



Tax Laws Amendment (2009 GST Administration Measures) Bill 2009

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Law and Bills Digest Section

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Tax Laws Amendment (2009 GST Administration Measures) Bill 2009

Date introduced: 25 November 2009

House: House of Representatives

Portfolio: Treasury

Commencement: The formal provisions of the Bill, together with **Schedules 1 and 3–6**, commence on Royal Assent; **Schedule 2 (items 1 and 2)** and **Schedule 2 (items 5 to 23)** commence on 1 July 2010; and **Schedule 2 (items 3 and 4)** commences on the later of Royal Assent or 1 July 2010.

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 amends various tax Acts to reduce costs associated with the administration of the Goods and Services Tax (GST). Otherwise it streamlines the GST administration framework by correcting some current anomalies.

Background

Basis of policy commitment

On 11 June 2008, Chris Bowen MP (then Assistant Treasurer) announced that the Board of Taxation ('the Board') would undertake a review of the legal framework for the administration of the GST.¹ The focus of the review was on:

- streamlining and improving the operation of the GST;
- reducing compliance costs; and
- removing anomalies.²

Mr Bowen indicated that the review was intended to save time and money for business, particularly small business. However, he also emphasised that the review would not

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1. C Bowen MP (then Assistant Treasurer), *Government Acts to Reduce GST Compliance Costs for Business*, media release, No. 41, 11 June 2008, viewed 19 January 2010, <http://assistant.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/041.htm&pageID=003&min=ceb&Year=&DocType=>
 2. Ibid.

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examine the rate of the GST nor the scope of goods and services which attract GST. Instead the review was asked to include the following issues in its examination:

- the application of the GST to the rulings process
- the period of review
- the application of the general interest charge for overpaid tax refunds, and
- the Government's proposal to simplify business activity statements (known as 'BAS Easy').³

The Board was urged to consult widely with business and tax practitioners, and with the states and territories. It was asked to report to the Government by the end of December 2008.⁴

On 12 May 2009, the then Assistant Treasurer announced the release of the Board's report.⁵ At the same time, he also announced the Government's response to the Board's 46 recommendations, of which the Government agreed to implement 41. The current Bill gives effect to some of those recommendations (see below).

On 6 October 2009, the current Assistant Treasurer, Senator Nick Sherry, released a draft Bill.⁶ Interested parties were invited to comment on all or some of the exposure draft material by 28 October 2009. Treasury received nine submissions, of which two were confidential. The current Bill is almost identical to the exposure draft, with the main exception of **proposed Division 93** of the *A New Tax System (Goods and Services Tax) Act 1999* ('the GST Act') and **proposed Division 47** of the *Fuel Tax Act 2006* ('the Fuel Tax Act'), which impose the four-year time limit on entitlements to input tax and fuel tax credits. The content of those proposed Divisions is not dissimilar to that in the exposure

3. Ibid.

4. Ibid.

5. C Bowen MP (then Assistant Treasurer), *Government Response to Board of Taxation Review of GST Administration*, media release, No. 42, 12 May 2009, viewed 19 January 2010,

<http://assistant.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/042.htm&pageID=003&min=ceb&Year=&DocType=0>

See also Board of Taxation, 'Review of the legal framework for the administration of the GST', *Board of Taxation website*, 2009, viewed 19 January 2010,

http://www.taxboard.gov.au/content/gst_administration_review.asp

The report is available at Board of Taxation, *Review of the Legal Framework for the Administration of the Goods and Services Tax — a report to the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs*, report, December 2008, viewed 19 January 2010,

http://www.taxboard.gov.au/content/GST_administration_review/report/index.asp

6. Treasury, 'GST Administration Draft Legislation and Exposure Draft', *website*, 6 October 2009, viewed 25 January 2010,

<http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1631>

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draft, but instead of there being only one single section in each Division, the material is now contained in two or three separate sections and is much easier to understand. Further details about these provisions are set out below.

Key issues

The Bill deals with six main issues, as summarised below.

Limited time to claim input tax credits

Schedule 1 imposes a four-year time limit on a taxpayer's ability to claim input tax credits and fuel tax credits.⁷ It gives effect to Recommendation 20 of the Board's report, which states:

The law should be amended to limit claims for input tax credits to a four-year period in line with the time limit on refunds and credits provision in the *Taxation Administration Act 1953* [for indirect tax liabilities and entitlements] and to clarify that a taxpayer can defer input tax credit claims (within these limits) even if they held a tax invoice at the end of the period to which the credit would otherwise be attributable.⁸

Currently, the *Taxation Administration Act 1953* ('TAA 1953') sets a four-year limitation period for the claiming of indirect tax liabilities and entitlements (including input tax credits and fuel tax credits). The limitation period starts from the end of the tax period to which the relevant credit is attributable.⁹ However, the attribution rules in the GST Act and the Fuel Tax Act allow the taxpayer to defer the attribution of credits until a later tax period, thereby diluting the effectiveness of establishing the time limit in the first place.¹⁰

The amendments in **Schedule 1** strengthen the effectiveness of the current limitation period by disentitling a taxpayer to claim an input tax credit or a fuel tax credit if the credit

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7. An 'input tax credit' is a taxpayer's entitlement arising out of a 'creditable acquisition' (section 11-20 of the GST Act) or a 'creditable importation' (section 15-15 of the GST Act). For example, under section 11-20 of the GST, a taxpayer makes a 'creditable acquisition' if:
 - (a) he or she acquires anything solely or partly for the carrying on of his or her enterprise and not to make input taxed or private supplies
 - (b) the supply to the taxpayer is a taxable supply
 - (c) the taxpayer provides (or is liable to provide) consideration (that is, payment of some kind), and
 - (d) the taxpayer is registered, or required to be registered for GST.
 In these circumstances, the taxpayer is entitled to claim an input tax credit of one-eleventh of the consideration the taxpayer pays or is liable to pay for the acquisition.
 8. Board of Taxation, *Review of the Legal Framework for the Administration of the Goods and Services Tax* (report), op. cit., p. 86.
 9. Section 105–55 in Schedule 1 to the TAA 1953.
 10. Sections 29–10 of the GST Act (input tax credits) and section 65–5 of the Fuel Tax Act (fuel tax credits).

