2008-2009

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TAX LAWS AMENDMENT (2009 MEASURES No. 2) BILL 2009

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Treasurer, the Hon Wayne Swan MP)

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

Abbreviation	***Definition***
AAT	Administrative Appeals Tribunal
ABN	Australian Business Number
ABN Act	*A New Tax System (Australian Business Number) Act 1999*
ABR	Australian Business Register
ADI	authorised deposit-taking institution
APRA	Australian Prudential Regulation Authority
APRA Act	*Australian Prudential Regulation Authority Act 1998*
ATO	Australian Taxation Office
Banking Act	*Banking Act 1959*
CGT	capital gains tax
Commissioner	Commissioner of Taxation
DGRs	deductible gift recipients
FHSA	first home saver account
FHSA Act	*First Home Saver Accounts Act 2008*
FMD	farm management deposit
GCPP	Greenhouse Challenge Plus Programme
Insurance Act	*Insurance Act 1973*
ITAA 1936	*Income Tax Assessment Act 1936*
ITAA 1997	*Income Tax Assessment Act 1997*
PAYG	pay as you go
plan	National Urban Water and Desalination Plan
Registrar	Australian Business Registrar
RSA	retirement savings account
SBR	Standard Business Reporting

Abbreviation	***Definition***
scheme	financial claims scheme
Small Business Act	*Tax Laws Amendment (Small Business) Act 2007*
TAA 1953	*Taxation Administration Act 1953*
TFN	tax file number
Water Department	Department of the Environment, Water, Heritage and the Arts
Water Minister	Minister for Climate Change and Water

General outline and financial impact

Application of the income tax law to financial claims scheme entitlements

Schedule 1 to this Bill amends various Acts to ensure there are no adverse taxation implications arising from a payment made by the Australian Prudential Regulation Authority, or by a liquidator, under the financial claims scheme (the scheme).

It achieves this in general by amending the law to treat payments made under the scheme in the same way as if they had been made by the failed institution to which the scheme applies.

Specific amendments cover capital gains tax, farm management deposits, retirement savings accounts, first home saver accounts, reporting obligations and withholding obligations.

Date of effect: These amendments generally apply to all payments made, and other things done, under the scheme, whether before or after the amendments commence. Certain obligations and penalties only apply from the time the amendments commence.

Proposal announced: The scheme was announced in the Treasurer's Media Release No. 061 of 2 June 2008 and in the Prime Minister's Media Release of 12 October 2008.

Financial impact: Because it is not possible to determine whether the scheme will be activated during the forward estimates period, the revenue impact is unquantifiable but, if it is activated, the impact will be negligible because the tax outcomes are designed to be the same as if the payments had been made by the financial or insurance institution.

Compliance cost impact: Low.

Increase access to the small business capital gains tax concessions

Schedule 2 to this Bill amends the law to increase access to the small business capital gains tax (CGT) concessions for taxpayers owning a CGT asset used in a business by an affiliate or entity connected with the taxpayer and for partners owning a CGT asset used in the partnership business, with effect from the 2007-08 income year. This Schedule also makes a number of other minor amendments to clarify and refine elements of the small business CGT concessions.

Date of effect: The main amendments apply to CGT events happening in the 2007-08 income year and later income years. The minor amendments have their own particular application dates.

Proposal announced: This measure was announced in the 2008-09 Budget on 13 May 2008.

Financial impact: This measure will have an unquantifiable (but minimal to small) cost to revenue over the forward estimates.

Compliance cost impact: Compliance costs are expected to be low.

Tax benefits and capital gains tax

Schedule 3 to this Bill amends the *Income Tax Assessment Act 1997* to provide a general exemption from capital gains tax (CGT) for capital gains arising from a right or entitlement to a tax offset, deduction or similar benefit.

Date of effect: This measure applies to CGT events happening in the 2009-10 income year and later income years.

Proposal announced: This measure has not previously been announced.

Financial impact: Nil.

Compliance cost impact: Nil.

National Urban Water and Desalination Plan — urban water tax offset

Schedule 4 to this Bill amends the *Income Tax Assessment Act 1997* to provide a refundable tax offset in relation to certain projects approved under the National Urban Water and Desalination Plan.

Date of effect: This measure applies to approved projects between the 2008-09 and 2012-13 income years.

Proposal announced: This measure was announced in the 2008-09 Budget on 13 May 2008.

Financial impact: This measure will have these financial implications:

2008-09	*2009-10*	*2010-11*	*2011-12*
–$14m	–$129m	–$195m	–$315m

Compliance cost impact: The compliance cost impact of this measure is estimated to be moderate.

Deductible gift recipients

Schedule 5 to this Bill amends the *Income Tax Assessment Act 1997* (ITAA 1997) to update the list of the deductible gift recipients (DGRs) to include four new entities and to extend the time period of three organisations currently listed in the ITAA 1997.

Tax deductions are provided to donors who give to organisations that are endorsed as deductible gift recipients (DGRs), subject to certain conditions. Organisations which do not fall under the general DGR categories may seek specific listing in the income tax law.

Date of effect: The date of effect for each organisation being specifically listed is included in Tables 5.1 and 5.2 in Chapter 5.

Proposal announced: The listing of these organisations has not been announced.

Financial impact: This measure will have the following revenue implications:

DGRs	*2008-09*	*2009-10*	*2010-11*	*2011-12*	*2012-13*	*Total*
Australasian College for Emergency Medicine	Nil	–$300,000	–$307,500	–$315,188	–$323,067	–$1,245,755
Grattan Institute	Nil	–$1,500,000	–$1,500,000	–$300,000	Nil	–$3,300,000
PWR Melbourne 2009 Limited	Nil	–$600,000	–$600,000	Nil	Nil	–$1,200,000
ACT Region Crime Stoppers Limited	Nil	–$10,500	–$21,525	–$22,063	–$22,615	–$76,703

DGRs	*2008-09*	*2009-10*	*2010-11*	*2011-12*	*2012-13*	*Total*
Yachad Accelerated Learning Project Limited	Nil	–$111,000	Nil	Nil	Nil	–$111,000
Bunbury Diocese Cathedral Rebuilding Fund	Nil	–$150,000	–$300,000	–$150,000	Nil	–$600,000
St George’s Cathedral Restoration Fund	Nil	–$124,800	–$166,400	–$166,400	–$41,600	–$499,200
Total	**Nil**	**–$2,796,300**	**–$2,895,425**	**–$953,651**	**–$387,282**	**–$7,032,658**

Compliance cost impact: Negligible.

Australian Business Register

Schedule 6 to this Bill amends the *A New Tax System (Australian Business Number) Act 1999* (ABN Act) to allow the Registrar of the Australian Business Register (ABR) to act as the Multi-agency Registration Authority, to enable representatives of businesses to be identified for the purpose of communicating electronically with multiple government agencies on behalf of businesses. This is a part of the Government’s Standard Business Reporting program.

Other amendments to the ABN Act improve the integrity and efficiency of the ABR and help position the Registrar to take on the role of the Multi-agency Registration Authority.

There are also two consequential amendments to other tax Acts that clarify the existing law.

Date of effect: The amendments to introduce the Multi-agency Registration Authority 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 commence on Royal Assent.

Proposal announced: This measure has not previously been announced.

Financial impact: Nil.

Compliance cost impact: There will be minimal additional costs imposed by the introduction of the Multi-agency Registration Authority and the other amendments to the ABN Act. However, this is far outweighed by the substantial reduction in costs that benefit businesses in their reporting to governments through the Standard Business Reporting program that is facilitated by the Multi-agency Registration Authority amendments.

Removing the Greenhouse Challenge Plus Programme condition for fuel tax credits

Schedule 7 to this Bill amends the *Fuel Tax Act 2006* to remove the restriction that businesses may not claim more than $3 million of fuel tax credits in a financial year unless they are a member of Greenhouse Challenge Plus Programme.

Date of effect: This measure takes effect on 1 July 2009.

Proposal announced: This measure has not previously been announced.

Financial impact: Nil. This measure maintains businesses' ability to claim their full fuel tax credit entitlement.

Compliance cost impact: Nil.

Tax exemption for certain grants to businesses affected by the Victorian bushfires

Schedule 8 to this Bill amends the *Income Tax Assessment Act 1997* to provide an exemption from tax for the Clean-up and Restoration Grants paid to small businesses and primary producers affected by the Victorian bushfires.

Date of effect: This measure applies to the Clean-up and Restoration Grants paid to small businesses and primary producers in the 2008-09 and 2009-10 income years.

Proposal announced: This measure has not previously been announced.

Financial impact: This measure will have these revenue implications:

2008-09	*2009-10*	*2010-11*	*2011-12*	*2012-13*
Nil	–$3.1m	–$3.2m	–$0.3m	–$0.3m

Compliance cost impact: Nil.

Chapter 1
Application of the income tax law to financial claims scheme entitlements

Outline of chapter

1.1 Schedule 1 to this Bill amends various Acts to ensure 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 (the scheme).

1.2 It achieves this in general by amending the law to treat payments made under the scheme in the same way as if they had been made by the failed institution to which the scheme applies.

1.3 Specific amendments cover capital gains tax (CGT), farm management deposits (FMDs), retirement savings accounts (RSAs), first home saver accounts (FHSAs), reporting obligations and withholding obligations.

Context of amendments

1.4 The *Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Act 2008*, amended the *Banking Act 1959* (Banking Act) and the *Insurance Act 1973* (Insurance Act) to establish the financial claims scheme.

1.5 That scheme allows APRA to pay depositors in failed financial institutions some part of their deposit, subject to a global limit determined by the Treasurer when he or she activates the scheme in a particular case. To the extent that APRA makes a payment, that part of depositors' rights to recover their deposit is assigned to APRA. The scheme provides a similar arrangement for APRA to pay claimants under a general insurance policy the insurance amounts to which they are entitled when their insurer has failed.

1.6 The original legislation did not include the consequential amendments of the tax law that ensure appropriate tax outcomes in relation to the scheme.

Income tax and capital gains tax

1.7 General deposit holders in an authorised deposit-taking institution (ADI) are assessable on any interest or gains paid, payable or credited on financial deposits. If interest or a gain has been paid or credited to the deposit holder then the amount is already derived and assessable to the deposit holder. Payments under the scheme in respect of these amounts would not alter the tax outcome compared to payment by the ADI.

1.8 Where interest has accrued but not been paid or credited by the failed ADI to the depositor, the existing law may not treat the payments under the scheme in respect of these amounts in the same way as interest payment by the ADI.

