client alert | explanatory memorandum

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Tax Laws Amendment (2009 Measures No 2) Bill 2009

On 19 March 2009, the Federal Government introduced Tax Laws Amendment (2009 Measures No 2) Bill 2009 into the House of Representatives. Broadly, the Bill seeks to:

- ensure that there are no adverse taxation implications arising from a payment made by the Australian Prudential Regulation Authority (APRA), or by a liquidator, under the financial claims scheme;
- increase the access to the small business CGT concessions for taxpayers owning a CGT asset used in a business by an affiliate or entity connected with a taxpayer, and for partners owning a CGT asset used in the partnership business;
- exempt from CGT those capital gains arising from a right or entitlement to a tax offset, deduction or similar benefit;
- provide a refundable tax offset in relation to certain projects approved under the National Urban Water and Desalination Plan;
- update the list of deductible gift recipients and to extend the time period of three organisations as deductible gift recipients;
- allow the Registrar of the Australian Business Register to act as the Multi-agency Registration Authority;
- remove the restriction that businesses may not claim more than $3 million of fuel tax credits in an income year unless they are a member of the Greenhouse Challenge Plus Programme; and
- exempt from income tax the Clean-up and Restoration Grants paid to small businesses and primary producers affected by the Victorian bushfires.

A discussion of the amendments follows.

Taxation implications and financial claims scheme entitlement

The Bill will amend various Acts to ensure there are no adverse tax implications arising from a payment made by APRA, or by a liquidator under the financial claims scheme (FCS). This will be achieved, in general, by treating payments made under the FCS in the same way as if they had been made by the failed financial institution or insurer to which the FCS applies. The amendments are proposed to:

- the CGT provisions;
- farm management deposits (FMDs);
- retirement savings accounts (RSAs);
- first home saver accounts (FHSAs);
- reporting obligations; and
- PAYG withholding obligations.

CGT amendments

The Bill will amend the CGT provisions to disregard a capital gain or loss arising from an entitlement under the FCS in relation to an authorised deposit-taking institution (ADI) deposit or a general insurance policy.

Generally, there are two rights arising from the FCS in relation to ADI deposits to which the CGT rules can apply:

- the right of the depositor to receive a payment from the FCS administrator; and
- the right of the depositor to the portion of the funds in an ADI deposit that is transferred to the FCS administrator following payment by the administrator to the depositor.

Where the FCS covers only part of an ADI deposit, a payment made under the scheme will result in a partial disposal of the ADI deposit.

The Bill specifies that the cost base of the part of a deposit which is covered by the scheme is equal to the payment under the scheme. The cost base of the remainder of a deposit following a payment from the scheme is equal to the cost base of the deposit reduced by the amount that has been paid under the scheme.

The amendments to disregard capital gains or capital losses in respect of ADI deposits or general insurance policies apply to CGT events after the commencement of the scheme on 17 October 2008. This seeks to ensure that the CGT rules can apply immediately if the scheme is activated.

Farm management deposits

The Bill proposes to amend Sch 2G of ITAA 1936 to ensure there are no adverse tax implications for holders of FMDs arising from the scheme where FMDs are held with failed ADIs. The measure also covers the actions of both APRA and the liquidators of failed ADIs.

The Bill will also provide that the establishment of a new FMD by APRA will not result in a withdrawal of the original FMD and the making of a new FMD for tax purposes. The establishment of a new FMD will instead be treated as a transfer of the old FMD. Similarly, the establishment of a new FMD by a liquidator will be treated as a transfer of the old FMD for tax purposes.

Retirement saving accounts

A payment by APRA of an individual's RSA scheme entitlement in a failed ADI will be treated as a rollover superannuation benefit from the failed ADI.

First home saver accounts

The Bill will make consequential amendments to the eligibility and administration of FHSAs under the *First Home Saver Accounts Act 2008*. If an ADI fails, APRA or the liquidator will be empowered to open an FHSA in another ADI and transfer the funds guaranteed by the scheme into the new FHSA for the affected person.

Reporting obligations

The Bill will require APRA to report, in an annual statement to account-holders and recipients, all amounts paid to, or applied to the benefit of, account-holders and recipients under the scheme in a financial year. APRA is also required to report these details to the Commissioner in an annual report within four months after the end of the financial year in which the payments are made.

In this respect, APRA will be required to provide TFN information to the Commissioner that would have otherwise been provided by the investment body under reg 56 of the *Income Tax Regulations 1936*.

PAYG withholding

The Bill will insert a new Div 21 in Sch 1 to the *Taxation Administration Act 1953* to ensure that the PAYG withholding provisions apply to payments under the FCS in a manner corresponding to the way they would apply if the payment had been made by an ADI or general insurance company. Consequently, APRA as the administrator of the FCS is required to withhold amounts from payments made under the scheme and then report and remit these amounts to the Commissioner.

Date of effect

The amendments will commence on the date the Bill receives Royal Assent. However, the amendments apply to all payments made, and other actions carried out, under the scheme, whether before or after the amendments commence.

Small business CGT concessions

The Bill will increase access to the small business CGT concessions for a taxpayer owning a CGT asset used in a business by the taxpayer's affiliate or entity connected with the taxpayer via the $2 million aggregated turnover test (the small business entity test). It will also allow for partners owning a CGT asset used in the partnership business to access the concessions via the small business entity test where the CGT asset is not an 'asset of the partnership'. Further, it will make a number of minor amendments to clarify and refine elements of the small business CGT concessions.

Main amendments

Broadly, the main amendments will increase access to the small business CGT concessions for taxpayers (including partners in a partnership) that hold passive CGT assets.

