



Tax Laws Amendment (2010 Measures No. 5) Bill 2010

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Law and Bills Digest Section

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Tax Laws Amendment (2010 Measures No. 5) Bill 2010

Date introduced: 25 November 2010

House: House of Representatives

Portfolio: Treasury

Commencement: Schedules 1 to 4 and Schedule 7 commence on Royal Assent. Schedule 5 commences the day after Royal Assent. Schedule 6 commences on 1 July 2011.

Links: The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bills home page, or through <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at the ComLaw website, which is at <http://www.comlaw.gov.au/>.

Purpose

The Bill contains seven Schedules, each with a different purpose:

- to amend the eligibility provisions for two categories of film tax offset in the *Income Tax Assessment Act 1997* (the ITAA 1997) in order to make Australia a more attractive location for film production (**Schedule 1**).
- to amend the ITAA 1997 and the *Income Tax (Transitional Provisions) Act 1997* (the Transitional Provisions Act) to apply a new benchmark rate for interest paid on capital protected borrowings (**Schedule 2**)
- to amend the ITAA 1997 to introduce a new category of capital gains tax (CGT) exemption where land or a structure which is adjacent to and part of a taxpayer's main residence is compulsorily acquired but where the dwelling itself is not (**Schedule 3**)
- to amend the ITAA 1997 to allow complying superannuation funds and retirement savings account providers a deduction for costs associated with providing benefits for terminal medical conditions (**Schedule 4**)
- to amend the *A New Tax System (Goods and Services Tax) Act 1999* (the GST Act) to extend GST concessions available to parent entities to their non-profit sub-entities (**Schedule 5**)
- to amend the GST Act so that a credit is only offset against a business activity statement (BAS) amount when the amount becomes due and payable (**Schedule 6**), and
- to amend the ITAA 1997 to expand the Education Tax Refund to include an offset for the cost of school uniforms (**Schedule 7**).

Financial implications

According to the Explanatory Memorandum¹, the Bill has the following financial implications:

- **Schedule 1** – increased expenditure of \$6.9 million over the forward estimates period
- **Schedule 2** – increased revenue of \$170 million over the forward estimates period²
- **Schedule 3** – unquantifiable (but small) cost to revenue
- **Schedule 4** – \$7.5 million cost to revenue over the forward estimates period
- **Schedule 5** – nil
- **Schedule 6** – unquantifiable
- **Schedule 7** – \$340 million expense over the forward estimates period (nil in 2010-11)

Committee consideration

On 26 November the Senate Selection of Bills Committee resolved to defer consideration of the Bill to its next meeting.³

Schedule 1—Film tax offsets

Background

Schedule 1 amends the eligibility criteria for two categories of film tax offset in the ITAA 1997 in order to make Australia a more attractive location for film production.

The proposed measure was announced by the then Minister for Environment Protection, Heritage and the Arts, Peter Garrett MP, and the then Assistant Treasurer, Senator Nick Sherry, on 11 May 2010.⁴

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1. Explanatory Memorandum, Tax Laws Amendment (2010 Measures No. 5) Bill, pp. 3-7.
 2. The 2010-11 Budget Papers estimate ongoing **cost** to revenue of the change to the benchmark interest rate for capital protected borrowings will be \$28 million from 2009-10 to 2013-14: Australian Government, *Budget measures: budget paper no.2: 2009-2010*, Commonwealth of Australia, Canberra, 2010, viewed 2 February 2011, http://www.budget.gov.au/2010-11/content/bp2/html/bp2_revenue-01.htm. This is also the figure quoted in the media release announcing the measure: N Sherry (Assistant Treasurer), *Change to benchmark interest rate for capital protected borrowings*, media release, no. 091, 11 May 2010, viewed 6 January 2011, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=ld_per cent3A per cent22media per cent2Fpressrel per cent2F3IOW6 per cent22
 3. Selection of Bills Committee, *Report No. 15 of 2010*, Senate, Canberra, 26 November 2010, viewed 18 January 2011, http://www.aph.gov.au/Senate/committee/selectionbills_ctte/reports/2010/rep1510.pdf
 4. P Garrett (then Minister for Environment Protection, Heritage and the Arts) and N Sherry (then Assistant Treasurer), *Changes to film tax offsets to boost Australian film industry*, media release, no. 089, 11 May 2010, viewed 2 February 2011.

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The Schedule amends Division 376 of the ITAA 1997. Division 376 deals with film tax offsets and was inserted into the ITAA 1997 in 2002,⁵ introducing a refundable tax offset of 12.5 per cent for qualifying film expenditure in Australia. The division was repealed and replaced with the current division in 2007.⁶ The division currently contains three refundable tax offsets:

- a producer offset of 40 per cent of qualifying Australian production expenditure (for Australian films only)
- a location offset of 15 per cent of qualifying Australian production expenditure (the location offset), with a minimum expenditure threshold of \$15 million, and a further requirement that if qualifying Australian production expenditure is less than \$50 million, that expenditure must be at least 70 per cent of total production expenditure, and
- a post, digital and visual effects production offset (the PDV offset) of 15 per cent of qualifying Australian production expenditure, with a minimum expenditure threshold of \$5 million.