1.9 There are two rights arising from the scheme in relation to ADI deposits to which the CGT rules can apply:

- the right of the depositor to receive a payment from the scheme administrator; and
- a deposit with an ADI is a CGT asset. The right to a portion of the funds in the ADI deposit (part of the original deposit debt) is transferred to the scheme administrator following payment by the scheme administrator to the depositor.

1.10 Where a payment is made under the scheme, the part of the depositor’s right to recover their deposit is transferred to the scheme administrator. A receipt for a transfer in respect of an amount of uncredited interest may not have the character of interest or income in the hands of the depositor.

1.11 Payments under the scheme to a general insurance policy holder in settlement of a general insurance claim may be assessable as ordinary or statutory income or included in the calculation of ordinary or statutory income. For example, where the insurance payment is in respect of the loss or destruction of a depreciating asset, the payment would be taken into account in working out the capital allowance balancing adjustment under Division 40 of the *Income Tax Assessment Act 1997* (ITAA 1997).

1.12 The existing law would provide equivalent taxation treatment where the rights to recover amounts from the general insurer that are transferred to the scheme administrator are in respect of a policy for a building, CGT asset or depreciating asset. However, where the rights transferred to the APRA scheme administrator are in respect of a policy for personal injury, loss of income, interest or trading stock, the existing law may not treat the payments under the scheme by APRA in the same way as the payments they replace.

Farm management deposits

1.13 Schedule 2G to the *Income Tax Assessment Act 1936* (ITAA 1936) contains the provisions for FMDs. An FMD is a tax-linked, financial risk management tool for eligible primary producers. It is designed to allow eligible primary producers to set aside income in profitable years for subsequent withdrawal in low-income years. This reduces the risk to eligible primary producers of income variability owing to factors such as drought.

1.14 The following requirements exist for the deposits:

- The taxpayer's taxable non-primary production income for the year of income must be less than $65,000 in the year of deposit (paragraph 393-10(1)(b) of Schedule 2G to the ITAA 1936).
- The FMD balance cannot exceed $400,000 at any time (subsection 393-35(6) of Schedule 2G to the ITAA 1936).
- The minimum deposit must be $1,000 or more (subsection 393-35(5) of Schedule 2G to the ITAA 1936).
- The owner can only hold FMDs at one financial institution (subsection 393-35(7) of Schedule 2G to the ITAA 1936).
- The FMD must not be withdrawn or reduced to less than $1,000 within the first 12 months unless the withdrawal is made in exceptional circumstances. However, transferring an FMD to another institution is not treated as a withdrawal (section 393-37 of Schedule 2G to the ITAA 1936).
- Transfer of an FMD to another institution does not constitute a 'repayment' of the deposit for the purposes of working out an amount assessable on repayment of an FMD (paragraph 393-50(5)(a) of Schedule 2G to the ITAA 1936).
- Transfer of an FMD to another institution does not constitute 'making' a deposit for the purposes of working out an amount deductible for making of an FMD (paragraph 393-50(5)(b) of Schedule 2G to the ITAA 1936).

1.15 Under the scheme, taxpayers who hold an FMD with an ADI which becomes a declared ADI are eligible to be paid certain amounts to maintain their liquidity, before they receive payment in a winding up of the ADI.

1.16 Under Division 2AA of Part II of the Banking Act, APRA may automatically transfer all or part of an FMD from the old ADI to a new ADI.

1.17 In the event that APRA transfers only a part of the old FMD, a liquidator of the old ADI may pay a distribution from the liquidation of the old ADI, by making a new deposit into a new ADI.

Retirement savings accounts

1.18 Within the superannuation system, complying superannuation funds are subject to restrictions which do not apply to other forms of saving. Accounts are maintained within these entities for the purpose of providing retirement or death benefits for the member or account-holder, or their dependants.

1.19 An RSA is capital guaranteed and can be provided to the general public by an ADI. For income tax and superannuation purposes, RSAs are treated in a similar manner to superannuation products offered by complying superannuation funds.

1.20 As benefits in an RSA are generally preserved until retirement, it is not appropriate for payments by APRA or a liquidator under the scheme to be made directly to individuals. Consequently, payments are to be made into an RSA established with a new ADI. However, changes are required to the ITAA 1997 to ensure the payments receive the appropriate treatment for tax purposes.

First home saver accounts

1.21 Generally, because there are restrictions on when an individual can get their money out of an FHSA, it is not appropriate for an individual who has an FHSA in a failed ADI to receive their entitlement directly in their hands. As such, APRA or the liquidator will open a new FHSA and transfer the guaranteed funds to it on the individual's behalf.

1.22 As part of the scheme, where an account-holder's entitlement to be paid an amount includes an entitlement in relation to an FHSA, the entitlement relating to the FHSA is to be met through the application of the relevant amount to an FHSA in an ADI that is not a declared ADI.

1.23 APRA or the liquidator can open an FHSA in such circumstances regardless of any other laws. In the case of an FHSA, this is necessary because there are eligibility requirements in the *First Home Saver Accounts Act 2008* (FHSA Act) which would otherwise prevent an FHSA from being opened.

1.24 However, some other changes need to be made to ensure the scheme works appropriately with FHSAs.

Reporting obligations

1.25 Under the current law, an investment body (including ADIs) is required to give the Commissioner of Taxation (Commissioner) a written report relating to investments with the body (an annual investment income report).

1.26 There are no reporting obligations that require APRA to report amounts that are paid under the scheme (Division 2AA of Part II of the Banking Act and Part VC of the Insurance Act).

1.27 These amendments require APRA to report amounts paid under the scheme, aligning with the current reporting obligations that apply to ADIs. This reporting requirement will assist those receiving payments under the scheme in determining their tax related liabilities and entitlements and also assist the Australian Taxation Office (ATO) in conducting data-matching and compliance activities.

Withholding obligations

1.28 Under the pay as you go (PAYG) withholding provisions (Part 2-5 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953)), an ADI or a general insurer is required to withhold, report and remit to the Commissioner amounts from certain payments, including:

- payments for work and services;
- payments in respect of investment or payment for a supply where a tax file number (TFN) or Australian Business Number (ABN) is not quoted; and
- dividend, interest and royalty payments to an overseas person or a foreign resident.

1.29 The purpose of the PAYG withholding provisions in Part 2-5 of Schedule 1 to the TAA 1953 is to ensure the efficient collection of income tax during the year in anticipation of the payee’s income tax liability on assessment.

1.30 It is not clear whether the existing PAYG withholding provisions will apply to payments made under the scheme where the same payment, if made by the ADI or general insurer, would attract the application of the PAYG withholding provisions. These amendments ensure they do.

Summary of new law

1.31 Various Acts are amended to provide equivalent taxation treatment for any payments by the Administrator of the scheme to (or for the benefit of) an ADI deposit holder or a claimant under a general insurance policy as if the payments had been made by the ADI or general insurer.

Capital gains tax

1.32 Capital gains and capital losses arising from the rights under the scheme are disregarded. This ensures that the scheme does not trigger any CGT consequences that would not have arisen if the scheme was not activated.

Farm management deposits

1.33 This measure ensures that there are no adverse taxation implications for holders of FMDs arising from the scheme where FMDs are held with failed ADIs. This measure covers the actions of both APRA and the liquidators of failed ADIs.

1.34 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 from a tax perspective.

1.35 Similarly, the establishment of a new FMD by a liquidator will be treated as a transfer of the old FMD for tax purposes.

Retirement savings accounts

1.36 A payment by APRA of a scheme entitlement, or a distribution by a liquidator of a failed ADI declared under the scheme, in respect of an individual who held an RSA with a failed ADI, where made to another RSA, is to be treated for tax purposes as if the payment is a roll-over superannuation benefit from the failed ADI.

First home saver accounts

1.37 The payment of a scheme entitlement into a new FHSA is essentially a transfer of an FHSA from one provider to another. For the avoidance of doubt, this is being expressly stated. This means that the payment will fit within paragraph 11(3)(a) of the FHSA Act, which stops a transfer from one FHSA provider to another FHSA provider from being eligible for the government contribution.

1.38 There is the possibility that there could be a delay between the declaration of an ADI and a new FHSA being opened on behalf of an individual. Similarly, a person's entitlements could be paid in instalments which could be paid some time apart.

1.39 In these situations, there is the possibility that when an FHSA is opened on their behalf the individual will no longer be eligible to have an FHSA because they have acquired a qualifying interest in a dwelling.

1.40 An amendment is made to ensure that where this is the case, an individual will have to notify the new FHSA provider of their ineligibility. The time for doing so will be the same (in most cases 30 days) but will start to run from when APRA advises the FHSA holder that their new FHSA has been opened. This will ensure that the tax and penalty consequences of ineligibility will be as similar as possible to what they would have been if the old FHSA provider had not become a declared ADI.

1.41 Given that the extent of the Government's deposit guarantee may change in the future, future payments may also be made by the liquidator of the declared ADI.

1.42 Accordingly, an amendment is made to allow the liquidator to pay those amounts into a new FHSA, even if the eligibility requirements are not met, in the same way as APRA will be allowed to.

1.43 The FHSA Act limits the ability of account providers to make payments from an FHSA and enforces those limits with criminal penalties. APRA has a right to reimbursement from the declared ADI for amounts it pays into a new FHSA provider under the scheme.

1.44 Accordingly, an amendment is made to ensure that the liquidator of an account provider is not prevented from paying APRA any monies it is entitled to as a result of becoming a substituted creditor under the financial claims scheme.

Reporting obligations

1.45 In relation to payments made under the scheme, APRA is required to give:

- an annual statement to account-holders or recipients about the amounts paid to, or applied for the benefit of, the account-holder or recipient in the previous financial year; and
- an annual report to the Commissioner about all amounts paid to, or applied for the benefit of, account-holders or recipients in the previous financial year.

1.46 APRA may require certain entities to give information relevant to preparing or giving those statements or reports or to comply with an obligation under a law relating to taxation.

Withholding obligations

1.47 The amendments to Part 2-5 of Schedule 1 to the TAA 1953 apply to payments made under the scheme.

1.48 The amendments ensure that the PAYG withholding provisions apply to payments made under the scheme:

- to meet (wholly or partly) an entitlement of an account-holder of an insolvent ADI; or
- to meet (wholly or partly) an entitlement in connection with a general insurance policy issued by an insolvent general insurance company,

in a corresponding way to the way in which the PAYG withholding provisions would apply to the payments if they were made by the ADI or general insurance company.

1.49 The amendments clarify the application of the PAYG withholding provisions to the meeting of an entitlement under the scheme. This will help to ensure that taxpayers do not have unanticipated tax liabilities on assessment which they may have difficulty paying.

