

EXPLANATORY STATEMENT

Issued by authority of the Treasurer

A New Tax System (Goods and Services Tax) Act 1999
Fringe Benefits Tax (Application to the Commonwealth) Act 1986
Taxation Administration Act 1953

Treasury Laws Amendment (2017 Measures No. 3) Regulations 2017

The *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) establishes the goods and services tax (GST), a broad-based indirect tax on consumption. Generally, the GST applies to all supplies of goods and services at a uniform rate of 10 per cent.

The *Fringe Benefits Tax (Application to the Commonwealth) Act 1986* provides rules for the notional application of fringe benefits tax to the remuneration of Commonwealth employees.

The *Taxation Administration Act 1953* sets out the administrative framework for the tax law. This includes rules for the collection and recovery of income tax and other liabilities, objection, review and appeal processes, charges and penalties, rulings and other tax administration matters.

Section 177-15 of the GST Act, section 9 of the *Fringe Benefits Tax (Application to the Commonwealth) Act 1986* and section 18 of the *Taxation Administration Act 1953* provide that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

The purpose of Schedule 1 to the *Treasury Law Amendment (2017 Measures No. 3) Regulations 2017* (the Regulations) is to amend the *A New Tax System (Goods and Services Tax) Regulations 1999* (the GST Regulations) so that supplies of digital currency (broadly fungible digital units of consideration that are valuable only as consideration) receive comparable GST treatment to supplies of money.

Together with the amendments made to the GST Act by Schedule 1 to the *Treasury Laws Amendment (2017 Measures No. 6) Act 2017* (the Amending Act), this implements the measure announced by the Government in the 2017-18 Budget titled 'GST — removing the double taxation of digital currency'.

The amendments provide comparable treatment by amending the GST Regulations to make supplies of digital currency input taxed financial supplies, consistent with supplies of Australian and foreign currency. The Regulations also make changes to the treatment of acquisitions related to these new financial supplies to provide equivalent treatment.

The purpose of Schedule 2 to the Regulations is to make a minor amendment to the tax law and to repeal the *Fringe Benefits Tax (Application to the Commonwealth) Regulations* which have become inoperative as a result of amendments to the *Fringe Benefits Tax (Application to the Commonwealth) Act 1986* that duplicate the effect of those regulations.

Public consultation was undertaken on the amendments made by Schedule 1 to the Regulations together with the related amendments to the primary law from 29 June 2017 to 26 July 2017. As part of this process, meetings were held with Fintech Australia and with other industry stakeholders. Stakeholders strongly supported the amendments to the regulations. Consultation on the amendments made by Schedule 2 to the Regulations were not considered necessary as they do not change the operation of the law and are minor and machinery in nature.

The amendments made by Schedule 1 are complementary to amendments made to the GST Act by the Amending Act. The financial and compliance costs impacts of these amendments were included in the estimates provided for the principal amendments, which are detailed in the Explanatory Memorandum to the Amending Act. The amendments made by Schedule 2 are both minor and machinery in nature and have no financial or compliance cost impact.

Details of the Regulations are set out in the [Attachment](#).

The GST Act, *Fringe Benefits Tax (Application to the Commonwealth) Act 1986* and *Taxation Administration Act 1953* do not specify any conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

Schedule 1 to the Regulations commenced on 1 July 2017 and applies to supplies or payments made on or after 1 July 2017. The rules restricting retrospective application of legislative instruments in subsection 12(2) of the *Legislation Act 2003* do not apply to these amendments due to subsection 30(2) of the Amending Act.

Schedule 2 to the Regulations commences on the day after the Regulations are registered on the Federal Register of Legislation.

Details of the *Treasury Laws Amendment (2017 Measures No. 3) Regulations 2017*

Section 1 – Name of Regulations

This section provides that the title of the Regulations is the *Treasury Laws Amendment (2017 Measures No. 3) Regulations 2017* (the Regulations).

Section 2 – Commencement

This section would provide that each provision of the Regulations specified in column 1 of the table commenced, or is taken to have commenced, in accordance with column 2 of the table, and that any other statement in column 2 has effect according to its terms.

Schedule 1 to the Regulations commenced on 1 July 2017.

Schedule 2 to the Regulations commenced on the day after the Regulations were registered.

Section 3 – Authority

This section provides that the Regulations are made under the *A New Tax System (Goods and Services Tax) Act 1999* (the GST Act), *Fringe Benefits Tax (Application to the Commonwealth) Act 1986* and *Taxation Administration Act 1953*.

Section 4 – Schedule

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 — GST and digital currency

GST, money and digital currency

The GST Act includes a number of special rules for supplies of money. Generally, a supply of money is not a supply for GST purposes (subsection 9-10(4) of the GST Act). This means that entities paying consideration in money are not liable for GST on the supply of the money. Money is treated in this way because it is generally considered purely a medium of exchange that is not consumed and is therefore not subject to GST which seeks to effectively apply tax to final private consumption.

However, a supply of money is a supply for GST purposes if it is provided as consideration for another supply of money. In cases where one entity is paying another entity for money, the money is not being used exclusively as a medium of exchange to purchase goods, services or property — a valuable service is being provided (for example, activities involving the exchange of money for other money such as debt trading and foreign currency speculation are carried on for profit).

If a supply of money is a supply, the supply is generally an input taxed financial supply — see section 40-5 of the GST Act and item 9 of the table in subregulation 40-5.09(3) of the *A New Tax System (Goods and Services Tax) Regulations 1999* (GST Regulations).