Partnerships and passively held CGT assets

Basic requirements

Currently, a strict interpretation of s 152-10(c)(iii) of ITAA 1997 means that partners in a partnership seeking to access the small business CGT concessions via the small business entity test may be ineligible. This is because the subsection requires the CGT asset to be 'an asset of the partnership'. Therefore, the Bill will clarify the law and align it with the intended operation of the provision. This will be achieved by inserting the words 'interest in an' into the subsection as follows:

> (iii) you are a partner in a partnership that is a small business entity for the income year and the CGT asset is an **interest in an** asset of the partnership.

Indirect ownership in a CGT asset

The Bill will insert a new provision specifying rules to access the small business CGT concessions via the small business entity test for CGT assets, owned by partners, in which the partnership does not hold an interest, that are used in the business of the partnership, provided the assets are made available for use in the partnership. That is, the partners do not own the CGT assets in accordance with their fractional interest in the partnership or in accordance with their respective interests as specified in the partnership agreement.

A taxpayer who satisfies the following conditions contained in the new s 152-10(1B) will be able to access the concession:

- the taxpayer is a partner in a partnership for the income year in which the CGT event happens to the taxpayer's CGT asset;
- the partnership is a small business entity for the income year;
- the taxpayer does not carry on a business in the income year other than in the partnership;
- the CGT asset is not an interest in an asset of the partnership; and
- the business that the taxpayer carries on as a partner in the partnership is the business that the taxpayer, at any time in the income year, carries on (as referred to in s 152-40(1)(a)(i) or paragraph 152-40(1)(b)) in relation to the CGT asset.

Where an asset is an interest in an asset of a partnership, a taxpayer will not be able to utilise the above concession. Rather, its eligibility for the small business CGT concessions will be determined via the small business entity test contained in s 152-10(1)(c)(iii). It is important to note that, while the partnership will calculate its aggregated turnover under the requirements contained in Div 328 of ITAA 1997 for the purposes of determining whether it is a small business entity, the calculation method will be modified by the new s 152-48 of ITAA 1997 (see Aggregated turnover calculation and passively held CGT assets on page 5).

The Explanatory Memorandum accompanying the Bill provides the following example:

> Beau and Irene each own 50% of a supermarket building, which is used in the business of a partnership carried on by Beau, Jack, Casey and Irene. The partnership trades under the name 'Auzzie Supermarket'.
>
> Under the current law, Beau and Irene would not be able to access the small business CGT concessions via the small business entity test for any capital gain made on the sale of the building as their respective CGT asset is not an interest in an asset of the partnership. For the CGT assets to be interests in an asset of the partnership, Beau, Jack, Casey and Irene would either have to each own 25% of the supermarket building or the partnership agreement would have to specify what interest each partner owned in the building.
>
> Under the amendments, Beau and Irene may be able to access the small business CGT concessions in relation to their respective shares of the building via the small business entity test depending on the aggregated turnover of the partnership calculated respectively for Beau and Irene. The aggregated turnover of Auzzie Supermarket must be calculated separately for Beau and Irene taking into account any entities that are affiliates of, or connected with, each of them respectively.

Passively held CGT assets (other than partnerships)

Currently, if a taxpayer owns a CGT asset and does not carry on a business, the taxpayer cannot access the small business CGT concessions via the small business entity test, even if the asset is used in the business of an affiliate or a connected entity that is a small business entity.

The Bill will insert new s 152-10(1A) into ITAA 1997 to ensure that, where a taxpayer who owns a CGT asset (and does not carry on a business other than as a partner in a partnership) that is used in a business by the taxpayer's affiliate or a connected entity, the taxpayer can access the small business CGT concessions provided the following conditions are satisfied:

- the taxpayer's affiliate or connected entity is a small business entity for the income year;
- the taxpayer does not carry on a business in the income year other than in a partnership;
- if the taxpayer carries on a business in a partnership, the CGT asset is not an interest in an asset of the partnership;
- the small business entity referred to is the entity that, at any time in the income year, carries on the business (as referred to in s 152-40(1)(a)(ii) or (iii) or s 152-40(1)(b)) in relation to the CGT asset.

If an asset-owning entity is seeking access to the small business CGT concessions via the proposed amendments, the rules contained in s 328-115 of ITAA 1997 for determining the aggregated turnover of the relevant business are modified by the new special rules for calculating aggregated turnover for passively held assets (see Aggregated turnover calculation and passively held CGT assets on page 5).

The proposed amendment is only available if a taxpayer who owns the CGT asset, which is used in the business of its affiliate or an entity connected with the taxpayer, is not carrying on a business except as a partner in a partnership. Where the taxpayer is also carrying on a business other than in a partnership, the taxpayer would continue to determine its eligibility for the small business CGT concessions via the small business entity test under s 152-10(1)(c)(i) of ITAA 1997.

The Explanatory Memorandum accompanying the Bill provides the following example:

> Peter owns land that he leases to a company he wholly owns, Foxxy Farm Pty Ltd, which uses the land in its farming business. Peter does not carry on a business.
>
> Under the current law, Peter is not able to access the small business CGT concessions via the small business entity test because he does not carry on a business.
>
> Under the amendments, Peter would be able to access the small business CGT concessions via the small business entity test depending on the aggregated turnover of Foxxy Farm Pty Ltd. This follows because Foxxy Farm Pty Ltd, which is connected with Peter, uses Peter's land in carrying on its business.

Affiliates and passively held CGT assets

Currently, s 152-40(1A) of ITAA 1997 does not treat a CGT asset as active if an individual owns the asset and it is used in a business directly carried on by the individual's spouse or children (under 18 years of age). That is, the individual would have to rely on an entity being an affiliate of the individual to treat the asset as being active, which may be difficult to establish.

