June 2009.⁴⁵

The Senate Standing Committee on the Scrutiny of Bills had no comment on the Bill.⁴⁶

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41. C Bowen MP, 'Third reading: Tax Laws Amendment (2009 Budget Measures No. 1) Bill 2009', House of Representatives, *Debates*, 1 June 2009, p. 61.
 42. C Pearce MP, 'Second reading speech', p. 56.
 43. C Pearce MP, 'Second reading speech', p. 56.
 44. Senate Economics Committee, 'Inquiry into the Tax Laws Amendment (2009 Budget Measures No. 1) Bill 2009: Information about this Inquiry', http://www.aph.gov.au/Senate/committee/economics_ctte/flab_budget_measures_09/info.htm, viewed 2 June 2009.
 45. Selection Of Bills Committee, Report No. 6 of 2009, 1 June 2009, p. 3, viewed 2 June 2009, http://www.aph.gov.au/Senate/committee/selectionbills_ctte/reports/2009/rep0609.pdf
 46. Senate Standing Committee for the Scrutiny of Bills, Alert Digest, No. 6 of 2009, 2 June 2009, p. 81, viewed 2 June 2009, <http://www.aph.gov.au/Senate/committee/scrutiny/alerts/2009/d06.pdf>

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