Comparison of key features of new law and current law

New law	***Current law***
A payment under the scheme in respect of an ADI deposit or general insurance policy is treated as if the payment had been made by the ADI or general insurer.	The existing law may not treat payments under the scheme by APRA, where the rights assigned to the APRA scheme administrator are in respect of a policy for personal injury, loss of income, interest or trading stock, in the same way as the payments they replace.
A capital gain or capital loss arising from an entitlement under the scheme in relation to an ADI deposit or a general insurance policy is disregarded.	A right in relation to an ADI deposit or under a general insurance policy may be a CGT asset and may give rise to a capital gain or capital loss on disposal. The right to an entitlement under the scheme is a CGT asset. The satisfaction of that right due to a payment from the scheme will trigger a CGT event. The transfer of rights to APRA under the scheme will trigger a CGT event.
This measure will ensure there are no adverse taxation implications for holders of FMDs arising from the scheme where FMDs are held with failed ADIs. This measure covers the actions of both APRA and the liquidators of failed ADIs.	No equivalent.
This measure will ensure the appropriate treatment for tax purposes where payments in respect of an RSA held with a failed ADI are made to a new ADI. The measure also requires the paying entity under the scheme to be subject to certain reporting obligations. This measure covers the actions of both APRA and the liquidator of failed ADIs.	No equivalent.
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.	No equivalent.

New law	***Current law***
APRA is required to report all amounts paid to, or applied to the benefit of, account-holders and recipients under the scheme in a financial year in an annual statement to account-holders and recipients and in an annual report to the Commissioner.	No equivalent.
The PAYG withholding provisions apply to payments under the scheme in a corresponding way to the way in which the PAYG withholding provisions would have applied to the payment had it been made by an ADI or general insurance company.	The current law is unclear if the PAYG withholding provisions apply to payments made by APRA under the scheme.

Detailed explanation of new law

Capital gains tax

General deposits accounts in ADIs

1.50 New rules are inserted to specify the taxation treatment of the operation of the scheme for account-holders with insolvent ADIs.

1.51 There are two rights arising from the scheme in relation to ADI deposits to which the CGT rules can apply:

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

1.52 A new provision is inserted to provide that the income tax law is applied to a taxpayer if an amount is paid to the taxpayer under the scheme in the same way as if the amount was paid by the ADI under the terms and conditions of the agreement for keeping the account. ***[Schedule 1, item 20, section 253-5]***

1.53 Under the current law a capital gain or capital loss will be realised where there is a disposal of either of the rights arising from the scheme. The intention is that the scheme will not create any income tax consequences that would not arise if the scheme was not activated. A new section is inserted to disregard a capital gain or a capital loss a taxpayer makes because of the operation of the scheme. ***[Schedule 1, item 20, section 253-10]***

1.54 The existing law will apply to determine the CGT treatment of capital gains and capital losses in respect of the ADI deposit subsequent to the administration of the scheme and once the liquidation of the ADI is completed.

1.55 Where the scheme covers only part of an ADI deposit, a payment made under the scheme will result in a partial disposal of the ADI deposit. The CGT provisions in Division 112 of the ITAA 1997 modify the cost base of the remainder of a CGT asset where there is a partial disposal of the asset. Subsection 112-30(3) modifies the cost base with reference to the capital proceeds and the market value of the remainder of the asset. This could result in a capital gain or capital loss arising from the operation of the scheme, which is not intended.

1.56 A new section is inserted to specify 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. ***[Schedule 1, item 20, section 253-15]***

Example 1.1

A deposit holder has a deposit of $100,000 with an ADI. The scheme is activated for the ADI. Under the existing law if a payment of $20,000 is made by the scheme administrator, the cost base of the part of the deposit covered by the scheme is worked out using the formula in subsection 112-30(3). If the market value of the remaining $80,000, based on the market's expectation of the outcome of the liquidation of the ADI, is only $10,000 then the cost base of the amount covered by the scheme would be $66,666. That cost base is calculated as $100,000 × $20,000 / $20,000 + $10,000). A capital loss of $46,666 would arise from the operation of the scheme.

Under the existing law the cost base of the remainder of the deposit would be $33,334. This cost base would be used to determine whether a capital gain or capital loss arises for the taxpayer at the conclusion of the administration or liquidation of the ADI.

Under the new law, the cost base of the part of the deposit covered by the scheme will be equal to the payment, $20,000, and the cost base of the remainder of the deposit will be $80,000.

General insurance policies

1.57 New rules are inserted to specify the income tax treatment of scheme payments in respect of general insurance policies. Payments by the Administrator under the scheme in relation to a general insurance claim payable by a general insurer to a policy holder are to be treated for income tax purposes as if they were:

- paid directly by the general insurer to the claimant under the general insurance policy; and
- made under the terms and conditions of the general insurance policy to which the claim relates.

[Schedule 1, item 26, section 322-25]

1.58 Section 62ZZM of the Insurance Act provides that when an amount of a person's entitlement under the scheme in relation to a general insurance policy is met, the person is taken to have been paid the amount by the general insurer.

1.59 In order to ensure that the taxation laws apply to payments under the scheme in the same way as if the payments were made by the general insurer, the payments under the scheme must be described in such a way that they will have the same character as payments by the general insurer. Section 62ZZM is amended to treat the payment as being under the terms and conditions of the policy. ***[Schedule 1, item 32, section 62ZZM]***

1.60 An entitlement to receive a payment under the scheme is a right which is a CGT asset. The payment of an entitlement under the scheme triggers a CGT event as it is a disposal or other ending of the right to the entitlement. A new rule is inserted to disregard a capital gain or capital loss a taxpayer makes from the ending of an entitlement under the scheme in relation to an ADI deposit or a general insurance policy. This ensures that the operation of the scheme does not give rise to any capital gain or capital loss that would not arise if the scheme has not been activated. ***[Schedule 1, item 26, section 322-30]***

1.61 Notes are included in a number of provisions of the existing law to provide cross referencing to the new provisions inserted. Also, a reference to a new cost base modification provision is added to the finding table in section 112-97 of the ITAA 1997 for the cost base modification rules outside the CGT provisions. ***[Schedule 1, items 17 to 19, subsections 104-10(5) and 104-25(5) and section 112-97]***

Farm management deposits

Eligible taxpayers

1.62 These amendments apply when an entitlement under Division 2AA of Part II of the Banking Act in connection with an account containing an FMD is met, wholly or partly, by the making of a new deposit at a new ADI. They also apply in the case of liquidation, the liquidator making a new deposit for the taxpayer. ***[Schedule 1, item 15, subsection 393-80(1) in Schedule 2G to the ITAA 1936]***

1.63 In cases where amounts paid into a new account at an ADI can be attributed to multiple FMDs an allocation rule will be needed. Where the entitlement is met via instalments:

- If the entitlement only relates to one FMD, then 100 per cent of the instalment should be attributed to that FMD.
- If the entitlement relates to multiple FMDs, then each instalment should be apportioned based on each FMDs respective proportions of the total amount held in the original account(s). That is if an FMD is 10 per cent of the account(s)' total, then 10 per cent of the instalment should be attributed to that FMD. If a different FMD is 30 per cent of the account(s)' total, then 30 per cent of the instalment should be attributed to that FMD.
- The same rules apply when that entitlement is met by a single payment but relates to multiple FMDs.

[Schedule 1, item 15, subsection 393-80(1) in Schedule 2G to the ITAA 1936]

Example 1.2

A taxpayer has an account containing two FMDs worth a total of $100,000. The first FMD was deposited three years ago worth $10,000. The second FMD was deposited six months ago worth $90,000. As such, the first FMD is worth 10 per cent of the account and the second FMD is worth 90 per cent.

APRA meets the taxpayer's entitlement via instalments. The first instalment is $30,000 and the second is $70,000.

When the $30,000 is paid into a new account, the taxpayer must apportion the $30,000 between the two FMDs. The first FMD was 10 per cent of the old account and therefore 10 per cent of the new payment should be attributed to that FMD (ie, $3,000). Similarly, the second FMD should have 90 per cent of the instalment attributed to it (ie, $27,000).

When the $70,000 is paid into a new account, the taxpayer must apportion the $70,000 between the two FMDs. The first FMD was 10 per cent of the old account and therefore 10 per cent of the new payment should be attributed to that FMD (ie, $7,000). Similarly, the second FMD should have 90 per cent of the instalment attributed to it (ie, $63,000).

Tax treatment of actions taken by APRA or a liquidator

1.64 When the actions of APRA or a liquidator result in a new deposit, this is treated as satisfying the requirements for the transfer of deposits between financial institutions, set out in subsection 393-40(5) of Schedule 2G to the ITAA 1936. The effects of this are:

- the applicable depositing day for the old FMD is maintained under paragraph 393-37(7)(c) or (d) of Schedule 2G to the ITAA 1936 for the new deposit (which affects whether a withdrawal of the new deposit prevents it from being an FMD);
- the new deposit is not regarded as a repayment of the old FMD that may give rise to assessable income (see subsection 393-50(5) of Schedule 2G to the ITAA 1936); and
- the new deposit is not regarded as the making of a new FMD that may give rise to a deduction (see subsection 393-50(5) of Schedule 2G to the ITAA 1936).

[Schedule 1, item 15, subsection 393-80(2) in Schedule 2G to the ITAA 1936]

Example 1.3

A taxpayer made a $10,000 deposit into an FMD on 1 July 2001 and a $10,000 deduction is claimed in the taxpayer's tax return for the 2001-02 income year.

On 28 June 2009 the ADI which holds the FMD is declared to be covered by the scheme and the taxpayer is entitled to receive a new FMD at a new ADI. This entitlement is met by establishing a new FMD of $10,000 at a new ADI on 1 July 2009.

The creation of the new deposit at the new ADI will be treated as a transfer of the old deposit rather than a withdrawal and making of another deposit. As such, the FMD is not considered to have been withdrawn and no amount is included in assessable income in 2009-10. Furthermore, the new deposit will not allow a deduction for the taxpayer in the 2009-10 income year.

The applicable depositing day will remain 1 July 2001 to allow the taxpayer to withdraw the FMD without being considered to have withdrawn the FMD within 12 months of deposit.

1.65 The new deposit cannot lose its status as an FMD even if it is less than $1,000 (despite subsection 393-45(1) of Schedule 2G to the ITAA 1936 which outlines that an FMD can lose its status if the deposit is less than $1,000). This ensures that taxpayers are not disadvantaged if the new deposit can only be $1,000 or less due to the functioning of the scheme. ***[Schedule 1, item 15, subsection 393-80(3) in Schedule 2G to the ITAA 1936]***

Example 1.4

A taxpayer made a $10,000 deposit into an FMD on 1 July 2001 and a $10,000 deduction is claimed in the taxpayer's tax return for the 2001-02 income year. On 28 June 2009 the ADI is declared to be covered by the scheme. As such, the taxpayer has an entitlement under the scheme to receive a new FMD at a new ADI. This entitlement is met via two payments: $900 on 29 June 2009 and the residual $9,100 on 1 January 2010.