The Bill proposes to repeal this subsection and replace it with a new s 152-47. The new section will treat an individual's spouse or children as an affiliate for the purposes of determining whether the individual (or an entity the individual has an interest in or is a beneficiary of) is eligible for the small business CGT concessions where one entity owns a CGT asset and:

- the asset is used, or held ready for use, in the course of carrying on a business by another entity; or
- the asset is inherently connected with a business carried on by another entity.

Other points to note about the operation of the new affiliate rule are:

- it only applies if the 'business' entity is not otherwise an affiliate of, or connected with, the taxpayer who owns the asset;
- it also applies where an entity that operates a business owns a CGT asset that it provides to another entity for use in that other entity's business; and
- while it increases access to the concessions under the $2 million turnover test, it also potentially reduces access to the concessions under the $6 million maximum net asset value test by bringing in more affiliates and entities that are connected with the asset-owning entity than under the old rule.

In addition, under the amendments an entity that operates a business and owns a CGT asset that is used in the business of another entity will also be able to access the small business concessions via the $2 million turnover test. This could occur where the asset-owning entity is wholly owned by an individual, the entity using the asset in its business is wholly owned by the individual's spouse and the asset-owning entity and business entity are not affiliated and are not connected with each other.

The Explanatory Memorandum accompanying the Bill explains that the new rule is applied in two stages. The first stage will treat an individual's spouse or child as his or her affiliate. If the conditions of the first stage are met, the second stage will apply to treat the spouse or child as an affiliate of the individual for the purposes of Subdiv 152-A of ITAA 1997 and ss 328-110 to 328-125 of ITAA 1997 (to the extent that these sections relate to Subdiv 152-A).

Aggregated turnover calculation and passively held CGT assets

The Bill proposes to insert rules for calculating aggregated turnover for passively held assets that apply in addition to the standard aggregated turnover rules in Subdiv 328-C of ITAA 1997. For these purposes, a special rule treats an entity (the deemed entity) that is an affiliate of, or is connected with, the owner of a passively held CGT asset as an affiliate of, or connected with, the entity that uses the passively held asset in its business (the test entity) if the deemed entity is not already an affiliate of, or connected with, the test entity.

Businesses that are winding up

The Bill will provide comparable access to the small business concessions for owners of passively held assets, the amendments insert a new rule that permits the CGT event to occur in an income year after the business has ceased operating but while it is being wound up. The new rule applies to an entity that previously carried on a business which is being wound up in the CGT event year but only if the asset had been used, held ready for use, or was inherently connected with the business in the income year it ceased to operate.

Date of effect

The main amendments will apply to CGT events happening in the 2007/08 income year and later income years.

Other amendments

Net asset test

Currently, s 152-20(2)(a) of ITAA 1997 disregards the value of interests in entities connected with a taxpayer or the taxpayer's affiliates to avoid double counting in the net assets calculation. However, this excludes the liabilities relating to such disregarded interests so that such liabilities are never taken into account in the net asset value calculation. Consequently, this disadvantages taxpayers because it excludes liabilities that are indirectly related to assets whose gross values have been included in the net asset calculation.

The Bill will provide that liabilities relating to disregarded interests in entities connected with a taxpayer or the taxpayer's affiliates are taken into accounting when calculating the net asset value.

The Explanatory Memorandum accompanying the Bill provides the following example:

> Suppose Danny owns all the shares in ATommi Pty Ltd. The net asset value of ATommi Pty Ltd is $1 million. Danny has net assets of $5.2 million (not counting the value of his shareholding in ATommi Pty Ltd).
>
> Under the current law, Danny works out his maximum net asset value to be $6.2 million, which includes ATommi's net asset value of $1 million but excludes the value of Danny's shares in ATommi Pty Ltd.
>
> Danny still owes $500,000 that he borrowed to acquire the shares in ATommi Pty Ltd.
>
> The current law would exclude from the calculation Danny's $500,000 liability incurred to acquire the shares in ATommi Pty Ltd, resulting in a net asset value of $6.2 million. However, this has excluded a liability that is related (indirectly) to assets whose market value has been included elsewhere in the net asset calculation.
>
> The amendment will allow Danny to include the $500,000 liability in the calculation, resulting in a maximum net asset value of $5.7 million.

The amendment will apply to CGT events that happen on or after the day on which the amending legislation receives Royal Assent.

Assets mainly used to derive rent

The Bill will amend the active asset test contained in s 152-40 of ITAA 1997 to ensure that all the uses of an asset (apart from personal use of the asset by a taxpayer or an affiliate of the taxpayer) are considered in determining whether it is an active asset for the purpose of the small business CGT concessions.

Under the current law, it is possible for an asset which has a predominant rental and a minor business use to qualify as an active asset if the minor business use is undertaken by an affiliate or an entity connected with the taxpayer, but the rental use is by an entity that is neither an affiliate of, nor connected with, the taxpayer owning the asset.

The amendments will adopt an attribution approach in relation to the use of an asset by a taxpayer's affiliate or an entity connected with the taxpayer, including any personal use. This approach treats the use of the asset by the affiliate or the entity connected with the taxpayer as though it was the use of the taxpayer. As a result, if the affiliate or entity connected with the taxpayer uses the asset to derive interest, rent, royalty or foreign exchange gains from an entity that is neither an affiliate of nor connected with the taxpayer, that use is treated as the taxpayer's use.

The amendments will apply to CGT events that happen on or after the day on which the Bill receives Royal Assent.

Joint tenants and testamentary trusts

The Bill will extend access to the small business CGT concessions under s 152-80 of ITAA 1997 to capital gains relating to assets acquired on the death of a joint tenant and to assets that devolve to the trustee of a trust that is established by the will of an individual where the deceased would have been able to access the concessions.