The Schedule alters the eligibility criteria for the location offset and the PDV offset.

Main provisions

Items 1 and 2 amend section 376-10(1). The effect of the amendments is to remove the current \$50 million threshold for qualifying for the location offset.

Item 3 repeals paragraph 376-20(5)(b). The effect of the amendment is to remove the condition for qualifying for the location offset that the production expenditure in Australia on a film must be at least 70 per cent of the total production expenditure on the film.

Item 6 repeals section 376-25. The effect of the amendment is to remove a provision that allows a company to nominate one individual whose remuneration can be disregarded in working out the company's qualifying production expenditure for the location offset. The provision will become redundant due to the amendments under items 1, 2 and 11.

Item 7 amends paragraph 376-45(5)(a) to reduce the production expenditure threshold in qualifying for the PDV offset from \$5 million to \$500 000.

2011, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id_per_cent3A_per_cent22media_per_cent2Fpressrel_per_cent2F9NOW6_per_cent22

5. With the enactment of the *Taxation Laws Amendment (Film Incentives) Act 2002*. See: C Field, *Taxation Laws Amendment (Film Incentives) Bill 2002*, Bills Digest, no. 93, 2001-2002, Parliamentary Library, Canberra, 2002, viewed 11 January 2011, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id_per_cent3A_per_cent22legislation_per_cent2Fbillsdgs_per_cent2FM4366_per_cent22
6. With the enactment of the *Tax Laws Amendment (2007 Measures No. 5) Act 2007*. See L Nielson, *Tax Laws Amendment (2007 Measures No. 5 Bill) 2007*, Bills Digest, no. 42, 2007-2008, Parliamentary Library, Canberra, 2007, pp. 55-65, viewed 11 January 2011, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id_per_cent3A_per_cent22legislation_per_cent2Fbillsdgs_per_cent2FED806_per_cent22

Item 11 replaces existing section 376-230 with a new version which does not contain references to the repealed \$50 million production expenditure threshold. The section requires that qualifying expenditure must be incurred before a company applies for an offset certificate.

Item 12 contains applies the amendments to productions commencing after 1 July 2010.

Schedule 2—Capital protected borrowings

Background

Capital protected borrowings

Capital protected borrowings (CPBs) are financial products used for investing in shares.⁷ A CPB usually consists of a limited recourse loan and a put option⁸. Under the terms of a limited recourse loan, a lender cannot recover more than the value of the shares if the borrower defaults on the loan. If the value of the shares has increased over the term of the loan and exceeds the loan amount, the borrower pays back the loan amount in cash. Under the 'put option facility' if the value of shares has decreased and is less than the loan amount, the borrower transfers the securities back to the lender in full satisfaction of the loan. The borrower's capital (the amount invested in the product) is therefore protected against a fall in the value of the securities.⁹

Deductibility of interest on capital protected borrowings

In general, under section 8-1 of the ITAA 1997, an outgoing or loss incurred in producing assessable income is deductible against income, whereas a capital outgoing or loss is not. For example, interest on a loan used to buy shares is deductible where income is expected to be derived from the shares. Where the loan is used for the purpose of deriving a capital profit upon sale of the shares, the interest is not deductible against income.

In offering a put option the lender assumes a degree of risk due to exposure to a potential fall in value of the securities. The price of this risk is included in the interest rate on the loan. This portion of the interest is not deductible under section 8-1 of the ITAA 1997 as it is incurred in protecting the borrower's capital.

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7. CPBs are also used to invest other forms of securities. For ease of discussion this digest uses the term 'shares' in reference to securities which might be invested in via a CPB product.
 8. A put option is a contract under which the buyer of the option (in this case, the borrower) has a right to sell an underlying instrument (the shares) to the seller of the option (the lender) at a specified price at a specified time.
 9. For further information about capital protected borrowings, see the Australian Taxation Office website: <http://www.ato.gov.au/individuals/content.asp?doc=/content/44515.htm>

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CPB products do not normally attribute a proportion of the interest to capital protection. Division 247 of the ITAA 1997 contains the rules for determining this proportion. Division 247 operates by applying a benchmark rate to determine how much of the interest on CPBs is attributable to capital protection and therefore not deductible.

The current law

Division 247 was enacted in 2007 to overcome the effect of a decision of the Federal Court in *Commissioner of Taxation v Firth* (2002) 120 FCR 450 (Firth's case).¹⁰ In Firth's case, the Court ruled that interest on a capital protected loan was fully deductible against income. Prior to the decision in Firth's case, the Australian Taxation Office treated interest payable on capital protected loans as deductible only up to the amount of a benchmark rate, with any amount in excess of the benchmark rate being attributed to capital protection.

