



## Tax Laws Amendment (2009 Measure No. 5) Bill 2009

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## Tax Laws Amendment (2009 Measures No.5) Bill 2009

**Date introduced:** 16 September 2006

**House:** Representatives

**Portfolio:** Treasury

**Commencement:** Schedule 1 Part 1 commences on 1 July 2000, Schedule 1 Part 2 commences on 1 July 2006,<sup>1</sup> Schedule 1 Parts 3 and 4, Schedule 2 Part 1, Schedule 3, Schedule 6 Part 1 and item 5 commence on Royal Assent, Schedule 4 commences on 1 July 2010, Schedule 5 commences the day after Royal Assent, and Schedule 6 items 6 and commence 30 June 2016.

**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 Tax Laws Amendment (2009 Measures No. 5) Bill 2009 (the Bill) has six main purposes. It will:

- amend the *A New Tax System (Goods and Services Tax) Act 1999* (the GST Act) to respond to a decision of the Federal Court of Australia (Schedule 1)
- amend the *Taxation Administration Act 1953* (TAA 1953) to address unintended consequences of recent amendments to that Act by the *Tax Laws Amendment (Taxation of Financial Arrangements) Act 2009* (the TOFA Act) in the area of PAYG instalment income (Schedule 2)
- exempt from income tax the Outer Regional and Remote payment made under the Helping the Children with Autism package (Schedule 3)
- exempt from income tax, payments made under the Continence Aids Payment Scheme (Schedule 4)
- amend the *Income Tax Assessment Act 1936* (the ITAA 1936) to ensure that Commonwealth issued debt will be exempt from interest withholding tax (IWT) (Schedule 5)
- allow the Victorian Bushfire Appeal Fund Independent Advisory Panel to use donations for a broader range of purposes currently considered charitable in tax law,

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1. Comment on retrospectivity will be made at the relevant part of the Digest.

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and without jeopardising the charitable status of the Australian Red Cross Society (Schedule 6).

## Background

**Schedule 1** amends the *A New Tax System (Goods and Services Tax) Act 1999* (the GST Act) to counter the Federal Court decision in *Deputy Commissioner of Taxation v PM Developments Pty Ltd* (the PMD decision).<sup>2</sup> The measure was announced in a Media Release by the then Assistant Treasurer on [6 February 2009](#)<sup>3</sup>.

In the PMD decision, Logan J held against the Deputy Commissioner of Taxation and declared that the liquidator of a company being wound up (an ‘incapacitated entity’) was not personally liable to the Deputy Commissioner for GST or any related general interest charge on the sale of a property. According to the Parliamentary Secretary’s second reading speech:

The decision is contrary to the stated policy intention that the representative of an incapacitated entity is liable for GST on transactions with the scope of its appointment. It is also contrary to the Commissioner’s administration of the law since the introduction of the GST<sup>4</sup>.

Generally, under the *Corporations Act 2001*, all debts and claims proved in a winding up are to be ranked equally, and if there are insufficient funds, to be paid proportionally.<sup>5</sup> Section 556 then goes on to provide an order that certain creditors will be paid ahead of others. In the PMD decision, Logan J also declared that as the GST was a post-liquidation debt of the company (PMD), it enjoys the payment priority set out in the *Corporations Act 2001* for post-liquidation debts. That is, as a revenue debt, it does **not** get separate or special priority over other (secured) creditors.

In commenting on the Government’s draft legislation,<sup>6</sup> lawyers [Allens Arthur Robinson](#) explain the situation:

It would seem that the practical effect of the proposed legislation is to give the Commissioner priority in relation to GST arising from transactions following the appointment of a representative to an incapacitated entity. This is at odds with the

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2. *Deputy Commissioner of Taxation v PM Developments Pty Ltd* [2008] FCA 1886.
  3. C Bowen, ‘GST and Incapacitated Entities’, *Media Release*, No. 005, 6 February 2009.
  4. B Shorten, ‘Tax Laws Amendment (2009 Measures No. 5) Bill 2009’, *Hansard*, 9714.
  5. *Corporations Act 2001*, section 555.
  6. On 13 July 2009 Treasury announced that the [draft legislation](#) has been released for comment until 7 August 2009.