The amendments will ensure that the concessions are not denied simply because of the death of a joint tenant and the automatic transfer of the asset to the other tenant (rather than going through an estate) where the surviving tenant does not continue with the business. Similarly, the amendments will ensure that the concessions are not denied simply because, following the death of an individual, an asset devolves to the trustee of a testamentary trust established by the will of the deceased individual.

The amendments apply to CGT events that happen in the 2006/07 income year and later income years.

Retirement exemption

Capital proceeds received in instalments

The Bill will insert a rule to apply the retirement exemption available under the small business CGT concessions to capital proceeds received in instalments by individuals. The Bill will also remove the duplicate provision contained in s 152-310(3) of ITAA 1997 for receipt of capital proceeds in instalments by companies and trusts.

The amendment relating to capital proceeds received by individuals will apply from the 2007/08 income year and later income years. The amendment relating to capital proceeds received by companies and trusts will apply to payments made on or after the day on which the Bill receives Royal Assent.

CGT events J5 and J6

Currently, the retirement exemption is not available for CGT events J5 and J6 because capital gains arising from those events do not satisfy the basic conditions prescribed by ss 152-305(1)(a) and 152-305(2)(a) of ITAA 1997.

The Bill will insert a new provision to modify the operation of those sections to make satisfying the basic conditions for the retirement exemption unnecessary if a capital gain arises from CGT event J5 or J6.

The Explanatory Memorandum accompanying the Bill provides the following example:

> Bart sells his entire business with the intention of purchasing a new business. He claims the small business roll-over. At that time he is also eligible to claim the retirement exemption.
>
> Bart is unable to find a suitable replacement asset within two years and decides instead to retire from business. Under the current law, CGT event J5 is triggered. As Bart has not acquired a replacement asset or incurred the relevant improvement expenditure, he cannot satisfy the basic conditions for accessing the retirement exemption so the capital gain from CGT event J5 cannot be disregarded.
>
> The amendment will permit Bart to access the retirement exemption in these circumstances as he is no longer required to meet the basic conditions for accessing the retirement exemption in relation to his capital gain from the J5 event.

The amendment will apply to CGT events that happen in the 2006/07 income year and later income years.

Payments to CGT concession stakeholders through interposed entities

The Bill will allow a company or a trust to make a retirement exemption payment indirectly through one or more interposed entities to a CGT concession stakeholder. It will also provide that an indirect payment made through an interposed entity is:

- non-assessable non-exempt income of the interposed entity;
- not deductible from the interposed entity's assessable income; and
- neither a dividend nor a frankable distributable.

The Bill will ensure that retirement exemption payments made pursuant to s 152-325 of ITAA 1997 are excluded from the operation of Div 7A and s 109 of ITAA 1936. It will also remove the requirement that a payment made by a company or a trust to an employee for an amount exempted under the retirement exemption be treated as a payment made in respect of the termination of employment of the relevant CGT concession stakeholder.

The amendments will apply to payments made on or after the day on which the Bill receives Royal Assent.

Partners and small business entities

The Bill will amend the definition of a small business entity contained in s 328-110 of ITAA 1997 to provide that a partner in a partnership cannot be a small business entity in his or her capacity as a partner. It is important to note that this amendment applies to all the concessions available to a small business entity and not just for the small business CGT concessions.

The amendment will apply from the 2007/08 income year and later income years.

Tax benefits and CGT

The Bill proposes a general exemption from CGT for capital gains or losses arising from a right or entitlement to a tax offset, deduction or similar benefit. Examples of when this exemption will apply include:

- a capital gain or loss arising to a taxpayer who has a right to receive an urban water tax offset on the satisfaction of that right; and
- a capital gain arising to a taxpayer who has a right to receive a reduction in land tax available under an Australian law or under the law of a foreign country (or part of a foreign country).

The amendment will apply to relevant CGT events happening in the 2009/10 income year and later income years.

Urban water tax offset

The Bill will amend ITAA 1997 to provide a refundable tax offset in relation to certain projects approved under the National Urban Water and Desalination Plan. If an applicant is outside the tax system, the applicant will receive a grant.

Financial assistance is capped at 10% of eligible up-front capital costs up to a maximum of $100 million per project. In addition, projects must have eligible capital costs of at least $30 million. Special rules apply to stormwater harvesting projects such that the amount of the offset is up to 50% of eligible capital costs to a maximum of $20 million.

A company becomes entitled to a refundable tax offset if the Minister for Climate Change and Water issues a valid certificate. The amount may be paid over several certificates, coinciding with attaining project milestones, and therefore relate to different income years. Financial assistance will be of a fixed value once it has been approved, regardless of any subsequent changes to the capital cost of the project. If a certificate is revoked, the certificate will be treated as though it was never issued, and the relevant tax return of the company will need to be amended.

The Bill will also allow a company to apply to the AAT for review of the Minister's decision in relation to:

- the refusal to issue a certificate to a company;
- the amount specified in such a certificate; or
- the revocation of such a certificate.

The review rights apply only to the process surrounding the issuance and revoking of certificates, and not the application for assistance.

The Bill also contains a number of consequential amendments to include the tax offset in various parts of ITAA 1997, including amendments to provide a general exemption from CGT for capital gains arising from a right or entitlement to a tax offset, deduction or similar benefit.

Date of effect

The measure applies to approved projects between the 2009/10 and 2012/13 income years.

Deductible gift recipients

The Bill will update the list of deductible gift recipients (DGRs) contained in Div 30 of ITAA 1997 to include four new entities. The entities are:

Name of DGR	Date of effect	Special condition
The Australasian College for Emergency Medicine	3 February 2009	The gift must be made after 2 February 2009.
Grattan Institute	5 March 2009	The gift must be made after 4 March 2009 and before 5 March 2011.
ACT Region Crime Stoppers Limited	13 February 2009	The gift must be made after 12 February 2009.
PWR Melbourne 2009 Limited	3 March 2009	The gift must be made after 2 February 2009 and before 1 January 2010.