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has not been claimed within four years of the date to which the credit would have been attributable under the attribution rules. There are, however, some exceptions to the application of the amendments, such as where:

- the credit arises as a result of the taxpayer becoming entitled to a refund,¹¹ or
- the Commissioner of Taxation is satisfied that the taxpayer was engaged in GST- or fuel tax-related fraud or evasion giving rise to a credit.

A taxpayer's entitlement to the credits will not cease in these circumstances unless the taxpayer 'has not borne tax on the acquisition to which the credit relates'.¹²

Refund collection system

Schedule 2 allows residents of Australia's external territories (such as Norfolk Island and Christmas Island) to claim refunds of GST and (in some circumstances, refunds of wine equalisation tax) under the tourist refund scheme if they can prove the goods were exported to the territory within the required time after the goods were acquired. **Schedule 2** amends:

- Division 168 of the GST Act (which deals with the tourist refund scheme)
- Subdivision 38-E of the GST Act (which provides that exports and other goods that are supplied for consumption outside Australia are exempt from the GST), and
- Division 25 of the *A New Tax System (Wine Equalisation Tax) Act 1999* ('WET Act') (which also deals with the tourist refund scheme).

In summary, the tourist refund scheme (original emphasis):

... enables you to claim a refund, subject to certain conditions, of the goods and services tax (GST) and wine equalisation tax (WET) that you pay on goods you buy in Australia.

To claim a refund you must:

- Spend \$300 (GST inclusive) or more in the one store and get a single tax invoice
- Buy goods no more than 30 days before departure
- Wear or carry the goods on board the aircraft or ship and present them along with your original tax invoice, passport and international boarding pass to a Customs Officer at a TRS facility

...

11. Sections 105–50 and 105–55 in Schedule 1 to the TAA 1953.

12. Explanatory Memorandum, Tax Laws Amendment (2009 GST Administration Measures) Bill 2009, p. 13.

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The refund only applies to goods you take with you as **hand luggage or wear** (unless aviation security measures, effective from 31 March 2007, in regard to liquids, aerosols and gels prevent you from doing so) **onto the aircraft or ship** when you leave Australia. It does not apply to services or goods consumed or partly consumed in Australia, such as wine, chocolate or perfume. However, unlike other tourist shopping schemes, most of the goods, such as clothing and cameras, can be used in Australia before departure.

The TRS is open to all overseas visitors and Australian residents, **except operating air and sea crew**.

The GST refund is calculated by dividing the total amount of the purchase by 11. The WET refund is 14.5 percent of the price paid for wine. For example, if you buy goods for a GST-inclusive price of \$660 you will receive a refund of \$60. If the \$660 is made up of a camera (\$460) and wine (\$200), you will receive a total refund of \$89 (total GST refund of \$60 plus \$29 WET refund on the wine).¹³

Schedule 2 gives effect to Recommendation 31 of the Board's report, which states:

A system should be introduced under which residents of Australia's External Territories (Norfolk, Cocos & Keeling, and Christmas Islands) can claim refunds under the Tourist Refund Scheme if they can show proof of shipping of exported goods to their External Territory.¹⁴

Domestic agency provisions in the GST Act

Schedule 3 increases the range of entities that are entitled to act as a principal for GST purposes (and thus have access to simplified accounting rules). It amends Subdivision 153-B of the GST Act, which deals with principals and agents as separate suppliers or acquirers of goods and services that are subject to the GST.

Currently, only agents (or intermediaries) that are 'common law agents' are entitled to enter into agreements with principals for the supply or acquisition of goods and services.¹⁵

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13. Australian Customs and Border Protection Service, 'Advice for travellers: About the Tourist Refund Scheme', *website*, viewed 23 January 2010, <http://www.customs.gov.au/site/page4366.asp#e1157>
 14. Board of Taxation, *Review of the Legal Framework for the Administration of the Goods and Services Tax* (report), op. cit., p. 119.
 15. The term 'common law agent' is not defined in the GST Act. The Explanatory Memorandum explains (at p. 39, paragraph 3.6) that the term means an entity that is authorised under the common law 'to act on behalf of the principal so as to create or affect legal relations between the principal and third parties'. Representatives of the principal who are not common law agents (such as billing agents and commissioning agents) are not covered by Subdivision 153-B of the GST Act. Existing section 153-50 of the GST Act currently sets out the roles of both the principal and the agent in an arrangement under which the agent is treated as the supplier or acquirer of the goods or services for GST purposes in place of the principal.

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Some of these acquisitions and supplies may be treated for GST purposes as ‘taxable supplies’ and ‘creditable acquisitions’ made by the agent to or from the principal.¹⁶

Under the amendments, the arrangements in Subdivision 153-B will not be restricted to intermediaries who are common law agents. For example, they will be able to be used by intermediaries (such as travel agents) who *facilitate* supplies or acquisitions to or from third parties but who do not actually *make* those supplies or acquisitions on the principal’s behalf.

The Explanatory Memorandum states that the amendments will reduce the compliance costs of GST accounting where intermediaries are used by an entity. For example, intermediaries will be able ‘to issue tax invoices for, and be liable for GST payable on taxable supplies they are taken to make to a third party’. Intermediaries will be entitled to input tax credits for creditable acquisitions they are taken to make from a third party, and will record these on their own Business Activity Statement. Principals will also be taken to make or acquire a supply to or from the intermediary.¹⁷

Schedule 3 gives effect to Recommendation 40 of the Board’s report, which states:

The scope of the domestic agency provisions should be broadened to include representatives that operate in a similar way to, but do not amount to, common law agents, such as invoicing and commission agents, and consider simplification of the underlying principles.¹⁸

Gambling activities by entities outside Australia

Schedule 4 amends Division 126 of the GST Act to clarify how a gambling operator’s margin is calculated where the supplies made by the operator are GST-free.