The current law contains two methodologies determining the amount of interest on a CPB which is deductible. The existence of two methodologies is due to the fact that whilst interim measures for taxation of capital protected borrowings were announced on 16 April 2003¹¹ (with details released on 30 May 2003)¹², Division 247 was not enacted until 2007.

For CPBs entered into (or extended) between 16 April 2003 and 1 July 2007, an interim methodology contained in Division 247 of the Transitional Provisions Act applies. Under the interim methodology, the interest attributable to the cost of capital protection is the higher of the amount calculated using two methods: the 'indicator method' and the 'percentage method': the indicator method applies the RBA's Indicator Lending Rate for Personal Unsecured Loans, Variable Rate¹³, and the percentage method applies a certain percentage which varies according to the term of the loan.

For CPBs entered into on or after 1 July 2007 an 'ongoing methodology' applies.¹⁴ Under the ongoing methodology the interest attributable to the cost of capital protection is worked out by

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10. Division 247 was enacted by the *Tax Laws Amendment (2006 Measures No. 7) Act 2006*. For background to this Act and a discussion of Firth's case, see: T John, *Tax Laws Amendment (2006 Measures No. 7) Bill 2006*, Bills Digest, no. 79, 2006-2007, Parliamentary Library, Canberra, 2007, viewed 6 January 2011, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id per cent3A per cent22legislation per cent2Fbillsdgs per cent2F2I5M6 per cent22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%20per%20cent3A%20per%20cent22legislation%20per%20cent2Fbillsdgs%20per%20cent2F2I5M6%20per%20cent22)
 11. P Costello, (then Treasurer), *Taxation of capital protected borrowings*, media release, no. 019, 16 April 2003, viewed 28 January 2011, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id per cent3A per cent22media per cent2Fpressrel per cent2F471828 per cent22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%20per%20cent3A%20per%20cent22media%20per%20cent2Fpressrel%20per%20cent2F471828%20per%20cent22)
 12. H Coonan (then Minister for Revenue and Assistant Treasurer), *Taxation of capital protected products*, media release, no. CO46/03, 30 May 2003, viewed 28 January 2011, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id per cent3A per cent22media per cent2Fpressrel per cent2FH3I96 per cent22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%20per%20cent3A%20per%20cent22media%20per%20cent2Fpressrel%20per%20cent2FH3I96%20per%20cent22)
 13. Reserve Bank of Australia, *statistical table of indicator lending rates – F5*, Reserve Bank of Australia website, viewed 2 February 2011, <http://www.rba.gov.au/statistics/tables/index.html>. The indicator rate for personal unsecured loans is currently 15.25 per cent. The indicator rate for standard variable housing loans is currently 7.8 per cent.
 14. The term 'ongoing methodology' is drawn from the Explanatory Memorandum and is not used in the legislation.

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applying the Indicator Lending Rate for Personal Unsecured Loans, Variable Rate as the benchmark rate, interest in excess of which is attributed to capital protection and is not deductible.

For arrangements entered into before 16 April 2003, all interest paid on capital protected products is deductible as per the decision in Firth's case.¹⁵

The proposed changes

On 14 May 2008 (the 2008 Budget night) the Treasurer, Wayne Swan, announced that the benchmark rate for CPBs would be the Indicator Rate for Standard Variable Housing Loans, replacing the previous benchmark rate, the Indicator Lending Rate for Personal Unsecured Loans, Variable Rate. He also announced the Indicator Lending Rate for Personal Unsecured Loans, Variable Rate would continue to apply to existing products for a period of five years, or the life of the product, for CPBs entered into before the 2008 Budget night.¹⁶ The announced changes were not legislated.

The Assistant Treasurer, Senator Nick Sherry, effectively re-announced the 2008 Budget night announcement on 11 May 2010¹⁷, but with some minor alterations. The proposed new benchmark rate, to apply retrospectively to capital protected borrowings entered into from 2008 Budget time, will be the SVHL rate plus a further 100 basis points (or one per cent).¹⁸ The transitional measure announced by the Treasurer on 2008 Budget night will be extended until 30 June 2013 to align the transitional measure with the end of the 2012-13 financial year.

The justification for the change is that the adjusted benchmark interest rate better reflects the additional credit risk borne by lenders for the cost of capital protection and that lifting the benchmark interest rate by 100 basis points will allow borrowers to allocate a smaller proportion of the expenses on the borrowing on costs for capital protection, which is not deductible if on a capital account.¹⁹ As the Indicator Rate for Standard Variable Housing Loans rate is approximately half the Indicator Lending Rate for Personal Unsecured Loans, Variable rate²⁰, the deduction available to borrowers, despite the addition of 100 basis points to the proposed new benchmark rate, is significantly reduced.