The Bill will also extend the time period of three DGRs currently listed in Div 30 of ITAA 1997. The DGRs are:

Name of DGR	Date of effect	Special condition
Yachad Accelerated Learning Project Limited	1 July 2008	The gift must be made after 30 June 2008 and before 1 July 2009.
St George's Cathedral Restoration Fund	31 December 2007	The gift must be made after 30 December 2007 and before 1 January 2011.
Bunbury Diocese Cathedral Rebuilding Fund	19 December 2008	The gift must be made after 18 December 2008 and before 19 December 2010.

Australian Business Register

The Bill proposes to amend the *A New Tax System (Australian Business Number) Act 1999* (the ABN Act) to allow the Registrar of the Australian Business Register (ABR) to take on the role of the Multi-agency Registration Authority. This amendment will enable representatives of businesses to be identified for the purpose of communicating electronically with multiple government agencies on behalf of businesses.

The ABN Act will also be amended to improve the integrity and efficiency of the ABR.

Australian Business Register amendments

The Bill will amend the ABN Act to permit the Registrar to use the approved form provisions outlined in s 388-50 in Sch 1 to the *Taxation Administration Act 1953* (TAA) for a range of purposes. The purposes of the approved forms include:

- the application for an ABN which requires the identification of the entity and its associates;
- the notification of changes to various details recorded on the ABR in respect of the entity;
- the obligation for an entity or an associate to provide certain information in respect of the entity or an associate respectively; and
- the possible need for an entity to request the cancellation of the entity's ABN.

The Registrar will also be given the power to update details on the ABR.

The Bill also introduces objection rights for a range of Registrar's decisions rather than entities having to apply to the AAT for review. If the entity is not satisfied with the decision on an objection, it will be able to take the matter to the AAT or the Courts.

The amendments also include an additional condition to be satisfied before the Registrar must register an entity. The additional condition requires the Registrar to be satisfied that the identity of an associate of the entity has been established.

Multi-agency Registration Authority amendments

The amendments will allow the Registrar to register and maintain details about representatives of businesses to enable electronic communication with one or more government agencies. The amendments will also require an entity (or a representative of the entity) to update its details on the Register.

The Bill will extend the objection rights of entities to cover decisions in respect of representatives, if an entity is dissatisfied with a decision of the Registrar.

The amendments also extend the use of the approved form provisions in the TAA for a range of purposes related to representatives of the entity. Such applications may request, but not compel, the provision of the TFN of a nominating individual and that of the representative.

The Bill will introduce two new offence provisions for impersonating a registered representative and for non-compliance with a request for information concerning either the identity of a representative or details entered on the ABR in respect of that representative.

Date of effect

The amendments to introduce the Multi-agency Registration Authority will commence on a single day to be fixed by Proclamation but limited to a day not later than 12 months after Royal Assent. The other amendments to the ABN Act and the consequential amendments will commence on Royal Assent.

Condition for fuel tax credits

The Bill will remove the restriction that a business may not claim more than $3 million of fuel tax credits in an income year unless they are a member of the Greenhouse Challenge Plus Programme (GCPP), or another program determined by the Minister for the Environment, Heritage and the Arts. This will be achieved by repealing Div 45 of the *Fuel Tax Act 2006*.

From 1 July 2009, businesses will not be able to join the GCPP. However, a consequential amendment will enable the businesses to make a decreasing adjustment for credits prior to 1 July 2009. This will be achieved by deeming a business that is not a member of the CGPP to be a member immediately prior to the CGPP termination.

The amendments will apply to the 2008/09 income year and later income years.

Tax exemption for certain grants

The Bill will exempt from income tax the Clean-up and Restoration Grants paid to small businesses and primary producers affected by the Victorian bushfires. That is, the payments will be non-assessable non-exempt income.

The exemption will apply to grants paid in the 2008/09 and 2009/10 income years.

Self-education Deductions

The Federal Court has held that a taxpayer who was receiving the Youth Allowance was entitled to a deduction for self-education expenses: *Anstis v FCT* [2009] FCA 286.

Background

For the income year ended 30 June 2006, the taxpayer was enrolled as a full-time student studying a teaching degree. In her tax return of that income year, she reported wages earned as a party-time sales assistant and the Youth Allowance. She did not declare any income from having worked as a teacher. However, the taxpayer claimed a deduction for self-education expenses. The expenses were described as ‘travel expenses other than to university’, ‘supplies for children during teacher rounds’, ‘student administration fee’, ‘depreciation — computer’, ‘textbooks and stationery’.

The Commissioner disallowed the deduction for self-education expenses and issued an assessment which increased the taxpayer’s assessable income. The taxpayer objected to the Commissioner’s decision. However, the Commissioner disallowed the taxpayer’s objection. As a result, the taxpayer made an application to the AAT for a review of the Commissioner’s decision. The taxpayer contended that she was entitled to the deduction because the expenses were incurred in gaining her assessable income (ie the Youth Allowance).

At first instance, the Tribunal affirmed the Commissioner’s decision to disallow the deduction. This was because the Tribunal found that the derivation of the Youth Allowance did not have the necessary nexus with the expenditure incurred. Subsequently, the taxpayer appealed to the Federal Court.

The taxpayer argued that she was entitled to the deduction as the expenditure had been incurred to meet the requirements for her to receive assessable income, ie the Youth Allowance. She submitted that in order to be entitled to the Youth Allowance, she was required to be enrolled, and to be making satisfactory progress, in full-time study, and therefore, the costs incurred in the course of her study were deductible as having been incurred in gaining that income.