GST is calculated on the basis of the ‘gambling operator’s margin’, which is the difference between the bets received by the operator (‘total amounts wagered’) and the monetary prizes paid to successful gamblers (‘total monetary prizes’). It is not calculated on individual bets or prizes, because it would be ‘administratively complex’.¹⁹ Instead, GST is applied at the rate of 1/11th of the gambling operator’s margin.²⁰ As the Board of

16. The term ‘creditable acquisition’ is discussed in footnote 7 above. Essentially the term ‘taxable supply’ is defined in the GST Act a similar way to the term ‘creditable acquisition’. Section 9-5 makes it clear that a supply is not a ‘taxable supply’ to the extent it is GST-free or input taxed.

17. Explanatory Memorandum, p. 40.

18. Board of Taxation, *Review of the Legal Framework for the Administration of the Goods and Services Tax* (report), op. cit., p. 158.

19. *Ibid.*, p. 159.

20. Subsection 126-10(1) of the GST Act.

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Taxation explains, this approach ‘is intended to have the same net result as applying GST to individual wagers and allowing tax input credits on prizes paid out’.²¹

However, there is some confusion under the existing law as to whether prize money paid to entities outside Australia should be excluded from the calculation of the operator’s total monetary prizes. This is because when an operator pays prize money to an entity outside Australia, the supply is GST-free and it should therefore be excluded from the operator’s total monetary prizes.²² **Schedule 4** makes it clear that the phrase ‘total monetary prizes’ in **existing subsection 126-10(1)** of the GST Act excludes prize money payable in relation to GST-free supplies.²³ It gives effect to Recommendation 41 of the Board’s report, which states: ‘The GST law should be amended to confirm the application of the rules about gambling to non-resident entities’.²⁴

Recovering overpaid refunds of GST, luxury car tax and fuel tax

Schedule 5 provides that an overpaid refund (in relation to GST, luxury car tax or fuel tax) is treated as an amount due and payable from the date of the overpayment.

The current law does not specify when the overpayment becomes due and payable, creating a discrepancy in the way in which refunds and underpayments of liabilities are treated. Currently, the Commissioner of Taxation is able to impose a general interest charge (sometimes called the ‘GIC’) on the underpayment of a liability but he or she is only able to treat an overpaid refund as an administrative overpayment and apply the general interest charge from the date of the incorrect refund.²⁵ However, the Board notes that ‘a recent court decision has raised doubts about the Commissioner’s current practice in the recovery of administrative overpayments’.²⁶

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21. Board of Taxation, *Review of the Legal Framework for the Administration of the Goods and Services Tax* (report), op. cit., p. 159, paragraph 8.1.8.
 22. Items 2 and 3 in subsection 38-190(1) of the GST Act.
 23. Section 38-270 of the GST Act provides that prize money payable on raffles and bingo competitions run by a charitable institution, a trustee of a charitable fund, a gift-deductible entity or a government school is GST-free.
 24. Board of Taxation, *Review of the Legal Framework for the Administration of the Goods and Services Tax* (report), op. cit., p. 160.
 25. See sections 8AAZN and 8AAZF of the TAA 1953.
 26. Board of Taxation, *Review of the Legal Framework for the Administration of the Goods and Services Tax* (report), op. cit., p. 162. While the Board provides no details of the case, it is reasonably likely to be the decision of the District Court of South Australia in *Deputy Commissioner of Taxation v De Angelis* [2008] SADC 103 (Shaw J, 14 August 2008), viewed 27 January 2010, <http://www.austlii.edu.au/au/cases/sa/SADC/2008/103.html>, where the taxpayer’s challenge to the Commissioner’s practice was upheld (allowed) by the Court. Note, however, that the same issue was the subject of the decision of the District Court of New South Wales in *Deputy Commissioner of Taxation v Smith* [2008] NSWDC 219 (Truss DCJ, 19 September 2008), viewed 27 January 2010, <http://www.austlii.edu.au/cgi->

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Accordingly, **Schedule 5** amends the GST Act, the *A New Tax System (Luxury Car Tax) Act 1999* ('the Luxury Car Tax Act') and the Fuel Tax Act to ensure overclaimed refunds and underpayments of liabilities are treated consistently, with the result that the general interest charge will also be applied consistently. It gives effect to Recommendation 44 of the Board's report, which stated: 'The law should be amended to allow over claimed refunds to be treated as an amount of tax which becomes payable when either refunded to the taxpayer or applied against a tax debt'.²⁷

Supplies to associates without consideration

Schedule 6 ensures that the GST treatment of a supply to an associate without consideration (that is, payment of some kind) is to be treated in the same way as an input taxed supply, a GST-free supply or a financial supply (as appropriate in the circumstances).²⁸ Also, where the supply to an associate would otherwise be a sale for consideration, the supply is taken for GST purposes to be a supply for consideration and the supply will be taxed as such.

Under the current law, supplies between associates are treated in a variety of ways. Ordinarily, for a supply to be a 'taxable supply', there must be consideration.²⁹ However, more often than not, a supply is made to an associate without consideration (or for consideration that is less than the market value of the supply). If a supply is made to an associate without consideration, the associate is not entitled to a full input tax credit, but the supply is still regarded as a taxable supply.³⁰ If the taxable supply is made to an associate for consideration of less than market value, and the associate is not entitled to a

bin/sinodisp/au/cases/nsw/NSWDC/2008/219.html, where the taxpayer's challenge to the Commissioner's practice was dismissed.