This amendment ensures that the new deposit created on 29 June 2009 cannot lose its status as an FMD despite the deposit being less than $1,000.

1.66 Amendments are also made to ensure that the old FMD and the new deposit do not lose their status as FMDs because they are held with more than one financial institution. Furthermore, any new FMDs made between the time the entitlement arises and the first time a new deposit is made by APRA to meet that entitlement will not lose their status as an FMD. ***[Schedule 1, item 15, subsection 393-80(4) in Schedule 2G to the ITAA 1936]***

Unrecouped FMD deduction for new deposit less than old FMD

1.67 When an FMD is withdrawn in a year of income, the owner is required to include as assessable income, any amount that equals the deductible amount previously allowed. The amount assessable is limited to the amount previously deductible by the use of the unrecouped FMD deduction.

1.68 The unrecouped FMD deduction will generally be that part of the deposit for which a deduction has been claimed but which has yet to be included in assessable income on repayment. If the FMD contains both deductible and non-deductible deposits, withdrawals are considered to have been made from the non-deductible part first.

1.69 If the new deposit is less than the old FMD at the time (the declaration time) the old ADI became a declared ADI under the

Banking Act, the unrecouped FMD deduction in respect of the new deposit is the amount worked out using the formula:

$$\begin{array}{c}\text{Unrecouped FMD deduction} \\ \text{in respect of old FMD} \\ \text{just before declaration time}\end{array} \times \frac{\text{New deposit}}{\begin{array}{c}\text{Old FMD just before} \\ \text{declaration time}\end{array}}$$

Example 1.5

A taxpayer made a $10,000 deposit into an FMD on 1 July 2001 and a $10,000 deduction is claimed in the taxpayer's tax return for the 2001-02 income year. As such, the unrecouped FMD deduction for that deposit is $10,000. On 28 June 2009 the ADI is declared to be covered by the scheme and the taxpayer has an entitlement under the scheme to receive a new FMD at a new ADI. This entitlement is met via two payments: $900 on 29 June 2009 and the residual $9,100 on 1 January 2010.

This amendment provides a way of attributing the unrecouped FMD deduction to each of the new deposits. Using the formula in relation to the first instalment of $900 yields an unrecouped FMD deduction of $900.

$$\$10{,}000 \times \frac{\$900}{\$10{,}000} = \$900$$

Similarly for the second instalment, the unrecouped FMD deduction will be $9,100.

$$\$10{,}000 \times \frac{\$9{,}100}{\$10{,}000} = \$9{,}100$$

[Schedule 1, item 15, subsection 393-80(6) in Schedule 2G to the ITAA 1936]

1.70 However, the total of the unrecouped FMD deduction attributable to the new deposits can not be greater than the original unrecouped FMD deduction. Therefore the taxpayer must work out the total unrecouped FMD deduction attributed to new deposits in relation to that old FMD.

1.71 To work out the unrecouped FMD deduction the following process must be followed. First the difference between the unrecouped FMD deduction just before declaration time and the total of the amounts worked out under all previous applications of the above formula in relation to that old FMD must be calculated.

1.72 If the unrecouped FMD deduction as calculated using the above formula for that instalment is greater than the difference calculated in paragraph 1.71, then the difference (if any) will be the unrecouped FMD deduction. ***[Schedule 1, item 15, subsection 393-80(7) in Schedule 2G to the ITAA 1936]***

Example 1.6

A taxpayer has an FMD in an account worth $100,000. The unrecouped FMD deduction attributable to that FMD is $100,000. An entitlement arises under the scheme to receive $100,000 and APRA meets the taxpayer's entitlement via three instalments: $70,000, $25,000 and $10,000 (while greater than $100,000, the excess may be interest that has not been received by the taxpayer prior to the ADI failing). The apportionment rule should work as follows:

For the first instalment, the calculation yields the following unrecouped FMD deduction for that new deposit:

$$\$100{,}000 \times \frac{\$70{,}000}{\$100{,}000} = \$70{,}000$$

- The unrecouped FMD deduction just before declaration time was $100,000. The total of the amounts worked out under all previous applications of this formula in relation to that old FMD is zero as its never been used before. Therefore the difference between the two is $100,000.
- The value of the unrecouped FMD deduction calculation is $70,000. As this is less than the original $100,000 unrecouped FMD deduction, the $70,000 can be attributed to the new deposit.

For the second instalment, the calculation yields the following unrecouped FMD deduction for that new deposit:

$$\$100{,}000 \times \frac{\$25{,}000}{\$100{,}000} = \$25{,}000$$

- The unrecouped FMD deduction just before declaration time was $100,000. The total of the amounts worked out under all previous applications of this formula in relation to that old FMD is $70,000 ($70,000 from the first instalment). The difference between the two is $30,000.
- As the amount calculated by the formula is less than $30,000, the whole $25,000 can be attributed to the second deposit as the unrecouped FMD deduction.

For the third instalment, the calculation yields the following unrecouped FMD deduction for that new deposit:

$$\$100{,}000 \times \frac{\$10{,}000}{\$100{,}000} = \$10{,}000$$

- The unrecouped FMD deduction just before declaration time was $100,000. The total of the amounts worked out under all previous applications of this formula in relation to that old FMD is $95,000 ($70,000 + $25,000). The difference between the two is $5,000.

- The amount calculated by the formula above is $25,000. The difference between the unrecouped FMD deduction just before declaration time and the total of the amounts worked out under all previous applications of the above formula in relation to that old FMD is $5,000. As the $25,000 is greater than $5,000, the $5,000 is the unrecouped FMD deduction in relation to that deposit.

Repayment if the owner of an FMD with an insolvent ADI is bankrupt, dies or ceases to be a primary producer

1.73 An FMD must be repaid if the owner dies, becomes bankrupt or ceases to be a primary producer for at least 120 days (subsection 393-40(3) of Schedule 2G to the ITAA 1936). Furthermore, the FMD is deemed to be repaid in these circumstances even if the FMD is not withdrawn (subsection 393-15(4) of Schedule 2G to the ITAA 1936). This results in taxpayers being assessed on their FMDs even when they have taken no action to withdraw the money.

1.74 To ensure that the taxpayer is not assessed on an unpaid FMD under the scheme, amendments are made to ensure that the taxpayer is not deemed to have repaid their FMD in the case of death, bankruptcy or ceasing to be a primary producer for 120 days for that part of the FMD which has not been paid by APRA or the liquidator. ***[Schedule 1, item 15, section 393-85 of Schedule 2G to the ITAA 1936]***

Example 1.7

A taxpayer made a $10,000 deposit into an FMD on 1 July 2001 and a $10,000 deduction is claimed in the taxpayer's tax return for the 2001-02 income year. On 30 June 2009 the taxpayer has ceased being a primary producer for 120 days and therefore the $10,000 should be included in assessable income for that year (the 2008-09 income year).

However, on 28 June 2009 the ADI is declared to be covered by the scheme. As such, the taxpayer has an entitlement under the scheme to receive a new FMD at a new ADI. This entitlement is met by establishing a new FMD of $10,000 at a new ADI on 1 July 2009. As such the taxpayer will have an unmet entitlement of $10,000 at the end of the 2008-09 income year.

This amendment ensures that the taxpayer is not assessed on the $10,000 in the 2008-09 income year.

1.75 This amendment only applies to that proportion of the old FMD to which an unmet entitlement with APRA or unmet claim against the ADI (in the case where the claim is against the winding up of an ADI) applies. ***[Schedule 1, item 15, section 393-85 of Schedule 2G to the ITAA 1936]***

Retirement savings accounts

1.76 Division 306 of the ITAA 1997 sets out the tax treatment of payments made from one superannuation plan to another superannuation plan, and of similar payments. It includes a definition of 'roll-over superannuation benefit'. Division 307 defines concepts such as 'superannuation benefit', 'superannuation lump sum', and the 'tax-free component' and 'taxable component' of such benefits.

1.77 Amendments to Division 306 provide the treatment, for tax purposes, of a payment of an entitlement arising under the scheme, or a distribution by a liquidator of a failed ADI declared under the scheme, where the payment or distribution is in respect of an individual who held an RSA with a failed ADI, and is made to another RSA. ***[Schedule 1, item 21, subsection 306-25(1)]***

1.78 Part 3-30 of the ITAA 1997 applies to the payer of the entitlement or the liquidator as if they were the failed ADI. Consequently, a payment or distribution is treated as if it were a superannuation member benefit and a superannuation lump sum. The payment or distribution will be treated as a roll-over superannuation benefit where it is paid from the original RSA to the new RSA.

1.79 The paying entity is also subject to the reporting obligations under Part 3-30 for the purposes of the payment. For example, the paying entity is required to report details of the amount effectively rolled-over to both the receiving ADI and the account-holder under Division 390 in Schedule 1 to the TAA 1953. The uniform administrative and criminal penalty regime for non-compliance prescribed in the TAA 1953 applies. ***[Schedule 1, item 21, subsection 306-25(2)]***

1.80 As part of its reporting obligations, the paying entity is required to report to the receiving ADI the value of the superannuation interest and the amount of the tax-free and taxable components of the interest. For an RSA in the accumulation phase, the value of the superannuation interest and the amount of each of those components are determined at the declaration time as defined in the Banking Act. For an RSA in the pension phase, these amounts are determined as at the time the income stream commenced with the failed ADI. ***[Schedule 1, item 21, subsections 306-25(3) and (4)]***

1.81 The operation of these amendments is not affected by other amendments dealing with the application of CGT to the failed ADI, and the treatment of entitlements relating to insolvent ADIs and general insurers. ***[Schedule 1, item 21, subsection 306-25(5)]***

First home saver accounts

Special provisions applying if financial claims scheme entitlements arise in relation to FHSAs

1.82 The amendments provide that the payment of a scheme entitlement into a new FHSA is treated as a transfer between FHSAs as described in paragraph 11(3)(a) of the FHSA Act, which stops a transfer from one FHSA provider to another FHSA provider from being eligible for the government contribution.