Broadly, the Commissioner contended that the essential character of the expenditure was for the purpose of gaining future employment as a teacher, and lacked the necessary connection to the Youth Allowance income. That is, the expenditure had been incurred to enable the taxpayer to obtain new employment and was 'at a point too soon' to be regarded as having been incurred in gaining or producing assessable income.

Decision

The court stated that the salient issue was whether the taxpayer was entitled, as a recipient of the Youth Allowance, to deduct from her income the costs incurred in the course of her study. The logic indicated by the court was that, as the Allowance was assessable income under s 6-5 of ITAA 1997, it follows that a deduction is allowable if expenditure was incurred in deriving that income under s 8-1 of ITAA 1997.

The court found the expenditure was incurred in gaining or producing the Youth Allowance within the meaning of s 8-1 as the various eligibility and qualifying requirements for the Allowance can only be satisfied by the expenditure of money. It said, 'that the taxpayer's ultimate purpose or motivate in undertaking the course was to acquire a qualification leading to future employment as teacher is irrelevant to the characterisation of the expenditure'. Rather, the court's opinion was that it was sufficient the expenditure was incurred as a necessary incident of deriving the Allowance.

The court rejected the Commissioner's contention that the self-education expenses were incurred at 'a point too soon' This was because the expenditure was incurred in the same tax year as, or otherwise close in time to, the receipt of the Allowance.

Accordingly, the court allowed the appeal and set aside the Tribunal's decision. The court also remitted the amended assessment to the Commissioner to revise the assessment in accordance with the court's decision.

At the time of publication, the Commissioner has not indicated whether he will be appealing the Federal Court's decision.

Deductibility of self-education expenses

If allowed to stand, the decision in *Anstis* may oblige the Commissioner to change his long-standing Taxation Ruling on self-education expenses.

In Taxation Ruling TR 98/9, the Tax Office states its view regarding the deductibility of self-education expenses against the following Commonwealth educational assistance schemes payments:

- AUSTUDY;
- ABSTUDY;
- Assistance for Isolated Children Scheme (AIC); and
- Veterans' Children Education Scheme (VCES).

According to the ruling, self-education expenses incurred by recipients of the above payments are not deductible because the expenses are not incidental and relevant to the educational assistance payments. The Commissioner's view is that the expenses incurred in fulfilling a course requirement are characterised as expenses incurred in undertaking study that might enable a recipient to obtain employment in a particular field.

It is important to note that the ruling does not specifically address the deductibility of self-education expenses in relation to other education assistance schemes. Where an individual receives other payments (eg Youth Allowance), it states that the principles of deductibility need to be considered on a case-by-case basis. However, it states that, generally, '**self-education expenses are not deductible where the scheme provides payments in the nature of assistance**'. [Emphasis added.]

The Commissioner's established view is that self-education expenses are, generally, deductible where the expenses have a relevant connection to a taxpayer's current income-earning activities. That is, if:

- the taxpayer's income-earning activities are based on the exercise of a skill or some specific knowledge and the purpose of the self-education is to enable the taxpayer to maintain or improve that skill or knowledge; or
- the self-education objectively leads to, or is likely to lead to, an increase in the taxpayer's income from his or her current income-earning activities in the future.

However, a deduction for self-education expenses is not allowable if the expenses are to obtain new employment or to open up a new income-earning activity (whether in business or in a taxpayer's current employment). This is because the Commissioner considers the expenses are incurred at a 'point too soon' to be regarded as incurred in gaining or producing assessable income.

Taxpayer Alert — Superannuation

The Tax Office has released Taxpayer Alert TA 2009/8, in which it describes arrangements that involve the transfer of benefits associated with the 1999 'transitional provisions' for self-managed superannuation funds (SMSFs) with pre-existing interests in unit trusts.

The Tax Office says that the Alert applies to arrangements with features substantially equivalent to the following:

- An organiser has (one or more) inactive SMSFs registered before 11 August 1999 (a 'pre-1999 SMSF') that hold interests in (one or more) related unit trusts acquired before 11 August 1999 ('the interest' in 'the unit trust'). The pre-1999 SMSFs may be inactive because, while registered with a nominal contribution, they may not have:
  - had any active members;
  - received any subsequent contributions;
  - made any investments; or
  - been continuously maintained for providing superannuation benefits to members on retirement eg where the fund was established, or subsequently sold, for the purpose of making a profit.
- The organiser advertises the sale of a pre-1999 SMSF and the unit trust. Typically, the advertising material states that the arrangement qualifies under the transitional provisions and therefore provides taxation and superannuation regulatory benefits, including:
  - allowing ownership of a residential property through the pre-1999 SMSF and gearing through a related unit trust, then leasing the property to a related party (eg a member of the SMSF), which would not otherwise be permitted for post-1999 SMSFs;
  - deducting interest expense which may not be deductible to other parties (ie private or domestic expenses of a member of the SMSF, or expenses incurred in producing exempt income of the SMSF);
  - reducing or avoiding potential capital gains tax through the lower taxes paid by the SMSF (ie on the property held through the unit trust); and
  - circumventing the superannuation regulatory restrictions (in particular the in-house asset rules) that would result in the SMSF's income or capital gains being subject to higher rates of tax.
- The organiser may also allege that the arrangement is supported by a Tax Office view (eg ATO ID 2002/388) without any qualification regarding materially different facts. This may mean that the arrangement does not qualify under the transitional provisions and that the advertised superannuation regulatory or taxation benefits would not be available.
- A taxpayer pays a fee to the organiser to effectively gain control of, or membership in, an inactive pre-1999 SMSF which holds the interest in the unit trust.
- The organiser then changes the control of the pre-1999 SMSF to the taxpayer by arranging for a change in the members and trustees (or directors in the case of a corporate trustee), and moves previous members' account balances out of the SMSF.
- The fund investment strategy of the pre-1999 SMSF may be updated to cover the fund's new investments (to meet other superannuation regulatory requirements).