27. Board of Taxation, *Review of the Legal Framework for the Administration of the Goods and Services Tax* (report), op. cit., p. 162.
28. Subsection 9-30(1) of the GST Act states that a supply is *GST-free* if it is GST-free under Division 38 of the GST Act (which deals with GST-free supplies) or under a provision of another Act, or it is a supply of a right to receive a supply that would be GST-free. Subsection 9-30(2) of the GST Act states that a supply is *input taxed* if it is input taxed under Division 40 of the GST Act (which deals with input taxed supplies) or under a provision of another Act, or it is a supply of a right to receive a supply that would be input taxed. Under section 40-5 of the GST Act, a 'financial supply' is input taxed and has the meaning given by the regulations. Regulation 40-5.08 of the A New Tax System (Goods and Services Tax) Regulations 1999 sets out when a supply may be a 'financial supply'. It provides that a supply is a 'financial supply' if the supply is mentioned as a financial supply in regulation 40-5.09 or an incidental financial supply in regulation 40-5.10. However, if a supply is mentioned in regulations 40-5.09 and 40-5.12, the supply is not a financial supply. It is not possible to summarise regulations 40-5.09, 40-5.10 and 40-4.12 here in any meaningful way.
29. Section 9-5 of the GST Act, discussed in footnote 16 above.
30. Section 72-5 of the GST Act.

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full input tax credit, GST is charged on the market value of the supply.³¹ Where the associate pays no consideration (or pays consideration that is less than market value), the associate is entitled to an input tax credit to the extent the acquisition is for a creditable purpose.

Schedule 6 gives effect to Recommendation 46 in the Board's report, which states: 'The GST law should be amended to remedy the interaction of the associate provisions and other provisions such as those relating to input taxed and GST-free supplies'.³²

Committee consideration

At the time of writing, the Bill has not been referred to any committee.

Position of significant interest groups/press commentary

There has been no media comment on the current Bill to date. However, as mentioned above, the Government released an exposure draft of the Bill on 6 October 2009 and invited submissions from the public (see above). Treasury received nine submissions, of which it published seven on its website. The submissions (from both large associations such as the Corporate Tax Association of Australia and CPA Australia and smaller accounting firms) were largely in favour of the exposure draft. They made suggestions for the improvement of the imposition of the four-year time limit on entitlements to input tax and fuel tax credits which are reflected in the expanded and revised provisions on this issue now contained in the current Bill. They also made relatively minor suggestions for the revision of certain draft provisions, including the application dates for certain of the new provisions. The Administration of Norfolk Island welcomed the proposed changes to the tourist refund scheme but made some suggestions to improve the logistical operation of the scheme for its residents.³³

There was also some media coverage of the position of other interest groups at the time of the draft legislation. For example, Kevin O'Rourke, GST partner at PricewaterhouseCoopers, was reported as saying that the proposed legislation is 'a "grab bag" of issues that had accumulated since the GST was introduced in 2000. ... It's related to the housekeeping of GST and tidying up all the cobwebs that have accumulated over the past nine years'. He criticised the draft Bill and explanatory material for being difficult to understand 'even by the normal standards of tax law'. Mr O'Rourke is reported as saying:

31. Section 72-10 of the GST Act.

32. Board of Taxation, *Review of the Legal Framework for the Administration of the Goods and Services Tax* (report), op. cit., p. 166.

33. Treasury, 'Submissions—GST Administration Draft Legislation and Exposure Draft', *website*, 25 November 2009, viewed 25 January 2010, <http://www.treasury.gov.au/contentitem.asp?ContentID=1671&NavID=037>

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‘A diligent suburban accountant or lawyer would find the wording impenetrable ... It’s been written by a GST expert for GST experts’.³⁴

Craig Whatman, tax partner at Pitcher Partners, would seem to support the expansion of the agency provisions. He is reported as saying: ‘Tourism and telecommunications use a lot of intermediaries and the expansion allows them to get access to the simplified accounting rules’. However, he went on to say that the amendments do not go far enough, ‘because [they do not] generally allow those intermediaries to issue tax invoices on behalf of the principals, which is a common problem we find in the property industry’.³⁵

Financial implications

The impact of each of the measures contained in the Bill is said to be unquantifiable.³⁶ Most of the amounts are expected to be small or negligible.³⁷

Main provisions

Schedule 1—Time limit on entitlements to input tax credits and fuel tax credits

Part 1—Amendments relating to input tax credits

Item 7 of Schedule 1 inserts **proposed Division 93** into the GST Act. It deals with the time limit on entitlements to input tax credits. Particularly, **proposed subsection 93-5(1)** provides that a taxpayer ceases to be entitled to an input tax credit for a creditable acquisition to the extent the taxpayer has not taken it into account in working out the taxpayer’s ‘net amount’ for:

- (a) the tax period to which the input tax credit would be attributable under subsection 29-10(1) or (2); or
- (b) any other tax period for which [the taxpayer gives] to the Commissioner a GST return during the period of 4 years after the day on which [the taxpayer was] required to give to the Commissioner a GST return for the tax period referred to in paragraph (a).³⁸

34. J Kehoe and F Anderson, ‘Less red tape for agents’, *Australian Financial Review*, 8 October 2009, p. 8, viewed 24 January 2010, http://parlinfo.aph.gov.au/parlInfo/download/media/pressclp/1CVU6/upload_binary/1cvu60.pdf;fileType=application/pdf#search=%22Review%20of%20the%20Legal%20Framework%22

35. Ibid.

36. Explanatory Memorandum, pp. 7–10.

37. Ibid.

38. Section 29-10 of the GST Act sets out the rule for attributing input tax credits to a taxpayer’s creditable acquisitions.