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general position of the Commissioner in relation to other GST liabilities and income tax law.<sup>7</sup>

In the course of his judgment in PMD decision, Logan J was critical of the Explanatory Memorandum to the GST Act in its explanation of the provisions relating to representatives for incapacitated entities. The Commissioner's submission was that the court could look to the Explanatory Memorandum<sup>8</sup> (relying on the *Acts Interpretation Act 1901*(Cth)) to see that the Act intended to make the representative personally liable for the GST payable. The Explanatory Memorandum stated:

6.271 If you are registered and you become bankrupt, or go into receivership or liquidation, the person who conducts your enterprise on your behalf is, generally, personally carrying on the enterprise.<sup>9</sup>

In commenting on this Logan J said:

The statement in para 6.271 of the explanatory memorandum as to who carries on an enterprise after bankruptcy, receivership or liquidation is true only of bankruptcy. It is not true of corporations who are placed in liquidation. Neither is it true of a privately appointed receiver. ... Such errors hardly, with respect, inspire confidence in the utility of the explanatory memorandum. The description in the explanatory memorandum is not matched by the language employed within Div 147 as enacted.<sup>10</sup>

In a recent decision of the High Court, *Bruton Holdings Pty Limited (in liquidation) v Commissioner of Taxation*<sup>11</sup> the High Court unanimously ruled against the Commissioner of Taxation and held he could not issue notices that had the effect of giving the ATO priority over other unsecured creditors such as employees, insolvency practitioners and liquidators in the event of a company being wound up. The High Court held that the ATO could not issue such a notice once a company had gone into liquidation. This means that the ATO will rank equally with other unsecured creditors. In a report in the *Australian Financial Review* about the High Court decision, the following comparison was noted:

While the Bruton case dealt with the ATO's ability to access income-tax debts, the situation could soon be different in relation to GST.

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7. Allens Arthur Robinson: *Client Update*, 'GST and representatives of incapacitated entities', 29 July 2009.
  8. Relying on the *Acts Interpretation Act 1901*, section 15AB.
  9. *Deputy Commissioner of Taxation v PM Developments Pty Ltd* [2008] FCA 1886 quoted at paragraph 46.
  10. *Deputy Commissioner of Taxation v PM Developments Pty Ltd* [2008] FCA 1886 at paragraph 48.
  11. *Bruton Holdings Pty Limited (in liquidation) v Commissioner of Taxation* [2009] HCA 32.

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The federal government is to introduce a bill into parliament in the spring sitting, which starts on September 7, that will give the ATO priority over other creditors when it comes to GST.

Mr Wolfers [KMPG tax partner] said it was “anomalous that while the High Court is confirming the abolition of the ATO’s priority in income tax, the parliament is seeking to reinforce the tax commissioner’s priority for GST”.<sup>12</sup>

**Schedule 2** amends the *Taxation Administration Act 1953* (TAA 1953) to change the basis on which a pay as you go (PAYG) instalment liability is calculated. The amendments were announced in the Assistant Treasurer’s Media Release No. 043 of 4 September 2009.<sup>13</sup> If a person or entity has business or investment income, the income tax liability must be paid by instalments. Division 45 of the TAA 1953 governs PAYG instalments. The amendments in this Bill are necessary to address previous amendments made to the TAA 1953 contained in the recent *Tax Laws Amendment (Taxation of Financial Arrangements) Act 2009* (the TOFA Act). According to the Explanatory Memorandum:

The effect of the PAYG amendments in the TOFA Act is arguably to substantially change the basis on which a PAYG instalment liability is calculated. The result of this change may be to decrease PAYG instalment payments. Any decrease will result in a deferral of revenue, which will be recouped after the relevant taxpayer lodges their income tax return.<sup>14</sup>

The amendments seek to reverse the changes made by the TOFA Act in order to prevent the potential decrease in the amount of PAYG instalments paid. Currently the net result of gains and losses is included in an entity’s instalment income for PAYG instalments purposes, and according to the Parliamentary Secretary ‘this could unintentionally lead to a reduction in the PAYG instalments paid, because the net basis of calculation can produce a reduction in PAYG instalment income’<sup>15</sup>.