- To attempt to exploit the transitional provisions (and gain the advertised superannuation regulatory or taxation benefits), the new members make contributions and/or rollover existing benefits held in complying superannuation funds to the pre-1999 SMSF, which are then invested in the related unit trust. This investment may include paying up partly paid-up units or applying the funds to existing units to facilitate the purchase of a property or land.
- The organiser charges a substantial fee for establishing this arrangement, based upon the perceived commercial advantages of the advertised superannuation regulatory or taxation benefits.

Regulatory issues

The Tax Office considers that arrangements of the type described above involve superannuation regulatory issues including whether:

- the inactive pre-1999 SMSF meets the definition of a superannuation fund at all times (ie both before and after the implementation of an arrangement);
- the transitional provisions contained in ss 71A to 71F of the *Superannuation Industry Supervisions Act 1993* (SISA) will apply, and;
- section 85 of SISA, which prohibits a fund from entering into any scheme to avoid the application of the in-house asset, has been breached.

The Tax Office also considers that the arrangements involve taxation issues including whether:

- the interest expense incurred by the related unit trust is deductible under s 8-1 of ITAA 1997;
- the capital gains tax concessions for complying superannuation funds will apply;
- the fee or commission paid (if any) by a taxpayer is an allowable deduction;
- the fee or commission received by the organisers of an arrangement constitutes assessable income;
- the provisions in Pt IVA of ITAA 1936 apply to the arrangement; and
- the entity involved in the arrangement may be a promoter of a tax exploitation scheme for the purposes of Div 290 of Sch 1 to the *Taxation Administration Act 1953*;

Legal status of a Taxpayer Alert

A Taxpayer Alert is only intended to be an 'early warning' of a tax planning arrangement that the Tax Office has under risk assessment. However, it is expected that a ruling or determination will be issued by the Tax Office following the release of the alert.

Taxpayers who have entered into or are contemplating entering into an arrangement similar to that described in the alert may contact the Tax Office to seek guidance in relation to the income tax and superannuation regulatory issues covered in the alert.

In-house assets transitional provisions

Under the in-house assets rule contained in Pt 8 of SISA, a regulated superannuation fund is, generally, restricted from having more than 5% of the total market value of its assets invested in in-house assets. However, ss 71A to 71F provide transitional arrangements in relation to in-house assets acquired before 11 August 1999. These transitional arrangements include:

- an asset that is a loan or an investment made either before the end of 11 August 1999 (the 'test time') or, alternatively, after the test time under a contract entered into before the test time, that is not, or would not have been, an in-house asset immediately before the test time;
- a share or unit in a unit trust acquired either before the test time or, alternatively, after the test time under a contract entered into before the test time, where payments are made to the issuer of the share or unit after the test time, but before 1 July 2009;
- an investment made in a related-party company or unit trust between the test time and 30 June 2009, where the amount of the investment does not exceed the amount of a debt owed by the company or the unit trust to a person other than the superannuation fund at the test time;

- an asset arising from the reinvestment of dividend or trust earnings, where the original investment was made before the test time and the reinvestment occurs after the test time but before 1 July 2009. (In SMSFD 2007/1 the Commissioner states his view on when a dividend or trust distribution is 'received' before the end of 30 June 2009);
- an asset subject to a lease (or a lease arrangement, or a legally enforceable agreement to lease, or an uninterrupted sequence of leases and lease arrangements), which is (or the first of which is) entered into between the trustee of a superannuation fund and a related before the test time; and
- a related party loan, investment or lease made between the test time and 23 December 1999, where such a loan, investment or lease was not an in-house asset before 1 July 2001.

PAYG Instalment Reduction

In a joint media release issued by the Treasurer and the Minister for Small Business, Independent Contractors and the Service Economy, they announced that the Government will cut the quarterly PAYG instalments for the 2009/10 income year for taxpayers who calculate their quarterly instalment using the gross domestic product (GDP) adjusted notional tax method. The media release stated that business owners who pay their GST quarterly will also benefit from the proposed measure. The Commissioner has advised that a 2% adjustment factor will be used when calculating GST instalments for eligible business owners.

The proposed measure will not apply to taxpayers who calculate their instalments using the instalment rate notified by the Tax Office.

The media release stated that the Government will use the expected increase in the consumer price index (CPI) for 2009/10 to calculate the tax instalments for taxpayers. It also stated that 'for the 2009/10 income year, the Government has reduced the GDP adjustment from 9% to 2%, aligning it with the expected CPI growth of 2% for 2009/10, as forecast in the Updated Economic and Fiscal Outlook'.

At the time of publication, the Government has not released further details or implemented any regulations to give effect to the proposed measure.

Data Matching Projects

The Tax Office has released details of three data matching projects which it will carry out. The projects are discussed below.

Motor vehicle data matching

The Tax Office has announced that it will request and collect details of individuals or entities that have purchased or acquired a motor vehicle valued at $10,000 or higher from the following state and territory departments:

- NSW Roads and Traffic Authority;
- Queensland Transport;
- VicRoads;
- Tasmania Department of Infrastructure, Energy and Resources;
- South Australia Department for Transport, Energy and Infrastructure (Transport SA);
- Western Australia Department for Planning and Infrastructure ;
- Northern Territory Department of Planning and Infrastructure (Transport Division); and
- ACT Road Transport Authority, Road User Services, Urban Services.

According to the Tax Office, records relating to approximately 2.5 million individuals will be matched. These details will be electronically matched with certain sections of its data holdings to identify non-compliance with lodgment and payment obligations.