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However, **proposed section 93-10** sets out three exceptions to the four-year time limit on a taxpayer's entitlement to an input tax credit.³⁹ In summary, a taxpayer does not cease to be entitled to an input tax credit at the expiration of the four-year time limit in **proposed section 93-5** if:

- within the four-year period, the Commissioner of Taxation has issued a notice to the taxpayer under section 105-50 or 105-55 in Schedule 1 to the TAA 1953 in relation to a refund for overpayment (or an additional tax liability), and the credit arose from the circumstances of the taxpayer's refund or liability⁴⁰
- the Commissioner of Taxation is satisfied that the taxpayer was engaged in GST-related fraud or tax evasion, and the credit arose in those circumstances,⁴¹ or
- within the four-year period, the taxpayer has given a notice to the Commissioner of Taxation under section 105-55 in Schedule 1 to the TAA 1953.⁴²

Further, in some circumstances, entitlement to an input tax credit will not be preserved even if one of the exceptions in **proposed section 93-10** exists. These circumstances are set out in **proposed section 93-15** and are summarised in the Explanatory Memorandum as follows:

- The Commissioner is no longer able to obtain payment of the GST from the supplier of the taxable supply which relates to the recipient's input tax credits sought to be claimed; and
- A tax invoice was not issued for the supply within four years.⁴³

Item 11 of **Schedule 1** to the Bill inserts **proposed Division 133** of the GST Act, dealing with the providing of additional consideration under contractual 'gross-up' clauses.⁴⁴ Particularly, **proposed subsection 133-5(1)** provides that a taxpayer may have a 'decreasing adjustment' for additional consideration provided to a supplier under a contractual 'gross-up clause' if:

- the acquisition was originally made on the basis that it was not a 'creditable acquisition' because the supply of the acquisition was not a 'taxable supply' or it was only partly creditable because the supply was only partly a 'taxable supply',⁴⁵ and
- to take account of a GST liability that the supplier is subsequently found to have, the taxpayer provides additional consideration to the supplier (in compliance with a

39. The Explanatory Memorandum provides some useful examples to illustrate the intended operation of the new law. See Explanatory Memorandum, pp. 17–20.

40. **Proposed subsection 93-10(1)** of the GST Act.

41. **Proposed subsection 93-10(2)** of the GST Act.

42. **Proposed subsection 93-10(3)** of the GST Act.

43. Explanatory Memorandum, p. 22, paragraph 1.44.

44. The phrase 'gross-up clause' refers to a contractual term requiring the payment of additional consideration.

45. **Proposed paragraph 133-5(1)(a)**. See the definition of 'creditable acquisition' and 'taxable supply' in footnotes 7 and 16 above.

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contractual obligation) at a time when GST on the supply has not ceased to be payable but at a time when the taxpayer can no longer claim an input tax credit.⁴⁶

Proposed section 133-10 states that if a taxpayer has a decreasing adjustment under **proposed Division 19**, and the circumstances that gave rise to the adjustment also constitute an ‘adjustment event’, then the taxpayer does not have a decreasing adjustment under section 19-70 of the GST Act for the acquisition.⁴⁷

Part 2—Amendments relating to fuel tax credits

Item 17 of Schedule 1 to the Bill inserts **proposed Division 47** into the Fuel Tax Act, which sets a time limit on entitlements to fuel tax credits. It is in largely the same terms as proposed Division 93 of the GST Act (see item 7 of Schedule 1 to the Bill, discussed above). **Proposed section 47-5** provides that a taxpayer’s entitlement to fuel tax credits cease unless the taxpayer includes them in his/her/its net fuel amounts within four years. **Proposed section 47-10** sets out the three exceptions to the time limit on entitlements to fuel tax credits (which are the same exceptions contained in proposed section 93-10 in relation to input tax credits).

Part 3—Application of Amendments

Item 19 of Schedule 1 to the Bill states that the amendments contained in **Part 1 of Schedule 1** apply (and are taken to have applied) in relation to acquisitions and adjustments that are taken into account in GST returns given to the Commissioner of Taxation under the GST Act after 7.30pm AEST on 12 May 2009.⁴⁸ The amendments also apply to assessments made by the Commissioner under Subdivision 105-A in Schedule 1 to the TAA after that time, and to amendments of the GST returns and assessments just mentioned.

Item 20 of Schedule 1 to the Bill provides that the amendments made by **Part 2 of Schedule 1** apply (and are taken to have applied) in relation to ‘acquisitions, manufacturing, importations and adjustments’ that are taken into account in returns given to the Commissioner of Taxation under section 61-15 of the Fuel Tax Act on or after

46. **Proposed paragraphs 133-5(b)–(d).**

47. Section 19-70 of the GST Act deals with adjustments for acquisitions arising out of ‘adjustment events’. That term is defined in section 195-1 to have the meaning given by sections 19-10 and 69-50. Those provisions respectively set out the general characteristics of adjustment events, and adjustment events involving elections for GST purposes relating to meal entertainment and entertainment facilities.

48. This date is the date of the then Assistant Treasurer’s media release setting out the Rudd Government’s response to the Board of Taxations review of the legal framework for the administration of the GST. See C Bowen MP (then Assistant Treasurer), *Government response to Board of Taxation Review of GST Administration*, op. cit.

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1 July 2010 (being the start of the forthcoming financial year) or amendments of such returns.⁴⁹

Schedule 2—Refund collection system

Items 1–4 of Schedule 2 to the Bill amend **existing section 38-185** of the GST Act, which sets out when the export of goods from Australia is GST-free. These amendments are largely consequential to the amendments made elsewhere in Schedule 2 (see below) and make it clear that where a refund of GST has not been sought under section 168-5 of the GST Act or section 25-5 of the WET Act, then the supplier of goods is treated as having exported the goods from Australia.⁵⁰

Items 5–11 amend Division 168 of the GST Act, which currently deals with refunds of GST payable on the supply of goods where the taxpayer takes goods overseas as accompanied baggage. They expand the operation of the division to cover residents of Australian external territories who send goods home.