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15. Australian Taxation Office, *ATO Interpretive Decision 2003/674*, 1 August 2003, Australian Taxation Office website, viewed 2 February 2011, http://law.ato.gov.au/atolaw/print.htm?DocID=AID_per_cent2FAID2003674_per_cent2F00001&PiT=99991231235958&Life=10010101000001-99991231235959
 16. W Swan (Treasurer), *Capital protected borrowings*, media release, no. 051, 13 May 2008, viewed 6 January 2011, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id_per_cent3A_per_cent22media_per_cent2Fpressrel_per_cent2F7LGQ6_per_cent22.
 17. N Sherry (Assistant Treasurer), *Change to benchmark interest rate for capital protected borrowings*, media release, no. 091, 11 May 2010, viewed 6 January 2011, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id_per_cent3A_per_cent22media_per_cent2Fpressrel_per_cent2F3IOW6_per_cent22
 18. 7.30pm (AEST) 13 May 2008.
 19. N Sherry (Assistant Treasurer), *Change to benchmark interest rate for capital protected borrowings*, op. cit.
 20. Reserve Bank of Australia, *statistical table of indicator lending rates – F5*, op. cit.

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The Treasury consulted on an exposure draft of the Bill during May and June 2010, receiving two submissions.²¹ No substantial changes were made in response to submissions.

The retrospective application of the change to the benchmark rate and the uncertainty caused by the delay in enacting the announced change were noted by the Senate Standing Committee for the Scrutiny of Bills:

These amendments were announced in July 2010, but will take effect from 13 May 2008. The Committee notes that although the more recent modification to the original changes are beneficial to taxpayers, the normal assumption is that citizens are not required to order their affairs in accordance with announcements made by the Executive which have not been enacted into law by the Parliament. As this example illustrates, one press release may be modified by a later press release, and where this happens over a long period of time the law is left in a state of uncertainty. The Committee is concerned about this approach, but in the circumstances **leaves to the Senate as a whole** the question of whether this amounts to an undue trespass on individual rights and liberties.²²

Main provisions

Item 1 of Schedule 2 repeals existing paragraph 247-20(1)(a) and inserts **proposed paragraphs 247-20(1)(aa)** and **247-20(1)(a)**.

Existing subsection 247-20(1) divides capital protected borrowings into two categories: those entered into on or after 1 July 2007, and those entered into between 16 April 2003 and 1 July 2007.

The principal effect of the amendments in **item 1** is to subdivide the first category of borrowings, those entered into on or after 1 July 2007, into two categories:

- borrowings entered into between 1 July 2007 and the 2008 Budget time, and
- borrowings entered into entered after the 2008 Budget time

In calculating the deduction, a method statement applies to borrowings entered into after the 2008 Budget time under paragraph 247-20(3). An amount reasonably attributable to the cost of capital protection facility applies to borrowings entered into between 1 July 2007 and the 2008 Budget

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21. The Australian Financial Markets Association (AFMA) submitted, among other things, that the proposed benchmark rate was too low to adequately compensate lenders for the assumption of risk in respect of the loan. Australian Financial Markets Association, *Exposure Draft – Changes to the Taxation of Capital Protected Borrowings*, submission to Treasury, 14 June 2010, viewed 2 February 2011, http://www.treasury.gov.au/documents/1906/PDF/Australian_Financial_Markets_Association.pdf. Technical suggestions from AFMA did not lead to any major change to the exposure draft legislation. A second submission endorsed the AFMA submission. See: Treasury, *Summary of consultation process*, 2010, Treasury website, viewed 2 February 2011, http://www.treasury.gov.au/documents/1906/PDF/Consult_summary_capital_protected_borrowings.pdf
22. Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 1 of 2011*, 9 February 2011, p. 35, viewed 17 February 2011, <http://www.aph.gov.au/Senate/committee/scrutiny/alerts/2011/d01.pdf>

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time, and continues to apply to borrowings entered into between 16 April 2003 and 1 July 2007. The method for calculating a reasonable attributable amount resides within Division 247 of the Transitional Provisions Act.²³

Item 7 repeals existing subsections 247-20(4) and (5), and replaces them with **proposed subsections 247-20(4), (5) and (5A)**. Under existing subsections 247-20(4) and (5), the benchmark rate is the Indicator Lending Rate for Personal Unsecured Loans, Variable rate (where the capital protected borrowing is at a fixed rate), or an average of Indicator Lending Rates for Personal Unsecured Loans Variable rate (where the capital protected borrowing is at a variable rate.) The effect of the amendments is to replace the Indicator Lending Rate for Personal Unsecured Loans, Variable rate (the existing benchmark rate) with the Indicator Rate for Standard Variable Housing Loans plus 100 basis points (the **proposed adjusted loan rate**).