Personal services income data matching

The Tax Office has also announced that it will request and collect information on amounts paid to personal services entities from the following labour hire firms, placement agencies and computer consultancies:

- Adecco Holdings Pty Ltd;
- Aker Kvaerner Advantage Pty Ltd;
- Brunel Technical Services Pty Ltd;
- Chandler Macleod Group Pty Ltd;
- Collective Resources IT Recruitment Pty Ltd;
- Clarius Group Ltd;
- Dare Holdings Pty Ltd;
- Drake Australia Pty Ltd;
- Entity Solutions Services Pty Ltd;
- Greythorn Pty Ltd;
- Hays Specialist Recruitment (Australia) Pty Ltd;
- HR Connect Pty Ltd;
- Hudson Global Resources (Aust) Pty Ltd;
- Infosys Technologies Australia Pty Ltd;
- Labourforce Solutions Pty Ltd;
- Link Recruitment Pty Ltd;
- LogicaCMG Pty Ltd;
- Manpower Services (Australia) Pty Ltd;
- Michael Page International (Australia) Pty Ltd;
- Netstar Australia Pty Ltd;
- Paxus Australia Pty Ltd;
- Peoplebank Australia Ltd;
- Randstad Pty Ltd;
- Robert Walters Pty Ltd;
- Ross Human Directions Ltd;
- SAP Australia Pty Ltd;
- Service Stream Communications Pty Ltd;
- Service Stream Solutions Pty Ltd;
- Technical Resources Pty Ltd;
- The Trustee for Adaps Unit Trust;
- The Trustee for Swan Drafting Unit Trust;
- Unisys Australia Pty Ltd; and
- Unisys West Pty Ltd;
- UXC Ltd.

The information being sought will include:

- the ABN of the entity making payments;
- the ABN of the entity receiving payments; and
- the sum of amounts paid for the years ended 30 June 2007 and 30 June 2008 (exclusive of GST).

The Tax Office says that the information collected will be electronically matched with certain sections of its data holding to identify non compliance with lodgment and payment obligations. It also says that records relating to approximately 30,000 individuals and entities will be matched.

Payments received from mining companies

The Tax Office has also announced that it will request and collect information on amounts paid by mining companies to contractors and sub-contractors. The data to be requested will also include name and address details of the individual who is the main service provider to an entity.

The information will be sourced from the following mining companies:

- Anglo Coal Holdings Australia Ltd;
- Barrick Gold;
- BHP Billiton;
- ExxonMobil Australia Pty Ltd;
- Newcrest Mining;
- Newmont Australia Holdings Pty Ltd;
- Oz Minerals;
- Rio Tinto;

- Woodside Petroleum Ltd;
- Worley Parsons; and
- Xstrata Limited.

The Tax Office has stated that records relating to approximately 10,000 individuals and entities who have received contract payments from the above listed mining companies will be electronically matched with certain sections of its data holdings to identify non-compliance with lodgment and payment obligations under taxation law.

Superannuation Rates and Thresholds 2009/10

The Tax Office has released the key superannuation rates and thresholds for 2009/10, which include the superannuation contributions caps and employment termination payments caps.

Contributions caps

Description	2009/10	2008/09
Concessional contributions cap[1]	55,000	50,000
Non-concessional contributions cap[2]	165,000	150,000
CGT cap amount	1,100,000	1,045,000
Low rate cap threshold for superannuation lump sum payments	150,000	145,000
Untaxed plan cap amount for superannuation lump sum benefits	1,100,000	1,045,000

1. A transitional contribution cap of $100,000 per annum applies until 30 June 2012 for individuals between 50 and 74.
2. Individuals under age 65 may bring forward the non-concessional cap for the next two years.

Employment termination payments

Description	2009/10	2008/09
Cap amount for life benefit termination payments	150,000	145,000
Cap amount for death benefit termination payments	150,000	145,000
Transitional employment termination payments lower cap amount	150,000	145,000
Transitional employment termination payments upper cap amount[1]	1,000,000	1,000,000

1. The upper cap amount is not indexed.

Reminder: Individual Tax Rates from 1 July 2009

The resident individual tax rates will change from 1 July 2009. The new rates applicable for the 2009/10 income year are set out below with the changes in bold.

Taxable income ($)	Tax payable ($)
0–6,000	Nil
6,001–**35,000**	Nil + 15% of excess over 6,000
35,001–80,000	4,350 + 30% of excess over 35,000
80,001–180,000	17,850 + **38%** of excess over 80,000
180,001+	55,850 + 45% of excess over 180,000

The foreign resident individual tax rates will change from 1 July 2009. The new rates applicable for the 2009/10 income year are set out below with the changes in bold.

Taxable income ($)	Tax payable ($)
0–**35,000**	29%
35,001–80,000	10,150 + 30% of excess over 35,000
80,001–180,000	23,650 + **38**% of excess over 80,000
180,001+	61,650 + 45% of excess over 180,000

Low-income tax offset

The maximum amount of the low-income tax offset and the phase-out limit will increase from 1 July 2009. For the 2009/10 income year, the maximum amount of offset is $1,350 (increased from $1,200 for the 2008/09 income year). The phase-out limit for the 2009/10 income year is $63,750 (increased from $60,000 for the 2008/09 income year).

Taxable income (TI)	Offset
0–$30,000	$1,350
$30,001–$63,749	$1,350 – ([TI – $30,000] x 4%)
$63,750+	Nil

Currency:
This issue of Client Alert takes into account all developments up to and including 23 April 2009.

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Thomson Reuters (Professional) Australia Limited ABN 64 058 914 668
35 Cotham Road, Kew Vic 3101

Tel: 1300 304 197

Fax: 1300 304 198

Email: LTA.Service@thomsonreuters.com

Website: www.thomsonreuters.com.au