The PAYG instalments system facilitates the collection of income tax on business and investment income in anticipation of a taxpayer’s final income tax liability on assessment. Generally, instalment income is calculated on a gross basis. The amendments made in the TOFA Act recognised the gain or loss, or the part of the gain or loss on a financial arrangement, meaning the net result of gains and losses is included in an entity’s instalment income for PAYG instalment purposes.

In summary, **Schedule 2** makes three amendments:

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12. R Nickless, ‘Court stops Tax Office jumping creditors queue’, *Australian Financial Review*, 27 August 2009, p. 4.
  13. Tax Laws Amendment (2009 Measures No. 5) Bill 2009, Explanatory Memorandum, p. 8.
  14. Tax Laws Amendment (2009 Measures No. 5) Bill 2009, Explanatory Memorandum, paragraph 2.4, p. 35.
  15. B Shorten, *op cit*.

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- it repeals the version of subsection 45-120(2B) that was inserted by the TOFA Act
- it provides for a catch-up payment where an instalment is underpaid as a result of subsection 45-120(2B) applying, and
- it reinserts the previous version of subsection 45-120(2B) that was unintentionally repealed by the TOFA Act.

**Schedule 3** is a beneficial measure which has not been previously announced.<sup>16</sup> Its effect is to ensure that the remote and regional payment made under the [Helping Children with Autism](#) package is not subject to income tax. In an answer to questions in Estimates,<sup>17</sup> the Department of Families, Housing, Community Services and Indigenous Affairs said that as at 30 April 2009 there were 262 children nationally that received the payment.

**Schedule 4** will ensure that payments made under the Continence Aids Payment Scheme will be exempt from income tax. The Scheme is a payment to assist persons with incontinence to meet some of the costs of their products. It is by way of direct payment and will commence from 1 July 2010. It is replacing the current Continence Aids Assistance Scheme, but the Department of Health and Ageing [Fact Sheet](#) dated 1 June 2009 states that there will be a transition from the existing scheme to the new one, and there will be no disadvantage.

**Schedule 5** concerns interest paid under a debenture being exempt from interest withholding tax (IWT) if the issue of the debenture satisfies a ‘public offer’ test (section 128F ITAA36). Subsection 128F(2) states that tax is not payable in respect of interest to which the section applies, but debentures or debt interest issued by the Commonwealth or a Commonwealth authority will not be exempt. The amendments will make the Commonwealth-issued debt exempt from the interest withholding tax. According to the Parliamentary Secretary’s second reading speech:

This important measure will mean that Commonwealth debt, state government debt and private sector debt will be afforded the same treatment for interest withholding tax purposes. This will help improve the neutrality of the tax system, and bring Australia’s tax treatment of Commonwealth Government Securities into line with most other countries, including the United States and the United Kingdom.<sup>18</sup>

This measure was announced in the Treasurer’s Media Release No. 092 of 21 August 2009 where it was stated:

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16. Tax Laws Amendment (2009 Measures No. 5) Bill 2009, Explanatory Memorandum, p. 8. The Explanatory Memorandum explains that the measure has not been previously announced, but the outer regional and remote payment was announced jointly on 25 June 2008.
  17. Senate Community Affairs Committee, *Answers to Estimates Questions on Notice*, Question No: 172, 2009-10 Budget Estimates, 1, 2, 5 June 2009.
  18. B Shorten, *op. cit.* p. 9715.

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This will address the anomaly that has existed since IWT was removed from publicly issued corporate bonds in 1999 and state government securities in 2008.

**Schedule 6** amends the *Income Tax Assessment Act 1997* (the ITAA 1997) to allow donations received by the 2009 Victorian Bushfire Appeal Trust Account to be used for a broader range of purposes to assist communities and individuals affected by the bushfires in 2009. The Victorian Bushfire Appeal Trust Account has been established under section 19 of the *Financial Management Act 1994* (Victoria). An independent advisory panel oversees the expenditure of funds from the Trust Account. The amendments expand the allowable purposes to target sections of the community which have been specifically identified as in need of support as a result of the bushfires.<sup>19</sup> **Schedule 6** also will provide that when looking at the status of the Red Cross Society (the charity that collected the donations) as a benevolent or charitable institution, payments to the Trust Account are to be disregarded. This will protect the charitable status of the Red Cross so long as the funds are used for the allowable purposes.