Items 9-12 divide Division 247 of the Transitional Provisions Act, which sets out the interim apportionment methodology that applies to capital protected borrowings entered into between 16 April 2003 and before 1 July 2007, into two subdivisions. Existing Division 247 is retained as **proposed Division 247A**. **Item 12** inserts **proposed subdivision 247-B** which contains transitional provisions applying the Indicator Lending Rate for Personal Unsecured Loans, Variable rate to capital protected borrowings entered into after 1 July 2007 but before 2008 Budget time (**proposed section 247-75**), transitional provisions applying the proposed **adjusted loan rate** for protected borrowings which are entered into before the 2008 budget time and still exist at 1 July 2013 (**proposed section 247-80**), and specific provisions for CPBs entered into before the 2008 Budget time and varied prior to 1 July 2013 (**proposed section 247-85**).

Schedule 3—Extending CGT exemption for certain compulsory acquisitions

Background

Under subdivision 118-B of the ITAA 1997, an exemption to the capital gains tax (CGT) rules applies where the asset disposed of is the taxpayer's main residence (the main residence exemption). The main residence exemption operates to allow a taxpayer to ignore a capital gain or loss from disposal of a dwelling and up to two hectares of adjacent land.

Currently, the main residence exemption does not apply where adjacent land and structures are disposed of but the main dwelling is not. For example, where a taxpayer subdivides a property and sells the vacant portion. Similarly, a taxpayer currently cannot claim the main residence exemption where adjacent land and structures are compulsorily acquired unless the dwelling is also compulsorily acquired.

23. See particularly section 247-5 in the Transitional Provisions Act.

Schedule 3 extends the main residence exemption to cover situations where land and structures adjacent to a main residence dwelling are compulsorily acquired but where the dwelling itself is not. The extension ensures that taxpayers are not worse off than they would be had the dwelling also been compulsorily acquired.

Chris Bowen, then Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, announced the extension on 19 March 2009.²⁴ The Assistant Treasurer, Senator Nick Sherry, announced a Treasury consultation on exposure draft legislation on 15 June 2010.²⁵ The consultation received two confidential submissions. The Schedule as presented to Parliament on 25 November 2010 contains some minor changes but is not substantially different from the exposure draft.

Main provisions

Item 4 replaces existing section 118-120 of the ITAA 1997 with a revised section. The existing section 118-120 operates to extend the main residence exemption in section 118-110 to adjacent land used primarily for private or domestic purposes in association with the dwelling, and in the case of flats or home units, adjacent structures such as garages and storerooms.

Proposed section 118-120 introduces new definitions of 'adjacent land' and 'adjacent structure' and 'maximum exempt area' in order to accommodate the amendments contained in **item 6** (discussed below).

The term 'adjacent land' is defined in **proposed subsections 118-120(2)** and **(3)** as land adjacent to a dwelling which is used primarily for private or domestic purposes in association with the dwelling, to a maximum area of two hectares, less the area of land immediately underneath the dwelling.

'Adjacent structure' is defined in **proposed subsection 118-120(6)** a garage, storeroom or other structure associated with a flat or home unit which is used primarily for private or domestic purposes in association with the flat or home unit.

The main difference between existing subsection 118-120 and **proposed section 118-120** is the introduction of a new provision contained in **proposed subsection 118-120(4)**. Where an earlier

24. C Bowen (then Assistant Treasurer and Minister for Competition Policy and Consumer Affairs), *Capital gains tax relief for compulsory acquisitions of part of a main residence*, media release, no. 019, 19 March 2009, viewed 1 February 2011, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id_per_cent3A_per_cent22media_per_cent2Fpressrel_per_cent2FBN2T6_per_cent22

25. N Sherry (Assistant Treasurer), *Draft legislation to provide home owners capital gains tax relief for partial compulsory acquisitions*, media release, no. 127, 16 June 2010, viewed 1 February 2011, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id_per_cent3A_per_cent22media_per_cent2Fpressrel_per_cent2F5U0X6_per_cent22

compulsory acquisition²⁶ has occurred and for which an exemption has been claimed, **proposed subsection 118-120(4)** operates to reduce the area to which the exemption applies, by applying the new definition of ‘maximum exempt area’. The maximum exempt area is calculated using a method contained in **proposed section 118-255**. Under this method, the maximum exempt area is two hectares (the maximum amount of adjacent land claimable under the main residence exemption) less any amount of adjacent land which has been exempted as a result of an earlier compulsory acquisition (under **proposed section 118-245**, discussed below) and which resulted in the taxpayer losing rights to the substantial use and enjoyment of that land either completely or for at least ten years.