Item 7 inserts **proposed subsection 168-5(1A)**, which provides that if:

- a taxpayer acquires goods, the supply of which is a taxable supply
- the acquisition is of a kind specified in the regulations
- at the time of the acquisition the taxpayer is an individual who resides or is domiciled in an external territory, or has actually been in an external territory continuously or intermittently during more than half of the last 12 months
- the taxpayer was not registered (or required to be registered) in relation to the GST at the time of the acquisition, and
- the taxpayer leaves Australia and exports the goods to the external territory other than as accompanied baggage (in the circumstances specified in the regulations) or in other circumstances specified in the regulations,

then the Commissioner of Taxation must (on behalf of the Commonwealth) pay to the taxpayer an amount equal to the amount of the GST payable on the taxable supply or such proportion of that amount of GST as is specified in the regulations. Under **existing subsection 168-5(2)** (as only slightly modified by **item 9**), the refund is payable within the period and in the manner specified in the regulations.⁵¹

49. Section 61-15 of the Fuel Tax Act sets out when a taxpayer must give the Commissioner of Taxation a return.

50. Both sections 168-5 of the GST Act and 25-5 of the WET Act are the subject of amendment by **Schedule 2**.

51. The regulations would be subject to parliamentary disallowance under Part 5 of the *Legislative Instruments Act 2003*.

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Item 11 inserts **proposed section 168-10**, which deals with the situation where a taxpayer is paid a refund under **proposed subsection 168-5(1A)** for a supply, but the supply is or later becomes a GST-free supply. In that situation, the taxpayer becomes liable to repay the amount of the refund (known as ‘the recoverable amount’) to the Commonwealth on the later of the following days:

- the day the taxpayer was paid the recoverable amount, or
- the day the supply becomes a GST-free supply.

The taxpayer is also liable to pay the general interest charge on the whole or any part of the recoverable amount that remains unpaid after the due day for amounts that remain unpaid from the date of the due day until the end of the last day when either the recoverable amount or the general interest charge on the recoverable amount remains unpaid.⁵²

Items 12–18 amend **Division 25** of the WET Act, which deals with a taxpayer’s entitlement to a refund of wine tax ‘borne’ by the taxpayer/purchaser where the taxpayer takes the wine overseas as accompanied baggage.⁵³ The amendments extend the entitlement to residents of Australian external territories who send wine home.

In order for the external territory resident/taxpayer to be entitled to the refund, the taxpayer must meet the requirements in **proposed subsection 25-5(1A)**, which are that:

- the taxpayer must have borne wine tax on wine that he or she purchased
- the purchase must be of a kind specified in the regulations, and
- an amount is payable by the taxpayer under subsection 168-5(1A) of the GST Act for the taxable supply corresponding to the purchase⁵⁴

then the Commissioner of Taxation must (on behalf of the Commonwealth) pay to the taxpayer an amount equal to the amount of wine tax that the taxpayer has borne on the wine or such proportion of that amount of wine tax as is specified in the regulations.⁵⁵

52. **Proposed subsection 168-10(2)** of the GST Act.

53. The phrase ‘borne wine tax’ is defined in section 33-1 of the WET Act to have the meaning given by Subdivision 31-C of that Act. Subsection 31-10(2) provides that an entity is taken to have ‘borne wine tax’ on wine if the entity has become liable to wine tax on an assessable dealing with the wine. However, the wine tax for which the entity has become liable is not counted to the extent to which it has been the basis of a wine tax credit entitlement. Subsection 31-10(3) also provides that an entity is taken to have ‘borne wine tax’ on wine if the entity purchased the wine for a price that included wine tax. However, the amount of wine tax borne is to be reduced by any amount of the wine tax included in that price that has been refunded or wine tax credited to the entity.

54. **Proposed subsection 168-5(1A)** is to be inserted by **item 7** of **Schedule 2** to the current Bill. See discussion above.

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Items 15 and 16 make very minor amendments to **existing subsections 25-5(2) and 25-5(3)**, which respectively provide that:

- the regulations may specify how amounts of wine tax borne are to be worked out, and
- an amount payable under section 25-5 is payable within the period and in the manner specified in the regulations.

Item 18 inserts **proposed section 25-10** into the WET Act and deals with the situation where a taxpayer is paid a refund in relation to wine tax borne on wine purchased by a resident of an Australian external territory who sent the wine home but where the purchase is later found to be a GST-free supply.⁵⁶ In that situation, the taxpayer becomes liable to repay the amount of the refund (known as ‘the recoverable amount’) to the Commonwealth on the later of the following days:

- the day the taxpayer was paid the recoverable amount, or
- the day the supply becomes a GST-free supply.

The taxpayer is also liable to pay the general interest charge on the whole or any part of the recoverable amount that remains unpaid after the due day for amounts that remain unpaid from the date of the due day until the end of the last day when either the recoverable amount or the general interest charge on the recoverable amount remains unpaid.⁵⁷

Items 19–22 amend the TAA 1953. Specifically, **items 19 and 20** amend the table in **existing subsection 8AAB(5)** to include **proposed section 168-10** of the GST Act and **proposed section 25-10** of the WET Act.⁵⁸

Items 21–22 amend the table in **existing subsection 250-10(2)** in Schedule 1 to the TAA 1953 to include **proposed section 168-10** of the GST Act and **proposed section 25-10** of the WET Act. As mentioned elsewhere in this Digest, the table in existing subsection 250-10(2) in Schedule 1 to the TAA 1953 sets out an index of each tax-related

55. The regulations would be subject to parliamentary disallowance under Part 5 of the *Legislative Instruments Act 2003*.

56. **Proposed section 25-10** of the WET Act is similar to **proposed section 168-10** of the GST Act—see **item 11** of **Schedule 2** above.