1.83 The effects of this include the contribution not being considered a personal FHSA contribution, not counting against the limit on contributions set by section 27 of the FHSA Act and not counting for working out the amount of a Government FHSA contribution for the person under section 38. ***[Schedule 1, item 9, subsection 128A(2) of the FHSA Act]***

1.84 The amendments provide that the eligibility rules in paragraphs 15(1)(e) and (f) of the FHSA Act are disregarded to ensure that the holding and closure of the old FHSA after the entitlement arises cannot prevent the person from meeting the FHSA eligibility requirements in relation to the new FHSA being established by APRA. ***[Schedule 1, item 9, subsection 128A(3) of the FHSA Act]***

1.85 The amendments provide an exemption from the criminal offence in subsection 19(1) of the FHSA Act that an FHSA provider might otherwise face for opening an FHSA for someone who has not applied in an approved form, quoted their TFN and stated that they meet the eligibility requirements for opening an account.

1.86 The FHSA provider has the onus of proving that the new exemption applies. This is appropriate because the information about the matter is peculiarly within the knowledge of the provider. The ATO would bear significant costs if it were required to obtain the information needed to negate the exemption, and the provisions are likely to be used only infrequently and where used the information is easily available to the provider. In addition, drafting the provisions in this way promotes simpler, clearer legislation.

1.87 The amendments ensure that APRA or the liquidator will not be prevented from meeting their obligations under the financial claims scheme to open a new account for the FHSA holder. ***[Schedule 1, item 9, subsection 128A(4) of the FHSA Act]***

1.88 The amendments cover the instances when an FHSA holder would have to give a notice that they do not satisfy the FHSA eligibility requirements, except that the old FHSA is in liquidation. Given it is uncertain when APRA or the liquidator will complete a transfer into a new FHSA, provision is made so that any tax or penalty consequences are merely deferred until a new account has been established in a new FHSA provider. ***[Schedule 1, item 8, subsection 128A(4) of the FHSA Act]***

1.89 The amendments provide that the person must give notice within 30 days after he or she is advised that a new FHSA has been opened in his or her name with a new FHSA provider. ***[Schedule 1, item 9, subsection 128A(5) of the FHSA Act]***

1.90 The amendments provide that APRA's right to be reimbursed out of money held in the declared ADI is not affected by the limits on payments out of FHSA accounts outlined in section 31 of the FHSA Act. ***[Schedule 1, item 9, subsection 128A(6) of the FHSA Act]***

Reporting obligations

1.91 In relation to payments made under the scheme (under Division 2AA of Part II of the Banking Act or Part VC of the Insurance Act), APRA is required to give both:

- an annual statement to an account-holder or recipient about the amounts paid to, or applied for the benefit of, the account-holder or recipient in the previous financial year; and

- a separate annual report to the Commissioner about all amounts paid to, or applied for the benefit of account-holders and all amounts paid to, or applied for the benefit of recipients in the previous financial year.

[Schedule 1, items 1 and 30, sections 16AHA of the Banking Act and 62ZZKA of the Insurance Act]

1.92 The term 'recipient' is used in the amendments to the Insurance Act rather than the term 'policyholder', because a third person can receive a payment under Division 3 of Part VC of the Insurance Act.

1.93 APRA is only required to provide the annual statement and report to the Commissioner in the situation where one or more amounts are paid to, or applied for the benefit of, one or more account-holders or one or more recipients in a financial year to meet (in whole or in part) the entitlements under the scheme. Therefore, if no payments are made under the scheme, APRA will not be required to give the statement or report. ***[Schedule 1, items 1 and 30, subsections 16AHA(1) of the Banking Act and 62ZZKA(1) of the Insurance Act]***

1.94 Current provisions in the Banking Act and the Insurance Act give APRA the power to delegate the functions and powers it has in regard to administering the scheme. In the situation where a delegate of APRA makes a payment under the scheme, APRA will need to provide the statement and report.

APRA to give information to account-holders and recipients

1.95 If a payment is made to an account-holder or recipient under the scheme, then APRA will be required to provide that account-holder or recipient with a statement that:

- is in the approved form;
- names the account-holder or recipient;
- states the account-holder's or recipient's TFN (if known to APRA);
- states the total of the amounts, and the total of the amounts withheld from the amounts, paid to the account-holder or recipient; and
- specifies the financial year to which the statement relates.

[Schedule 1, items 1 and 30, subsections 16AHA(2) of the Banking Act and 62ZZKA(2) of the Insurance Act]

1.96 The information provided in the statement given to an account-holder or recipient includes that account-holder's or recipient's TFN, if APRA knows it. As the TFN information is only quoted in the statement going to that TFN holder, it is not divulged or communicated to a third person within the meaning of section 8WB of Part III of the TAA 1953 (relating to penalties for divulging or communicating TFN information). Therefore, no offence is committed.

1.97 The annual statement must be provided to the account-holder or recipient within 14 days after the end of the financial year in which the amounts are paid. ***[Schedule 1, items 1 and 30, subsections 16AHA(2) of the Banking Act and 62ZZKA(2) of the Insurance Act]***

1.98 The requirement for APRA to provide the statement within 14 days after the end of the financial year is so that account-holders and recipients can use the information provided in the statement to help calculate their end of year tax position, which will therefore assist them in complying with their taxation obligations.

1.99 The approved form rules in Division 388 in Schedule 1 to the TAA 1953 apply to the requirements to provide those statements as if the requirements were taxation laws. This ensures that the approved form rules apply to the statements APRA must provide without having to reproduce those rules in full. ***[Schedule 1, items 1 and 30, subsections 16AHA(4) and (5) of the Banking Act and 62ZZKA(4) and (5) of the Insurance Act]***

1.100 An 'approved form' is a form approved by the Commissioner that contains the information the Commissioner requires and is provided in the manner the Commissioner requires.

APRA to give information to the Commissioner

1.101 If a payment is made to an account-holder or to a recipient under the scheme, then as well as making a statement to the account-holder or recipient, APRA will also be required to give the Commissioner a report in the approved form about all amounts paid to the account-holders or recipients. ***[Schedule 1, items 1 and 30, subsection 16AHA(3) of the Banking Act and 62ZZKA(3) of the Insurance Act]***

1.102 APRA is required to provide the report to the Commissioner within four months after the end of the financial year, in which the payments are made. ***[Schedule 1, items 1 and 30, subsection 16AHA(3) of the Banking Act and 62ZZKA(3) of the Insurance Act]***

1.103 As the law currently stands, investment bodies, such as ADIs, are required by Regulation 56 of the *Income Tax Regulations 1936* to give the Commissioner a written report (an annual investment income report) regarding all payments (and the details of those payments) made to investors in a financial year. The report that is required to be given to the Commissioner includes TFN information of the investor where the investor has quoted that information to the investment body. As APRA, being the administrator of the scheme, will be making payments in regard to certain failed ADIs, it is appropriate that APRA provide information, such as TFN information to the Commissioner that would have otherwise been provided by the ADI.

1.104 Providing TFN information to the Commissioner assists the ATO with compliance and data matching activities.

Purposes for which information can be obtained

1.105 The Banking Act is amended to allow APRA, by written notice, to require a certain entity to give a specified person specified information about an account-holder relevant to preparing or giving a statement or report required by section 16AHA and relevant to complying with an obligation under a law relating to taxation. ***[Schedule 1, item 3, paragraphs 16AK(4)(ea) and (eb) of the Banking Act]***

1.106 A 'certain entity' that APRA may require to give information includes:

- an ADI (whether or not it is a declared ADI);
- an administrator appointed to take control of an ADI's business; or
- a liquidator (including a provisional liquidator) appointed in connection with the winding up, or proposed winding up, of an ADI.

1.107 Offence and civil penalty provisions in the Banking Act apply to an entity mentioned in paragraph 1.106, if the entity fails to give the specified information to the specified person in the written request provided by APRA.

1.108 The Insurance Act is amended to allow APRA, by written notice, to require a certain entity to give a specified person specified information relevant to preparing or giving a statement or report required by section 62ZZKA and relevant to complying with an obligation under a law relating to taxation. ***[Schedule 1, item 33, paragraphs 62ZZP(4)(da) and (db) of the Insurance Act]***

1.109 A 'certain entity' that APRA may require to give information includes:

- a general insurer (whether or not it is a declared general insurer); or
- a liquidator (including a provisional liquidator) appointed in connection with the winding up, or proposed winding up, of a general insurer.

1.110 Offence and civil penalty provisions in the Insurance Act apply to an entity mentioned in paragraph 1.109, if the entity fails to give the specified information to the specified person in the written request provided by APRA.

Withholding obligations

1.111 The TAA 1953 is amended to ensure that the PAYG withholding provisions apply to payments made to meet an entitlement under the scheme in a way corresponding to the way that the PAYG withholding provisions would have applied if the payment was made by an ADI or general insurance company. ***[Schedule 1, item 34, section 21-1 of Schedule 1 to the TAA 1953]***

1.112 Therefore, APRA, as the administrator of the scheme, will be required to withhold amounts from payments made under the scheme and then report and remit these amounts to the Commissioner.

1.113 The terms 'general insurance policy' and 'general insurance company' are defined terms for the purposes of the TAA 1953 and are used in the amendments instead of the terms 'protected policy' and 'general insurer', that are used in the provisions relating to the scheme in the Insurance Act ('protected policy' and 'general insurer' are not defined terms for the purposes of the TAA 1953).

1.114 The use of the terms 'general insurance policy' and 'general insurance company' cover, for the purposes of the amendments, the same scope as the terms 'protected policy' and 'general insurer', because the amendments apply to specific payments made by a general insurance company under the scheme.

1.115 The amendments apply if an entity's entitlement under:

- Division 2AA of Part II of the Banking Act to be paid an amount by APRA in connection with the entity's account with an ADI; or

- Part VC of the Insurance Act, to be paid an amount in connection with a general insurance policy issued by a general insurance company,

is met wholly or partly. ***[Schedule 1, item 34, subsection 21-5(1) of Schedule 1 to the TAA 1953]***

1.116 Therefore, the entitlements do not necessarily have to be met by APRA for the amendments to apply.

1.117 Division 2AA of Part II of the Banking Act entitles account-holders that have certain accounts with certain ADIs to be paid amounts by APRA worked out by reference to the balance of those accounts.

1.118 Part VC of the Insurance Act entitles policyholders and other persons to be paid amounts by APRA in relation to certain policies with an insolvent general insurer.

1.119 Part 2-5 in Schedule 1 to the TAA 1953 (the PAYG withholding provisions) applies in relation to APRA and the meeting of the entitlement in a corresponding way to the way in which it would have applied in relation to the ADI or general insurance company doing, in connection with the account or policy, whatever was done in meeting the entitlement. ***[Schedule 1, item 34, subsection 21-5(2) of Schedule 1 to the TAA 1953]***

1.120 This means that APRA needs to take steps corresponding to those an ADI or general insurance company would have taken, when an entitlement is met under the scheme.