Proposed subsection 118-120(4) applies only where a taxpayer has chosen to apply **proposed subsection 118-245(2)** in order to disregard a capital gain or loss resulting from an earlier compulsory acquisition. The maximum exempt area provisions are intended to ensure that earlier compulsory acquisitions are taken into account when applying the exemption to later compulsory acquisitions, and to ensure that a taxpayer is not disadvantaged where an earlier compulsory acquisition has occurred but which has not resulted in losing rights to the substantial use and enjoyment of the land covered by the CGT event.²⁷

Item 6 contains the key operating provisions of Schedule 3 to the Bill. **Proposed section 118-245** operates so that a taxpayer can ignore a capital gain or capital loss from a CGT event (that is, a compulsory acquisition) where all of the following conditions are satisfied:

- the taxpayer is an individual
- the exempt land is adjacent to a dwelling
- the CGT event does not happen to a dwelling or ownership interest in it
- the dwelling is either the taxpayer’s main residence, or an inheritance (as owner or trustee) from a deceased estate
- **proposed section 118-250** applies (see discussion below), and
- the sum of the area of the adjacent land, the land under the dwelling and any area of land subject to an earlier CGT event (see discussion of **item 7**) is 2 hectares or less.

Proposed section 118-250 defines the events which are considered to be compulsory acquisitions of adjacent land for the purpose of the proposed exemption. In each case the CGT event must be the result of action by an Australian government agency or other entity under a power conferred by Australian law. The events which qualify are:

- compulsory acquisition (**proposed paragraph 118-250(1)(a)**), or a disposal to an entity by negotiation where, had negotiation failed, a compulsory acquisition would have occurred (**proposed paragraph 118-250(1)(b)**)

26. This digest uses the term ‘compulsory acquisition’ in reference to all of the events covered by the proposed extension (as listed in **proposed section 118-250**).

27. Explanatory Memorandum, paragraph 3.33.

- compulsory cancellation or varying of an ownership interest in the exempt land (**proposed paragraph 118-250(2)(a)**), or surrender or varying by negotiation of an ownership interest where, had negotiation failed, a compulsory cancellation or variation would have occurred (**proposed paragraph 118-250(2)(b)**)
- compulsory conferral of an interest or right (**proposed paragraph 118-250(3)(a)**) or conferral by negotiation of an interest or right where, had negotiation failed, a compulsory conferral would have occurred (**proposed paragraph 118-250(3)(b)**), and/or
- conferral by an Australian government agency of an ownership interest for a limited but renewable period, where non-renewal triggers a CGT event (**proposed paragraph 118-250(4)(b)**).

Proposed section 118-260 provides a partial exemption by increasing the capital gain or loss from a CGT event where a dwelling was not a main residence for the relevant period (**proposed paragraph 118-260(1)(a)**) and/or where the extent to which the dwelling was used for producing assessable income during the relevant period (**proposed paragraph 118-260(1)(b)**). The effect of this section is to reduce the amount of the capital gain which can be exempted under the new rules in these circumstances.

Proposed section 118-265 applies the new rules to structures that are adjacent to flats or home units in the same way that the new rules apply to land that is adjacent to a dwelling.

Item 10 applies the amendments to CGT events happening on or after the day of Royal Assent. A taxpayer may choose the new rules to apply to CGT events occurring at the start of 2004-05 income year.

Schedule 4—Deductions in relation to benefits for terminal medical conditions

Background

Schedule 1 to the Superannuation Industry (Supervision) Regulations 1994 (the SIS Regulations) contains a list of conditions of release specifying the circumstances under which the full amount of a superannuation fund can be distributed. Retirement, death and permanent incapacity were the three conditions until 16 February 2008, when the Regulations were amended to include a terminal medical condition (TMC) as a condition of release.²⁸

Where a complying superannuation fund or retirement savings account (RSA) provider has taken out insurance against liabilities associated with providing benefits, section 295-460 of the ITAA 1997 allows the provider to claim deductions for a proportion of premiums related to insurance against

28. See the Superannuation Industry (Supervision) Amendment Regulations 2008 (No. 1).

retirement, death and permanent incapacity fund distributions. Section 295-470 allows a similar deduction for any future liability to pay benefits.²⁹

Schedule 4 to the Bill brings the ITAA 1997 in line with the SIS Regulations by extending the deduction provisions to cover insurance premiums and liabilities relating to fund distributions for TMCs.

The amendments were announced in the 2010-11 Budget.³⁰

Main provisions

Item 1 inserts **proposed paragraph 295-460(aa)** into the ITAA 1997, thereby adding TMC to the list of categories of benefit for which a deduction for insurance premiums and future liabilities is available.

Item 6 applies the amendments retrospectively to 16 February 2008 to match the date when the amendments to the SIS Regulations mentioned above took effect.