57. **Proposed subsection 25-10(2)** of the WET Act. The period of time for which the general interest charge is payable includes both the start and end dates mentioned above.

58. Section 8AAB of the TAA 1953 sets out when the general interest charge applies. The table in subsection 8AAB(5) is an index of the provisions of Acts other than the *Income Tax Assessment Act 1936* that deal with liability to pay the charge.

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liability under provisions of tax Acts other than the *Income Tax Assessment Act 1936* ('ITAA 1936').⁵⁹

Item 23 provides that the amendments in **Schedule 2** to the Bill apply in relation to goods acquired and wine purchased on or after 1 July 2010 (being the start of the forthcoming financial year). However, if the proposed Act does not receive Royal Assent on or before that date, the amendments made by **items 3 and 4** of this Schedule apply in relation to goods acquired and wine purchased on or after the day the proposed Act receives Royal Assent.⁶⁰

Schedule 3—Agency provisions

Items 1–28 of **Schedule 3** to the Bill amend **existing Division 153** of the GST Act.

Currently the division sets out the arrangements under which 'agents' are treated (in place of a principal entity) as suppliers or acquirers of goods and services for the purposes of the GST. The amendments expand the range of entities entitled to act as a principal for GST accounting purposes, primarily by replacing the word 'agent' with the more general term, 'intermediary'.⁶¹

Similarly, **item 30** amends **existing subsection 382-5(5)** in Schedule 1 to the TAA 1953 to replace the word 'agent' with the word 'intermediary'.⁶²

Item 31 provides that the amendments made by **Schedule 3** to the Bill apply in relation to supplies and acquisitions made on or after 1 July 2010.

59. The tax-related liability provisions of the ITAA 1936 are set out in a table in subsection 250-10(1) in Schedule 1 to the TAA 1953.

60. **Items 3 and 4** of **Schedule 2** to the Bill contain amendments to **existing subsection 38-185(4)** of the GST Act. They relate to associates covered by **proposed paragraph 168-5(1A)(c)** of the GST Act—see **item 7** of **Schedule 2** above, specifically the residence and domicile requirements that must be satisfied by a taxpayer wishing to claim a refund in relation to the supply of goods sent home to an external territory.

61. See, for example, **items 4–28**, which amend **existing sections 153-50** (Arrangements under which agents are treated as suppliers or acquirers), **153-55** (the effect of these arrangements on suppliers), **153-60** (The effect of these arrangements on acquisitions) and **153-65** (Determinations that supplies or acquisitions are taken to be under these arrangements). All references to 'agent' in these provisions are replaced with the word 'intermediary'.

62. Section 382-5 in Schedule 1 to the TAA currently requires a record of the arrangement between the intermediary and the principal to be kept by the principal. **Item 30** makes it clear that the intermediary does not need to keep a record too.

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Schedule 4—Gambling activities by entities outside Australia

Item 1 amends **existing subsection 126-10(3)** of the GST Act by omitting the reference to section 38-270. **Existing section 126-10** sets out the formula for calculating a taxpayer's 'global GST amount' for a particular tax period, where the taxpayer is a gambling operator/supplier.⁶³ Specifically, **existing subsection 126-10(3)** states that in working out the 'total monetary prizes' component of the formula, one should disregard any 'monetary prizes' the taxpayer is liable to pay during the tax period 'that relate to supplies that are GST-free under section 38-270'.⁶⁴

As a result of the proposed omission of the current reference to section 38-270 from **existing subsection 126-10(3)**, in calculating the taxpayer's 'total monetary prizes' one will disregard any 'monetary prizes' the taxpayer is liable to pay during the tax period 'that relate to supplies that are GST-free'. In other words, any prize money that a gambling operator taxpayer is liable to pay to entities outside Australia will be excluded from the calculation of the taxpayer's total monetary prizes (and thus also from the calculation of the taxpayer's global GST amount).

Item 2 states that the amendment made by **Schedule 4** to the Bill applies in relation to monetary prizes a taxpayer becomes liable to pay on or after the first day of the first quarterly tax period that starts on or after the commencement of Schedule 4 (being the day the proposed Act receives Royal Assent), regardless of whether quarterly tax periods are the tax periods that apply to the taxpayer in question.

Schedule 5—Recovering overpaid refunds

Items 1 and 2 of **Schedule 5** to the Bill amend **existing section 35-5** of the GST Act. **Item 1** renames the existing section as 'subsection 35-5(1)', and **item 2** inserts **proposed subsection 35-5(2)**.

Existing section 35-5 is located in Division 35 of the GST Act, which deals with refunds. It is found in Chapter 2 of that Act, which sets out the basic rules for the GST. Specifically, section 35-5 states that if a taxpayer's net amount for a tax period is less than zero, the Commissioner 'must, on behalf of the Commonwealth, pay that amount (expressed as a positive amount)' to the taxpayer. If the Commissioner is late in refunding the amount, interest is payable under the *Taxation (Interest on Overpayments and Early Payments) Act 1983*.

63. Existing section 126-10 of the GST Act is located in existing Division 126, which sets out the special GST rules that apply to gambling.

64. The term 'monetary prize' is defined in section 195-1 of the GST Act to mean any prize, or part of a prize, in the form of money; or if the prize is given at a casino—any prize, or part of a prize, in the form of money or in the form of gambling chips that may be redeemed for money.

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Proposed subsection 35-5(2) provides that if the amount refunded under **proposed subsection 35-5(1)** (being existing section 35-5) has been overpaid, the overpayment is treated as if it were GST that became due and payable by the taxpayer from the time the amount was paid to the taxpayer or was applied against a tax debt. The general interest charge applies to the overpayment from the date of the overpayment (or refund).