1.121 The reason payments are treated in a 'corresponding way' to the way those payments would be treated if paid by an ADI or general insurance company, is because payments made under the scheme will not be made by an ADI or general insurance company and therefore will not strictly be of an identical nature.

1.122 The phrase 'whatever was done in meeting the entitlement' simply refers to how the entitlement was met and usually this would be a payment. Therefore, in relation to the PAYG withholding provisions, the same outcome should result in relation to APRA and the meeting of the entitlement under the scheme as would have resulted if the ADI had made the payments to the account-holder.

1.123 Current provisions in the Banking Act and the Insurance Act give APRA the power to delegate the functions and powers it has in regard to administering the scheme.

1.124 In the case where a delegate makes a payment to meet an entitlement under the scheme, the PAYG withholding provisions will apply in relation to APRA and the meeting of the entitlement by the delegate in a corresponding way to the way in which the PAYG withholding provisions would apply to an ADI if they made that payment.

Example 1.8

> The PAYG withhold provisions require ADIs to withhold amounts on certain payments, such as when interest is paid to an account-holder and the account-holder has failed to quote their TFN.
>
> In the situation where APRA, as the administrator of the scheme, makes a payment to meet the entitlement of an eligible account-holder of a failed ADI, then that payment will be treated, for PAYG

withholding purposes, in a corresponding way to the way the payment would have been treated if it were made by the ADI.

Once APRA withholds an amount from the payment made to the eligible account-holder, APRA will need to remit and report the withheld amount to the Commissioner in line with the PAYG withholding provisions.

Application and transitional provisions

1.125 The amendments to disregard capital gains or capital losses in respect of ADI deposits or general insurance policies apply to CGT events after 17 October 2008, after the commencement of the scheme. This ensures that the CGT rules can apply immediately if the scheme is activated. ***[Schedule 1, items 27 and 29]***

1.126 The amendments to the FMD provisions apply to assessments for the year of income including 18 October 2008 and later income years. This aligns the application date for the tax treatment of the payments with the commencement of the scheme. The retrospective commencement will ensure no taxpayer is adversely affected should an ADI be declared before Royal Assent. ***[Schedule 1, item 16]***

1.127 The amendments relating to RSAs apply in relation to entitlements arising under the scheme after 17 October 2008. This aligns the application date for the tax treatment of the payments with the commencement of the scheme. ***[Schedule 1, subitem 22(1)]***

1.128 The amendments to impose the RSA reporting obligations under Division 390 of Schedule 1 to the TAA 1953 on APRA (or other paying entities) apply from the date of commencement of this measure. ***[Schedule 1, subitem 22(2)]***

1.129 The amendments relating to FHSAs apply in relation to entitlements arising under the scheme after 17 October 2008. This aligns the application date for the tax treatment of the payments with the commencement of the scheme. The retrospective commencement will ensure no taxpayer is adversely affected should an ADI be declared before Royal Assent. ***[Schedule 1, item 10]***

1.130 The amendments to the Banking Act and the Insurance Act that impose annual reporting obligations on APRA apply in relation to amounts paid or applied before, on or after the commencement of those amendments. ***[Schedule 1, items 2 and 31]***

1.131 As the amendments will require APRA to give an annual statement to an account-holder or recipient, or a report to the Commissioner after the end of a financial year about payments made during the financial year, the amendments need to apply to payments that may be made prior to the commencement of the amendments. Therefore, as long as the reporting obligations commence before the end of the 2008-09 financial year, then the reporting obligations will apply with respect to any payments made under the scheme during the 2008-09 financial year. (Note that the main scheme legislation received Royal Assent on 17 October 2008.)

1.132 The amendments to Part 2-5 of Schedule 1 to the TAA 1953 apply in relation to things done before, on or after the commencement of the amendments to meet entitlements arising after 17 October 2008 under the scheme. ***[Schedule 1, subitem 35(1)]***

1.133 The amendments ensure that (as required under Part 2-5 of Schedule 1 to the TAA 1953), APRA will include in its annual statements to account-holders, recipients and the Commissioner, withholding payments made under the scheme after 17 October 2008.

1.134 However, APRA is not required to comply with the PAYG withholding provisions before the commencement of amendments and therefore the amendments do not make APRA liable to a criminal or administrative penalty for an omission occurring before the commencement of the application provision. ***[Schedule 1, subitem 35(2)]***

Consequential amendments

Farm management deposits

1.135 Notes are inserted at the end of subsections 393-15(3) and (4) of Schedule 2G to the ITAA 1936 to indicate the amendments in this Bill interact with the core FMD provisions in section 393-15 of Schedule 2G to the ITAA 1936. ***[Schedule 1, items 11 and 12, subsections 393-15(3) and (4) of Schedule 2G to the ITAA 1936]***

1.136 Amendments are made to the definition of 'ADI' in section 393-25 of Schedule 2G to the ITAA 1936 to accommodate the required amendments needed for the scheme. ***[Schedule 1, items 12 and 13, section 393-25 of Schedule 2G to the ITAA 1936]***

Chapter 2
Increase access to the small business capital gains tax concessions

Outline of chapter

2.1 Schedule 2 to this Bill amends the law to increase access to the small business capital gains tax (CGT) concessions for taxpayers owning a CGT asset used in a business by an affiliate or entity connected with the taxpayer and for partners owning a CGT asset used in the partnership business. This Schedule also makes a number of other minor amendments to clarify and refine elements of the small business CGT concessions.

Context of amendments

2.2 The small business CGT concessions were introduced to provide small business operators with access to additional funds for retirement or to grow their businesses. The concessions are the:

- 15-year exemption;
- retirement exemption;
- active assets 50 per cent reduction; and
- small business roll-over.

2.3 *Tax Laws Amendment (Small Business) Act 2007* (Small Business Act) introduced a single definition of a small business entity, which replaced various threshold eligibility tests for accessing the range of small business concessions, including the CGT concessions. The single definition was introduced to simplify and standardise the various small business concessions.

2.4 In broad terms, a small business entity has to carry on a business and its yearly aggregated turnover has to be less than $2 million. The Small Business Act retained the existing alternative eligibility criteria for accessing the small business CGT concessions for entities that do not meet the new small business entity test but increased the maximum net asset value threshold from $5 million to $6 million.

Entities holding passive assets

2.5 The introduction of the $2 million small business turnover test and the retention of the $6 million net asset value test resulted in a difference between how the two tests treat businesses with passive asset structures (ie, where one entity owns a CGT asset and an affiliate or an entity connected with the asset-owning entity uses the asset in its business).

2.6 Owners of passively held CGT assets used in the business of an affiliate or an entity connected with the asset-owning entity can access the small business CGT concessions via the $6 million maximum net asset value test in some circumstances. However, they do not have access to the small business entity test ($2 million turnover test) because they typically do not meet the requirement of carrying on a business.

Partners in a partnership

2.7 A partner can access the small business CGT concessions via the aggregated turnover test only if the partnership is a small business entity and the relevant CGT asset is an 'asset of the partnership'. An asset of the partnership is an asset that is owned by the partners in accordance with their fractional interest in the partnership or in accordance with their respective interests as specified in the partnership agreement.

2.8 In some circumstances, an individual partner (or partners) owns an asset directly and makes the asset available for general use in the partnership. Under the current rules, this asset is not an asset of the partnership, as the partner (or partners) owns the asset. The partner is not able to access the small business CGT concessions for that asset via the aggregated turnover test but may be able to access the concessions via the maximum net asset value test.

Summary of new law

2.9 The amendments allow a taxpayer owning a CGT asset that is used in a business by the taxpayer's affiliate, or an entity connected with the taxpayer, to access the small business CGT concessions via the $2 million aggregated turnover test (small business entity test).

2.10 The amendments also allow partners who own a CGT asset that is used in a partnership business to access the small business CGT concessions via the $2 million aggregated turnover test where the CGT asset is not an 'asset of the partnership'.

2.11 Schedule 2 also makes a number of other amendments to refine and clarify aspects of the existing small business CGT concessions provisions. These are summarised in the comparison of new and current law in the table below.

Comparison of key features of new law and current law

New law	***Current law***
Taxpayers that do not carry on a business but own a CGT asset that is used in a business by the taxpayer's affiliate or an entity connected with the taxpayer are able to access the small business CGT concessions via the small business entity test.	Taxpayers that do not carry on a business but own a CGT asset that is used in a business by the taxpayer's affiliate or an entity connected with the taxpayer are not able to access the small business CGT concessions via the small business entity test.
The spouse or child (under 18 years of age) of an individual is taken to be an affiliate of the individual in a wider range of circumstances and for a wider range of purposes.	The spouse or child (under 18 years of age) of an individual is taken to be an affiliate of the individual in a narrow range of circumstances and for a particular purpose.
An individual partner (or partners) in a partnership is able to access the small business CGT concessions via the small business entity test where the asset is owned by the partner, but used in the partnership.	An individual partner (or partners) in a partnership can access the small business CGT concessions via the small business entity test only if the relevant CGT asset is an 'asset of the partnership'.
The small business CGT concessions are technically workable for partners in a partnership that are seeking relief via the small business entity test, as the relevant CGT asset is a partner's interest in an 'asset of the partnership'.	The small business CGT concessions are technically unworkable for partners in a partnership that are seeking relief via the small business entity test, as a partner's interest in a CGT asset of the partnership is not an 'asset of the partnership'.
Small business owners are allowed to include liabilities in the net asset value test where those liabilities relate to disregarded interests in an entity connected with the taxpayer that are disregarded to avoid double counting.	Liabilities are disregarded from the calculation of net asset value where the liabilities are related to interests in an entity connected with the taxpayer that have already been disregarded from the calculation to avoid double counting.

New law	***Current law***
Where an asset is used in an entity that is neither an affiliate of, nor connected with, the taxpayer owning the asset, all the uses of the asset (except for certain personal use and certain uses from which interest, annuity, rent, royalty or foreign exchange gains are derived) are considered in determining what its main use is and, therefore, whether it is an active asset.	An asset that has a predominant rental use and a minor business use may 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.
Capital gains made on assets acquired on the death of a joint tenant (or 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 small business CGT concessions and the surviving joint tenant (or trustee) does not continue carrying on the business, are eligible for the small business CGT concessions.	Capital gains made on assets acquired on the death of a joint tenant (or 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 small business CGT concessions and the surviving joint tenant (or trustee) does not continue carrying on the business, are not eligible for the small business CGT concessions.
The small business CGT retirement exemption applies appropriately to capital proceeds received by individuals in instalments.	There is no provision in the small business CGT retirement exemption to cater for an individual receiving capital proceeds in instalments.
Small business operators do not need to satisfy the basic conditions for the small business CGT retirement exemption if the capital gain arises from CGT event J5 or J6.	The small business CGT retirement exemption is not available for CGT events J5 and J6 as taxpayers cannot satisfy the basic conditions for accessing the small business CGT concessions.
The small business CGT retirement exemption caters for CGT exempt payments flowing through small business structures involving interposed entities ultimately to a CGT concession stakeholder without adverse tax consequences.	The small business CGT retirement exemption does not cater for CGT exempt payments flowing through small business structures involving interposed entities ultimately to a CGT concession stakeholder.
Division 7A and section 109 of the *Income Tax Assessment Act 1936* (ITAA 1936) will not apply to payments made to CGT concession stakeholders to satisfy the retirement exemption conditions.	Division 7A and section 109 of the ITAA 1936 could apply to retirement exemption payments made by private companies or trusts to CGT concession stakeholders to treat such payments as dividends.