Schedule 5—Non-profit sub-entities

Background

On 11 June 2008, the then Assistant Treasurer announced that he had asked the Board of Taxation to review the administration of the GST.³¹ On 12 May 2009, the Assistant Treasurer released the report of the review³² and the Government's response.³³ The Rudd Government accepted the Board's recommendation that the GST be amended to ensure that non-profit sub-entities are able to

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29. Under section 295-475 of the ITAA 1997, RSA providers may claim a deduction for insurance premiums but not for future liabilities.
 30. Australian Government, *Budget measures: budget paper no. 2: 2010-11*, Commonwealth of Australia, Canberra, 2010, p. 48, viewed 2 February 2011, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id per cent3A per cent22library per cent2Fbudget per cent2F2010 17 per cent22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%20per%20cent3A%20per%20cent22library%20per%20cent2Fbudget%20per%20cent2F2010%2017%20per%20cent22).
 31. C Bowen (Assistant Treasurer and Minister for Competition Policy and Consumer Affairs) *Government acts to reduce GST compliance costs for business*, media release, no. 048, 12 May 2009, viewed 16 February 2011, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id per cent3A per cent22media per cent2Fpressrel per cent2FP8PQ6 per cent22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%20per%20cent3A%20per%20cent22media%20per%20cent2Fpressrel%20per%20cent2FP8PQ6%20per%20cent22).
 32. Board of Taxation, *Review of the legal framework for the administration of the goods and services tax*, December 2008, viewed 24 January 2011, http://www.taxboard.gov.au/content/reviews_and_consultations/legal_framework_for_administration_of_gst/report/downloads/legal_framework_for_administration_of_gst_report.pdf
 33. C Bowen (Assistant Treasurer and Minister for Competition Policy and Consumer Affairs), *Government response to board of taxation review of GST administration*, media release, No. 042, 12 May 2009, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id per cent3A per cent22media per cent2Fpressrel per cent2F5QJT6 per cent22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%20per%20cent3A%20per%20cent22media%20per%20cent2Fpressrel%20per%20cent2F5QJT6%20per%20cent22);

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access the same GST concessions as their parent entities.³⁴ The amendments contained in Schedule 5 address uncertainty created by inconsistent treatment of non-profit sub-entities under the *Taxation Administration Act 1953* (the TAA 1953) and the ITAA 1997³⁵ and confirm current tax office practice which is to allow non-profit sub-entities access to the same concessions as their parent entities.³⁶

Treasury consulted on an exposure draft Bill and explanatory memorandum, and did not make any changes to the draft provisions in response to submissions.³⁷

Main provisions

Item 1 inserts **proposed subsection 63-25(1)** into the GST Act to allow a non-profit sub-entity to access the non-profit body registration turnover threshold under subsection 23-15(2) of the ACT (\$150 000 as against \$75 000 for other entities) regardless of whether the parent entity is a non-profit body.

Item 3 inserts **proposed section 63-27** into the GST ACT to deem a non-profit sub-entity to be of the same type as the parent entity and lists the variety of non-profit corporate forms to which the provision applies. The non-profit sub-entity can then access the concessions listed in **proposed subsection 63-27(2)** for which its parent entity qualifies.

The tax concessions available to eligible entities under **proposed section 63-27(2)** include preferential tax treatment of gifts, exemptions for certain types of non-commercial activities, and use of cash (as opposed to accrual) accounting.

Item 4 applies the amendments in **Schedule 5** to tax periods commencing on or after the item commences.

Schedule 6—Running balance accounts

Background

Recommendation 39 of the Board of Taxation's 2008 review of the administration of the GST³⁸ was to amend the GST law so that a credit is only offset against a business activity statement (BAS)³⁹

34. Board of Taxation, *Review of the legal framework for the administration of the goods and services tax*, op. cit., p. 161 (recommendation 43).

35. Explanatory Memorandum, paragraph 5.11.

36. Board of Taxation, *Review of the legal framework for the administration of the goods and services tax*, op. cit., paragraph 8.1.16.

37. Treasury, *Submissions: Exposure Draft - GST legislation - Running balance account and non-profit sub-entities*, Treasury website, 30 November 2010, viewed 1 February 2011, <http://www.treasury.gov.au/contentitem.asp?ContentID=1911&NavID=037>

amount when the amount becomes due and payable. The Board of Taxation's view was that the current requirement to offset a credit against a BAS amount when an amount is due but not yet payable is an 'administrative irritant for taxpayers.'⁴⁰ The then Assistant Treasurer announced on 12 May 2009 that the Rudd Government had accepted this recommendation.⁴¹

Under the TAA 1953 the Commissioner of Taxation may establish a running balance account (RBA) to manage and keep account of tax debts, tax credits and payments to the Commissioner. **Schedule 6** to the Bill amends the TAA 1953 so that the Commissioner will not be required to apply a payment, credit or RBA surplus against a tax debt that is a BAS amount unless that amount is due and payable.