Item 3 states that the amendment made by **item 2 (proposed subsection 35-5(2))** applies for tax periods starting on or after the commencement of Schedule 5 (being the day the proposed Act receives Royal Assent).

Item 4 amends the Luxury Car Tax Act by inserting **proposed section 17-15** to provide that an overpaid refund of luxury car tax credits must be repaid. Specifically, it provides that if the amount of a credit claimed by a taxpayer exceeds the amount to which the taxpayer is properly entitled under **existing section 17-5**, the excess is to be treated as if it were luxury car tax that became due and payable at the time when the credit was paid to the taxpayer or applied to reduce a tax debt.⁶⁵

Item 5 states that the amendment made by **item 4** applies in relation to claims made on or after the commencement of **Schedule 5** (being the day the proposed Act receives Royal Assent).

Item 6 amends **existing section 61-5** of the Fuel Tax Act by inserting **proposed subsection 61-5(3)** to provide that an overpaid refund of fuel tax credits must be repaid. **Existing subsection 61-5(1)** sets out a taxpayer's entitlement to a refund if the taxpayer's net fuel amount for a tax period (or fuel tax return period) is less than zero, and **existing subsection 61-5(2)** states that the entitlement to be paid an amount under subsection 61-5(1) arises when the taxpayer gives the Commissioner of Taxation a fuel tax return for the relevant tax period. **Proposed subsection 61-5(3)** states that if the amount (refund) paid to the taxpayer (or applied to a tax debt under the TAA 1953) is subsequently reduced by the Commissioner, the amount by which the overpaid refund has been reduced is treated as if it were a net fuel amount that became due and payable from the time the refund was paid or applied against a tax debt.

Item 7 states that the amendment made by **item 6** applies in relation to amounts payable under subsection 61-5 of the Fuel Tax Act for tax periods (or fuel tax return periods, if the taxpayer is not registered, nor required to be registered, for GST), starting on or after the commencement of **Schedule 5** (being the day the proposed Act receives Royal Assent).

65. **Division 17** of the Luxury Car Tax Act provides that in some circumstances a taxpayer may be able to claim a credit for luxury car tax paid by the taxpayer or by the supplier of the luxury car. Credits are only available to taxpayers who are not entitled to an adjustment for the circumstance. **Existing section 17-5** sets out the circumstances when a taxpayer is entitled to a credit for tax borne, and **existing section 17-10** states that the taxpayer must claim the credit within 4 years of becoming entitled to the credit, and that a claim for a credit must be made in the approved form.

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Items 8–10 amend the table in **existing subsection 250-10(2)** in Schedule 1 to the TAA 1953 to include reference to **proposed subsection 35-5(2)** of the GST Act (**item 2 of Schedule 5** above), **proposed section 17-15** of the Luxury Car Tax Act (**item 4 of Schedule 5** above), and **existing section 17-25** of the WET Act (which deals with excess wine tax credits but is not affected by the current Bill).⁶⁶

Item 11 amends existing table item 36 in **existing subsection 250-10(2)** in Schedule 1 to the TAA 1953 to include reference to **proposed subsection 61-5(3)** of the Fuel Tax Act (**item 6 of Schedule 5** above) alongside the existing reference to section 61-10 of that Act.

Schedule 6—Interaction of associate provisions

Items 1 and 2 of Schedule 6 amend **existing section 38-185** of the GST Act, which sets out when the export of goods from Australia is GST-free.⁶⁷ The amendments ensure that a supply to an associate without consideration is treated for GST purposes as either an input taxed supply; a GST-free supply; or a financial supply (whichever is appropriate in the circumstances of the supply).⁶⁸ If the goods are reimported into Australia, the supply is not GST-free, unless the reimportation is a ‘taxable importation’.⁶⁹

Item 3 amends **existing Subdivision 72-A** of the GST Act to insert **proposed section 72-20** (Supplies and acquisitions that would otherwise be sales etc) and **proposed section 72-25** (Supplies that would otherwise be GST-free, input taxed or financial supplies). **Existing Subdivision 72-A** deals with supplies without consideration, and currently comprises **sections 72-5** (Taxable supplies without consideration), **72-10** (The value of taxable supplies without consideration) and **72-15** (Attributing the GST to tax periods). It is located in **Division 72**, which deals generally with associates.

Proposed subsection 72-20(1) provides that if, *apart from a lack of consideration*, a supply by a taxpayer to an associate (or a supply to the taxpayer from an associate) would be a sale (or some other kind of supply), the supply is taken to be a supply of that kind for the purposes of the GST law.⁷⁰ Similarly, **proposed subsection 72-20(2)** provides that if, *apart from a lack of consideration*, an acquisition by a taxpayer’s associate from the taxpayer (or an acquisition by the taxpayer from the associate) would be by sale or some other means, the acquisition is taken to be an acquisition by that means for the purposes of the GST law.

66. Existing section 250-10 in Schedule 1 to the TAA 1953 sets out a summary of tax-related liabilities under various provisions of Australian tax law.

67. **Schedules 1 and 2** to the Bill also amend existing section 38-185 of the GST Act.

68. See footnote 28 above.

69. **Proposed subsection 38-185(4)** of the GST Act.

70. The term ‘GST law’ is defined in section 195-1 of the GST Act to mean a number of related tax laws including the GST Act; any Act that imposes GST; the *A New Tax System (Goods and Services Tax Transition) Act 1999*; the TAA 1953 (so far as it relates to the three Acts just mentioned); and regulations made under these or another relevant Act.

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Proposed section 72-25 provides that the fact that a supply to or from a taxpayer's associate is without consideration does not stop the supply from being (for the purposes of the GST law) a GST-free supply; a supply that is input taxed; or a financial supply.

Item 4 states that the amendments made by **Schedule 6** apply in relation to supplies and acquisitions made on or after the commencement of **Schedule 6** (being the day the proposed Act receives Royal Assent).

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