New law	*Current law*
A partner in a partnership is not a small business entity in their capacity as a partner. This rule applies to the small business concessions generally and not just to the CGT concessions.	The CGT provisions treat a partner in a partnership as carrying on a business. This creates uncertainty because a partner could argue that the business, for CGT purposes, is a small business entity where their aggregated turnover is less than $2 million.

Detailed explanation of new law

Partners and partnership assets — subsection 152-10(1) of the ITAA 1997

2.12 Individual partners make capital gains when a CGT event happens in relation to a partnership asset. Therefore individual partners must satisfy the basic conditions in subsection 152-10(1) of the *Income Tax Assessment Act 1997* (ITAA 1997) if seeking access to the small business CGT concessions. Although the small business CGT concessions apply to a partner's interest in a CGT asset of the partnership, the provision refers to the asset as 'an asset of the partnership'.

2.13 Therefore, on a strict reading, the current provisions are unworkable for partners in a partnership who are seeking relief via the small business entity test.

2.14 Schedule 2 amends subparagraph 152-10(1)(c)(iii) of the ITAA 1997 to refer to the partner's 'interest in an asset of the partnership', consistent with the references earlier in the subsection. The amendment will clarify this aspect of the law and align it with the intended operation of the provision. ***[Schedule 2, item 1, subparagraph 152-10(1)(c)(iii)]***

Treatment of passively held CGT assets

Use of CGT assets by affiliates or entities connected with the asset owner and the small business entity test

2.15 The basic eligibility conditions for the small business CGT concessions are specified in Division 152 of the ITAA 1997. Ignoring partnerships, a taxpayer with an active asset has to be either a small business entity or satisfy the maximum net asset value test to be eligible for the small business CGT concessions (subparagraphs 152-10(1)(c)(i) and (ii) of the ITAA 1997). Section 328-110 of the ITAA 1997 specifies the meaning of small business entity.

2.16 One of the existing conditions for accessing the small business CGT concessions via the small business entity test is that the entity that owns a CGT asset must also be a small business entity, which requires that entity to carry on a business (paragraph 152-10(1)(a), subparagraph 152-10(1)(c)(i) and paragraphs 328-110(1)(a) and (4)(a) of the ITAA 1997).

2.17 This condition means that a taxpayer who owns a CGT asset and who does not carry on a business cannot gain access to the small business CGT concessions via the small business entity test even if the asset is used in the business of an affiliate or an entity connected with the taxpayer that is a small business entity.

2.18 The amendments insert provisions to cover these arrangements so that a taxpayer who owns a CGT asset (and does not carry on a business other than as a partner in partnership) that is used in a business by the taxpayer's affiliate or an entity connected with the taxpayer is able to access the small business CGT concessions via the $2 million aggregated turnover test (small business entity test). ***[Schedule 2, item 2, subparagraph 152-10(1)(c)(iv); and item 4, subsection 152-10(1A)]***

2.19 This access to the small business CGT concessions via the small business entity test for a taxpayer who owns a CGT asset that is used in the business of an affiliate or an entity connected with the taxpayer occurs when the following conditions are satisfied:

- The taxpayer's affiliate, or an entity that is connected with the taxpayer, is a small business entity for the income year (ie, the income year in which the CGT event happens to the taxpayer's CGT asset).
- The taxpayer does not carry on a business in the income year other than in partnership.
- If the taxpayer carries on a business in partnership, the CGT asset is not an interest in an asset of the partnership.
- The small business entity that is the taxpayer's affiliate, or is connected with the taxpayer, is the entity that carries on the business referred to in subparagraph 152-40(1)(a)(ii) in its proposed new form, or new subparagraph 152-40(1)(a)(iii), or paragraph 152-40(1)(b) in its proposed new form in relation to the CGT asset.

[Schedule 2, item 4, subsection 152-10(1A)]

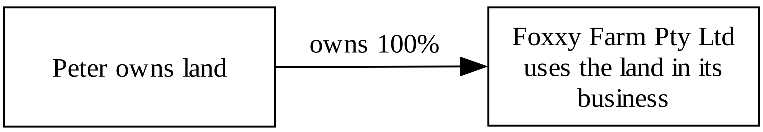
2.20 This access to the small business CGT concessions requires a taxpayer's affiliate or entity connected with the taxpayer to be a small business entity in the income year. The access also requires the small business entity to be the entity that carries on the business at a time in the income year referred to in subparagraph 152-40(1)(a)(ii) in its proposed new form, or new subparagraph 152-40(1)(a)(iii), or paragraph 152-40(1)(b) in its proposed new form in relation to the CGT asset. This link is necessary to prevent access to the concessions in a situation where a taxpayer's affiliate or entity connected with the taxpayer is a small business entity but the asset is used by an affiliate or entity connected with the taxpayer that is not a small business entity. ***[Schedule 2, item 4, paragraphs 152-10(1A)(a) and (d)]***

2.21 Where an asset-owning entity is seeking access to the small business CGT concessions via these amendments, the rules contained in section 328-115 of the 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. ***[Schedule 2, item 14, section 152-48]***

2.22 This access to the small business CGT concessions is only available where the taxpayer that 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 partnership. Taxpayers owning such CGT assets that also carry on a business other than in partnership would continue to determine their eligibility for the small business CGT concessions via the small business entity test under subparagraph 152-10(1)(c)(i) of the ITAA 1997. ***[Schedule 2, item 4, paragraph 152-10(1A)(b)]***

Example 2.9

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.

Use of CGT assets by partnerships

2.23 The CGT regime operates on the basis that a partner in a partnership carries on a business. The partner is considered to carry on the business of the partnership but collectively with the other partners. The changes to paragraphs 152-40(1)(a) and (b) of the ITAA 1997 make those paragraphs more explicitly consistent with this understanding of partners carrying on a business. However, a partner cannot be a small business entity (see paragraphs 2.109 to 2.114). ***[Schedule 2, item 8, paragraphs 152-40(1)(a) and (b)]***

2.24 The amendments 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 that are used in the business of the partnership but are not interests in assets of the partnership (ie, 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). ***[Schedule 2, item 4, subsection 152-10(1B)]***

2.25 Under the amendments, an individual partner (or partners) who owns a CGT asset that is not an interest in an asset of the partnership is able to access the small business CGT concessions via the small business entity test provided the asset is made available for use in the partnership. The access is available when the following conditions are satisfied:

- The taxpayer must be a partner in a partnership in the income year (ie, 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 must not carry on a business in an income year other than in partnership.
- The CGT asset is not an interest in an asset of the partnership.
- The business that the taxpayer carries on as a partner in the partnership referred to in new paragraph 152-10(1B)(e) is the business the taxpayer carries on referred to in subparagraph 152-40(1)(a)(i) or paragraph 152-40(1)(b) (in their proposed new form) in relation to the CGT asset.

[Schedule 2, item 4, subsection 152-10(1B)]

2.26 This access to the small business CGT concessions requires the taxpayer who owns the CGT asset to be a partner in a partnership in the income year that the CGT event happens and the partnership to be a small business entity in that year. ***[Schedule 2, item 4, paragraphs 152-10(1B)(a) and (b)]***

2.27 This access also requires the taxpayer not to carry on a business in the income year other than in partnership. If the taxpayer carried on a non-partnership business, they would continue to determine their eligibility for the small business CGT concessions via the small business entity test under subparagraph 152-10(1)(c)(i) of the ITAA 1997. ***[Schedule 2, item 4, paragraph 152-10(1B)(c)]***

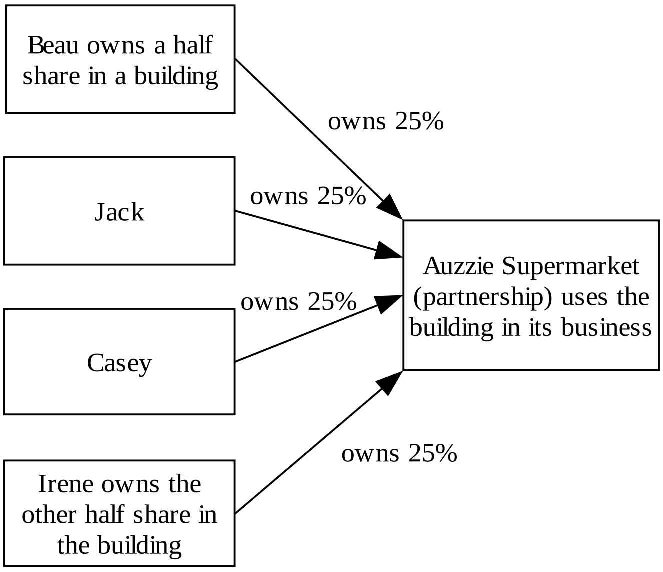
2.28 This access also requires that the taxpayer's asset is not an interest in an asset of the partnership. If the taxpayer's asset were an interest in an asset of the partnership, the taxpayer would continue to determine their eligibility for the small business CGT concessions via the small business entity test under subparagraph 152-10(1)(c)(iii) of the ITAA 1997. ***[Schedule 2, item 4, paragraph 152-10(1B)(d)]***

2.29 The business the taxpayer carries on in the partnership referred to in new paragraph 152-10(1B)(a) is required to be the business that the taxpayer at a time, in the income year, carries on in subparagraph 152-40(1)(a)(i) or paragraph 152-40(1)(b) (in their proposed new form) in relation to the CGT asset. This link is necessary to prevent access to the concessions in a situation where a taxpayer is a partner in a partnership that is a small business entity but the asset is used by another partnership in which the taxpayer is a partner that is not a small business entity. ***[Schedule 2, item 4, paragraph 152-10(1B)(e)]***

2.30 The partnership works out its aggregated turnover under the normal rules contained in section 328-115 of the ITAA 1997, but as those rules are modified by the new special rules for calculating aggregated turnover for passively held assets. ***[Schedule 2, item 14, section 152-48]***

Example 2.10

> Beau and Irene each own 50 per cent 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'.