Under existing section 8AAZL of the TAA 1953, the Commissioner has a discretion as to whether payments, credits and RBA surpluses are to be applied against tax debts. Existing subparagraph 8AAZL(3)(a)(i) specifically excludes tax debts that are BAS amounts, with the effect that the offsetting of payments, credits or RBA surpluses against BAS debts due but not yet payable is mandatory. This has potential to give rise to compliance costs for taxpayers, for example where a taxpayer makes a payment against a BAS amount tax debt whilst being unaware that the taxpayer's income tax refund has been applied against the debt. The current provisions also create complications for GST joint venturers, given that a GST joint venture operator may have credits relating to the GST joint venture offset against tax debts relating to the joint venturer's own operations.⁴²

Treasury consulted on an exposure draft Bill but did not make any changes to the draft provisions in response to submissions it received.⁴³

Main provisions

Schedule 6 contains one item. **Item 1** repeals existing paragraph 8AAZL(3)(a) and substitutes a new paragraph in its place. The effect of the amendment is to remove the specific exclusion of BAS

38. Board of Taxation, *Review of the legal framework for the administration of the goods and services tax*, op. cit., p. 203.

39. The BAS is a report submitted periodically by a taxpaying entity to the Australian Taxation Office in order to report on tax obligations. BAS reporting covers GST, fringe benefits tax, income tax withholding amounts and instalments, luxury car tax, wine equalisation tax and fuel credits. Obligations to report are contained in the legislation specific to each tax measure.

40. Board of Taxation, *Review of the legal framework for the administration of the goods and services tax, report to the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs*, op. cit, p. 153 (finding 7.6.16).

41. C Bowen (then Assistant Treasurer), *Government response to board of taxation review of GST administration*, media release, no. 042, 12 May 2009, viewed 2 February 2011, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=customrank;page=0;query=bowen per cent20 per cent22running per cent20balance per cent20account per cent22;rec=5;resCount=Default](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=customrank;page=0;query=bowen%20per%20per%22running%20balance%20account%22;rec=5;resCount=Default)

42. Explanatory Memorandum, paragraphs 6.4 and 6.5.

43. Treasury, *Submissions: Exposure Draft - GST legislation - Running balance account and non-profit sub-entities*, Treasury website, 30 November 2010, viewed 2 February 2011, <http://www.treasury.gov.au/contentitem.asp?ContentID=1911&NavID=037>

amounts from the Commissioner's discretionary power regarding the application of payments, credits and RBA surpluses against tax debts.

Schedule 6 contains no application provision, although according to the table in clause 2 to the Bill, **Schedule 6** commences on 1 July 2011.

Schedule 7—Education expenses tax offset (uniforms)

Background

The Rudd Government announced the Education Tax Refund on 18 October 2007 as part of its *Tax Plan for Australia's Future*.⁴⁴ On 13 July 2010 Prime Minister Gillard announced that the refund would be expanded to include the cost of school uniforms.⁴⁵

Under the Education Tax Refund eligible parents can currently claim a 50 per cent refund for up to \$780 of education expenses for primary school children (a refund of up to \$390) and up to \$1558 for secondary school children (a refund of up to \$779).⁴⁶ Subsection 61-640(4) of the ITAA 1997 contains a table listing claimable items, which includes computers, home internet, textbooks and trade tools for secondary school trade courses.⁴⁷ Under section 61-620 of that Act, only persons eligible for Family Tax Benefit (Part A)⁴⁸ are eligible for the Education Tax Refund.

Main provisions

Item 1 of the **Schedule 7** adds a **new table item 7** at the end of the table in subsection 61-640(4), to allow a deduction for the cost of clothing and footwear that is required or approved by a school as its school uniform.

Item 2 applies the amendment to expenses incurred on or after 1 July 2011.

44. K Rudd, S Smith, W Swan, *A tax plan for Australia's Future – Labor's \$2.3 billion education tax refund*, media statement, 18 October 2007, viewed 25 January 2011, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id per cent3A per cent22media per cent2Fpressrel per cent2FGLFQ6 per cent22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%20per%20cent3A%20per%20cent22media%20per%20cent2Fpressrel%20per%20cent2FGLFQ6%20per%20cent22).

45. J Gillard (Prime Minister), *Gillard Government to ease schools costs with new tax refund for school uniforms*, joint press release, 13 July 2010, viewed 25 January 2011, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id per cent3A per cent22media per cent2Fpressrel per cent2F15DX6 per cent22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%20per%20cent3A%20per%20cent22media%20per%20cent2Fpressrel%20per%20cent2F15DX6%20per%20cent22).

46. The amount claimable is indexed under subdivision 960-M of the ITAA 1997.

47. For more detailed information about the operation of the Education Tax Refund, see: <http://www.ato.gov.au/individuals/content.asp?doc=/content/00166469.htm>

48. The Family Tax Benefit provisions are contained in the *A New Tax System (Family Assistance) Act 1999* and the *A New Tax System (Family Assistance) (Administration) Act 1999*.

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