Money is broadly defined in the GST law, including Australian and foreign currency. However, in Goods and Services Tax Ruling GSTR 2014/3, the Commissioner of Taxation (Commissioner) advises that bitcoin is not money for the purposes of the GST Act. Specifically, the Commissioner considers it is not 'currency' as the term is used in Australian law as it is not issued by a government (see for example *Leask v Commonwealth* [1996] HCA 29). The same is likely to be true for other similar digital currencies (broadly fungible digital units of consideration that are valuable only as consideration).

As digital currencies have independent value rather than being a debt, credit or promise to make a payment, they are unlikely to meet any other items specifically included in the GST definition of money. The limited use of digital currencies in Australia also does not support an argument that they may be money in some broader sense.

The amendments

Schedule 1 to the *Treasury Laws Amendment (2017 Measures No. 6) Act 2017* (Amending Act) amended the GST Act to provide that supplies and acquisitions of digital currency are to be treated in the same way as supplies and acquisitions of money. This means that supplies and acquisitions of money and digital currency are disregarded for the purposes of the GST, unless the supply or acquisition is undertaken in exchange for a payment of money or digital currency. Schedule 1 to the Amending Act also made other minor amendments to ensure consistent treatment for digital currency.

Schedule 1 to the Regulations makes similar amendments to the GST Regulations to ensure consistent treatment.

Specifically, Schedule 1 amends the definition of financial supply so that supplies of digital currency in exchange for Australian, foreign or digital currencies are financial supplies. As a result if these supplies are not disregarded because of the amendments to the primary law, the supplies are input taxed, consistent with the treatment of supplies of money. These amendments also ensure that supplies of payment systems that transfer digital currencies are not financial supplies, consistent with the treatment of payment systems for the transfer of Australian or foreign currency.

It also makes minor amendments to the list of reduced credit acquisitions (acquisitions that may entitle entities to a reduced input tax credit despite being related to an input taxed financial supply). Again, these amendments make sure equivalent treatment applies to acquisitions relating to digital currency and money by ensuring listed reduced credit acquisitions are not limited by existing references to money or currency.

Schedule 1 further makes a number of minor technical amendments to existing provisions in the financial supply rules so that the rules apply appropriately and consistently to supplies of digital currency.

Consistent with the amendments made by Schedule 1 in the Amending Act, Schedule 1 commenced from 1 July 2017 and applies to supplies or payments made on or after 1 July 2017.

These changes benefit taxpayers by reducing GST and associated compliance costs. Further, the date of effect was announced in the 2017-18 Budget, and was supported in industry consultation. Given this, the retrospective operation is not considered to have any substantive adverse impact on taxpayers.

However, given the wide range of situations in which the rules relating to input tax credits concerning financial supplies apply, it cannot be guaranteed that no entity would face a technical disadvantage.

Making supplies input taxed means recipients are no longer entitled to claim an input tax credit for the acquisition. In practice such recipients are no worse off as they have not borne GST on the supply (or are able to obtain a refund if the supply was treated as taxable on or after 1 July 2017 but before Royal Assent of the Amending Act) and the GST integrity rules prevent input tax credits being available for a supply without evidence being available that it was treated as taxable (that is a tax invoice). However, nonetheless the recipient has 'lost' the entitlement to an input tax credit.

There could be doubt whether the amendments would be effective where an entity faces such a disadvantage, as subsection 12(2) of the *Legislation Act 2003* generally prevents a provision of a legislative instrument from having retrospective effect in relation to a person if it would disadvantage the person or subject them to a liability.

In order to remove any doubt that these related amendments to the GST Regulations commence and apply to all taxpayers from the same date as the amendments made by the Amending Act, subsection 30(2) of the Amending Act provides that subsection 12(2) of the *Legislation Act 2003* does not apply to amendments to regulations dealing with the GST treatment of financial supplies (and related acquisitions) if these amendments relate to digital currency and are made within six months of 30 October 2017 (the day Schedule 1 of the Amending Act received Royal Assent).

Given this, these amendments have effect from 1 July 2017 in all cases, despite their retrospective commencement.

Schedule 2 — Miscellaneous amendments

Fringe Benefits Tax (Application to the Commonwealth) Regulations

Part 1 of Schedule 2 to the Regulations repeals the *Fringe Benefits Tax (Application to the Commonwealth) Regulations* as they no longer have any effect due to the amendments to the *Fringe Benefits Tax (Application to the Commonwealth) Act 1986* which duplicated the effect of those regulations.

These regulations modified how the *Fringe Benefits Tax (Application to the Commonwealth) Act 1986* applied to some categories of Commonwealth benefits. These modifications are now incorporated into that Act and so the regulations no longer have any effect.

Seasonal Labour Mobility Program

Part 2 of Schedule 2 to the Regulations removes a reference to the visa number for the Seasonal Labour Mobility Program in the *Taxation Administration Regulations 2017* which is no longer current following amendments to the *Migration Regulations 1994*.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Treasury Law Amendment (2017 Measures No. 3) Regulations 2017

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

This Legislative Instrument consists of two schedules.

Schedule 1 amends the *A New Tax System (Goods and Services Tax) Regulations 1999* so that supplies of digital currency (broadly fungible digital units of consideration that are valuable only as consideration) receive comparable GST treatment to supplies of money.

Schedule 2 makes minor technical amendments to the tax law, including repealing the *Fringe Benefits Tax (Application to the Commonwealth) Regulations 1986* which have become inoperative.

Human rights implications

Neither Schedule engages any of the applicable rights or freedoms.

The only effect of Schedule 1 is to remove potential tax disincentives to the use of certain digital assets as a medium of exchange, while Schedule 2 only repeals and amends provisions that have no operative effect.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.