### Committee consideration

The Bill has not been referred to Committee.

## Financial implications

According to the Explanatory Memorandum:<sup>20</sup>

*Financial impact:* This measure has the following revenue implications:

<i>2009-10</i>	<i>2010-11</i>	<i>2011-12</i>	<i>2012-13</i>	<i>2013-14</i>
-\$13.4m	-\$22.1m	-\$13.5m	-\$4.5m	\$1.1m

*Compliance cost impact:* Nil.

## Main provisions

### Schedule 1

The main operative provisions of this Schedule will take effect from 1 July 2000, which is the date of the introduction of the GST. The consequential amendment to the *Fuel Tax Act 2006* will take effect from 1 July 2006, which is the date of commencement of that Act. In

19. Explanatory Memorandum, paragraphs 6.22 and 6.23, p. 54.

20. *ibid.*, p. 10.

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commenting on this retrospectivity, the Explanatory Memorandum gives a detailed explanation:

1.9 Retrospective amendment of the GST law is considered appropriate as the proposed amendments will give effect to the stated policy intention as at the commencement of the GST law on 1 July 2000. The proposed amendments are also generally consistent with the way the law has been administered by the Commissioner.

1.10 Consequently, retrospective application of the law is not expected to adversely impact taxpayers with one exception. Supplies by representatives to associates of incapacitated entities<sup>21</sup> for no consideration or inadequate consideration may have a different GST outcome as a result of the retrospective amendments. A transitional provision will apply to ensure that the amendments will not adversely impact those taxpayers affected.

**Schedule 1 Part 1 item 8** inserts **new Division 58**, ‘Representatives of incapacitated entities’, into the *A New Tax System (Goods and Services Tax) Act 1999* and inserts **new subsections 58-5, 58-10, 58-15 and 58-40**. **New subsection 58-1** summarises that the Division has the following effect:

This Division sets out how to ascribe activities of a representative of an incapacitated entity between the representative and the incapacitated entity for GST purposes.

In particular, supplies, acquisitions and importations, and associated acts and omissions, by the representative are, in most cases treated as having been by the incapacitated entity. This ensures that a transaction by the representative has the same consequences under the GST law as if the incapacitated entity had no representative.

However, in most cases, GST-related liabilities and entitlements are allocated to the representative for transactions that are within the scope of the representative’s responsibility or authority.

The **new Division 58** replaces Division 147 of the GST Act which currently contains the provisions relating to representatives of incapacitated entities. (Division 147 is repealed by **item 30**.)

**Part 1 item 10** repeals and substitutes **subsection 147-20(1)** to ensure that the subsection will apply only to increasing adjustments for the period between 1 July 2000 and the date of Royal Assent, and also to adjustments by the incapacitated entity. As to this latter aspect, the Explanatory Memorandum states:

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21. An ‘incapacitated entity’ means an individual who is a bankrupt, an entity that is in liquidation or receivership, or an entity that has a representative. See GST Act, section 195-1.

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In addition, current section 147-20 is predicated on the basis that the relevant adjustments are adjustments of the representative. However due to the operation of new section 58-5 the adjustments to which this section relates will always be adjustments that the incapacitated entity has. Therefore, this section, as currently worded, would have no application.<sup>22</sup>

Full details of the other measures in this Schedule of the Bill are contained in the Explanatory Memorandum.

## Schedule 2

**Schedule 2 Part 1 item 1** repeals subsection 45-120(2B) of the *Taxation Administration Act 1953* to clarify that the TOFA Act was not intended to reduce the amount of instalments an entity is liable to pay.

**Part 1 item 3** addresses the possibility of a decreased payment of PAYG instalments in the first and second instalment quarters, and provides a ‘catch-up’ payment in the event of this occurring.<sup>23</sup> The amendment is explained the following way in the Explanatory Memorandum:

2.26 This catch-up payment provision only applies in a very specific scenario. The amendment requires *all* of the below to occur in order to apply:

- The entity must make or have made an election under item 103 of the TOFA Act to apply TOFA early (that is, from income years starting on or after 1 July 2009) [*Schedule 2, Part 1, sub-subitem 3(1)(b)*].
- Schedule 2 to this Bill commences after 30 September 2009 [*Schedule 2, Part 1, sub-subitem 3(1)(b)*].
- The entity must be part of the PAYG instalments system, and be a quarterly payer of instalments that pays on the basis of instalment income [*Schedule 2, Part 1, sub-subitem 3(1)(a)*].
- The entity’s first instalment quarter for the income year starting on or after 1 July 2009 must end before the commencement of this Schedule. For example, assume that an entity has an income year starting on 1 October 2009 and this Schedule commences on 15 December 2009. In that case, the amendment will not apply to the entity because its

first instalment quarter ends on 31 December 2009, which is after the commencement of Schedule 2 in December 2009 [*Schedule 2, Part 1, sub-subitem 3(1)(b)*].

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22. Explanatory Memorandum, paragraph 1.86, p. 31.

23. For a detailed explanation of the amendment including how the catch-up of a decreased instalment is calculated see the Explanatory Memorandum, paragraphs 2.23-2.33, pp. 39–42.

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**Part 2 item 4** reinserts **subsection 45-120(2B)** in its original form to provide for the working out the instalment income of entities that have financial arrangements subject to Subdivision 250-E<sup>24</sup> of the ITAA 1997.<sup>25</sup>

### Schedule 3

**Schedule 3** amends the *Income Tax Assessment Act 1997* to insert the [Helping Children with Autism package](#), as part of the Outer Regional and Remote payment, into the table of social security or like payments. It will insert **new section 52-170** into that Act to provide that such payments are exempt from income tax. The amendments are to apply to payments made in the 2008-09 and later income years (**item 3**).

### Schedule 4

**Schedule 4** similarly amends the *Income Tax Assessment Act 1997* to insert **new section 52-175** to exempt the Continence Aids Payment Scheme payments from income tax. The amendments will apply from the 2010-11 and later income years (**item 3**). However the Explanatory Memorandum says the measure applies to amounts received in the 2009-10 income and later years:<sup>26</sup>

As clients do not pay any income tax on the value of benefits received under the current subsidised products scheme and will not pay any income tax on receiving the replacement income tax exempt cash payments, there is no impact on the forward estimates.

### Schedule 5

**Item 1 of Schedule 5** repeals **subsection 128F(5A)** of the *Income Tax Assessment Act 1936* which currently has the effect that the Commonwealth is liable to income withholding tax. The repeal of the provision will mean that the Commonwealth issued debt will be eligible for exemption. Currently subsection 128F(5B) states that State and Territory bonds are exempt from interest withholding tax. This subsection is also being repealed.

**Item 2** repeals and substitutes **subsection 128F(7)** to clarify that the section applies not only to an authority of the Commonwealth but also to the Commonwealth in its own right.

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24. Subdivision 250-E of the *Income Tax Assessment Act 1997* relates to the tax treatment of gains and losses from certain financial arrangements.

25. For more details on Schedule 2 refer to the Background section of this Digest at page 5, and the Explanatory Memorandum at pp. 35–42.

26. *ibid.*, p. 9.

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## Schedule 6

**Schedule 6, item 2** expands the purposes for the benefit of communities and individuals affected by the Victorian bushfires to include matters such as ‘broad public benefits’ that are consistent with the purposes of one or more exempt entities, reimbursing certain payments that have been made, providing long-term assistance to child orphans, assisting individuals whose houses were destroyed or who had to live in transitional housing and the like. **Item 3** ensures that the Red Cross Society does not lose its charitable status as a consequence of the broadening of the purposes that may or may not normally come within the meaning of what the tax law would consider charitable. It provides that when determining whether the Red Cross Society is a public benevolent or charitable institution, payments from the Red Cross Society to the 2009 Victorian Bushfire Appeal Trust Account are disregarded.

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