Operation of current law

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 per cent of the supermarket building or the partnership agreement would have to specify what interest each partner owned in the building.

Operation of new law

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.

Spouses or children taken to be affiliates

2.31 Subsection 152-40(1A) of the ITAA 1997 currently provides a special active asset rule to treat a CGT asset as active where an individual taxpayer owns the asset and it is used in a business directly carried on by their spouse or child (under 18 years of age). However, this special rule does not treat a CGT asset as active where the taxpayer's spouse owns an entity that uses the CGT asset in its business.

2.32 Where a taxpayer owns a CGT asset and their spouse uses the CGT asset in a business operated by an entity wholly owned by the spouse, the CGT asset may still be an active asset if the entity that carries on the business is an affiliate of the taxpayer. However, it may be difficult in practice to establish that the entity that carries on the business is an affiliate of the taxpayer if there is no visible or direct business relationship between them.

2.33 The amendments repeal subsection 152-40(1A) and insert a rule that treats an individual's spouse or child (under 18 years of age) as an affiliate of the individual for the purposes of determining whether the individual or an entity in which the individual has an interest, or is a beneficiary of, is eligible for the small business CGT concessions where one entity owns a CGT asset and:

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

[Schedule 2, items 11 and 14, subsections 152-47(1) and (2)]

2.34 The rule applies only if the 'business' entity is not otherwise an affiliate of, or connected with, the asset-owning entity. This means that if the business entity is an affiliate of the asset-owning entity as a result of applying section 328-130 of the ITAA 1997, an individual's spouse or child (under 18 years of age) would not be treated as an affiliate of the individual. Similarly, if the business entity is already connected with the asset-owning entity via section 328-125 of the ITAA 1997, an individual's spouse or child (under 18 years of age) would not be treated as an affiliate of the individual. ***[Schedule 2, item 14, paragraph 152-47(1)(c)]***

2.35 The rule is applied in two stages. The first stage treats an individual's spouse or child (under 18 years of age) as their affiliate, for the purposes of Subdivision 152-A of the ITAA 1997, when determining whether the entity that uses the CGT asset, or holds it ready for use, in its business is an affiliate of, or is connected with, the entity that owns the CGT asset. ***[Schedule 2, item 14, subsection 152-47(2)]***

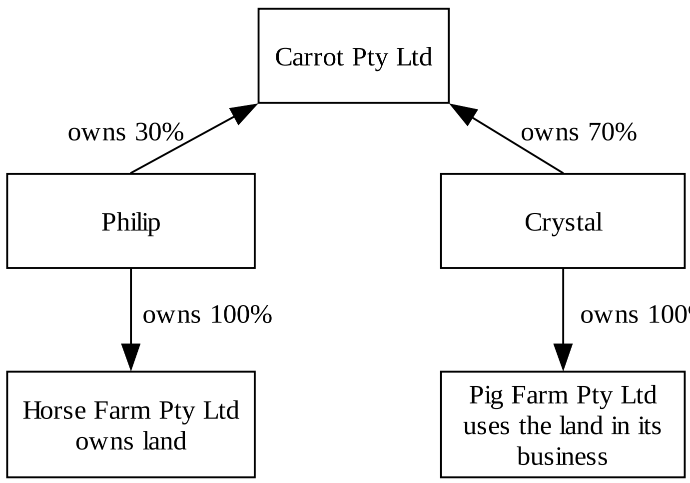
2.36 If the conditions of the first stage are met, the second stage will apply to treat the spouse or child (as the case may be) as an affiliate of the individual for the purposes of Subdivision 152-A of the ITAA 1997 and for the purposes of sections 328-110 to 328-125 of the ITAA 1997 to the extent that these sections relate to Subdivision 152-A. For example, if by the application of the first stage of the rule, the entity is taken to be an affiliate of, or an entity connected with, the entity that owns the asset, the asset is an active asset (subparagraph 152-40(1)(a)(ii) in its proposed new form, or new subparagraph 152-40(1)(a)(iii), or paragraph 152-40(1)(b) in its proposed new form). ***[Schedule 2, item 14, subsection 152-47(3)]***

2.37 The new affiliate rule affects access to the small business CGT concessions via the maximum net asset value test in addition to the small business entity test. Compared to the old rule (subsection 152-40(1A) of the ITAA 1997), the new rule increases access to the concessions by treating an individual's spouse or child (under 18 years of age) as their affiliate in a wider range of situations.

2.38 However, for the purposes of the maximum net asset value test, the new rule also reduces access to the concessions by potentially bringing in more affiliates and more entities that are connected with the asset-owning entity than the old rule.

Example 2.11

Philip owns 100 per cent of Horse Farm Pty Ltd. Horse Farm Pty Ltd owns land. Philip's spouse, Crystal, owns Pig Farm Pty Ltd. Pig Farm Pty Ltd uses the land to carry on a business. Philip owns 30 per cent and Crystal 70 per cent of Carrot Pty Ltd. Horse Farm Pty Ltd does not carry on a business.



Operation of current law

Prior to the amendments, Horse Farm Pty Ltd is not able to access the small business CGT concessions via the $2 million turnover test because Horse Farm Pty Ltd is not carrying on a business. The asset is instead being used in Pig Farm Pty Ltd's business.

Horse Farm Pty Ltd may be able to access the small business CGT concessions via the $6 million maximum net asset value test.

However, this will depend on the fulfilment of two necessary conditions:

- whether Pig Farm Pty Ltd is an affiliate of Horse Farm Pty Ltd (which would make the land an active asset); and
- whether Horse Farm Pty Ltd can satisfy the maximum net asset value test.

If Horse Farm Pty Ltd has a maximum net asset value greater than $6 million, it would not be able to access the small business CGT concessions.

In these circumstances, Pig Farm Pty Ltd would be an affiliate of Horse Farm Pty Ltd if Pig Farm Pty Ltd acts in concert with Horse Farm Pty Ltd in respect of Pig Farm Pty Ltd's business activities. This requirement may be difficult to demonstrate.

Operation of new law

If Pig Farm Pty Ltd is already an affiliate of Horse Farm Pty Ltd under section 328-130 of the ITAA 1997, the new affiliate rule would not apply.

Proceeding on the basis that Pig Farm Pty Ltd is not already an affiliate of, nor is connected with, Horse Farm Pty Ltd, the amendments treat Crystal as Philip's affiliate in determining whether Pig Farm Pty Ltd (the entity that uses the land in its business) is connected with Horse Farm Pty Ltd (the entity that owns the land). The new affiliate rule applies because one entity (Horse Farm Pty Ltd) owns a CGT asset that is used in the business of another entity (Pig Farm Pty Ltd).

Pig Farm Pty Ltd is connected with Horse Farm Pty Ltd because Philip controls Horse Farm Pty Ltd and Philip and his affiliate, Crystal, controls Pig Farm Pty Ltd.

This makes the land that Horse Farm Pty Ltd owns an active asset (new subparagraph 152-40(1)(a)(iii)). The land would also have to meet the requirements of the active asset test in section 152-35 of the ITAA 1997.

Therefore, Horse Farm Pty Ltd could access the small business CGT concessions if its maximum net asset value is not more than $6 million. Horse Farm Pty Ltd could also access the concessions if Pig Farm Pty Ltd's aggregated turnover is less than $2 million.

Because Crystal is treated as Philip's affiliate in determining whether Pig Farm Pty Ltd is an affiliate of, or connected with, Horse Farm Pty Ltd, Crystal is also treated as Philip's affiliate for testing whether Carrot Pty Ltd is connected with Horse Farm Pty Ltd. Carrot Pty Ltd is, therefore, connected with Horse Farm Pty Ltd because Philip controls Horse Farm Pty Ltd and Philip and his affiliate, Crystal, control Carrot Pty Ltd.

In seeking access to the small business CGT concessions via the maximum net asset value test, Horse Farm Pty Ltd would need to include the net assets of its affiliates and entities connected with it.

In seeking access to the small business CGT concessions via the small business entity test, Pig Farm Pty Ltd's aggregated turnover would include the annual turnovers of its affiliates and entities connected with it.

2.39 The application of the new affiliate rule is not limited to situations where an entity that owns a CGT asset and does not operate a business provides that asset to another entity for use in its business (the standard passively held asset). It also applies to situations 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.

2.40 Under the current law, an entity that operates a business and owns a CGT asset that is used in the business of another entity will not be able to access the small business CGT concessions via the small business entity test unless the other entity is an affiliate of, or connected with, the asset-owning entity.

2.41 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.

2.42 The new rule applies to these circumstances by treating the individual's spouse as their affiliate. As such, the two entities would be connected and the CGT asset would be an active asset (subsection 152-40(1) of the ITAA 1997). ***[Schedule 2, item 14, subsections 152-47(1) to (3)]***

2.43 The asset-owning entity may now be able to access the small business CGT concessions via the small business entity test if its aggregated turnover is less than $2 million. The asset-owning entity would calculate its aggregated turnover under the relevant provisions in Subdivision 328-C of the ITAA 1997 without any regard to the new special rule for calculating aggregated turnover inserted by these amendments. This is because the asset-owning entity carries on a business other than as a partner in a partnership and may be able to qualify as a small business entity under the normal rules depending on its aggregated turnover.

Example 2.12

Assume the same facts as in Example 2.3, except that Horse Farm Pty Ltd carries on a business other than as a partner in partnership.

Operation of current law

Horse Farm Pty Ltd may be able to access the small business CGT concessions via the small business entity test if Pig Farm Pty Ltd is an affiliate of Horse Farm Pty Ltd. In these circumstances, Horse Farm Pty Ltd's access would depend on its aggregated turnover.

Operation of new law

If Pig Farm Pty Ltd is already an affiliate of Horse Farm Pty Ltd under section 328-130 of the ITAA 1997, the new affiliate rule would not apply.

Proceeding on the basis that Pig Farm Pty Ltd is not already an affiliate of, nor is connected with, Horse Farm Pty Ltd, the new affiliate rule will apply to make Crystal an affiliate of Phillip. This is because one entity owns a CGT asset that is used in the business of another entity. Therefore, Horse Farm Pty Ltd is connected with Pig Farm Pty Ltd and the land is an active asset. Again, the land would also have to meet the requirements of the active asset test in section 152-35 of the ITAA 1997. Following the same reasoning as in Example 2.3, Carrot Pty Ltd is also connected with Horse Farm Pty Ltd.

Depending on Horse Farm Pty Ltd's aggregated turnover, it may be able to access the small business CGT concessions via the small business entity test. However, Horse Farm Pty Ltd will use the relevant provisions only in Subdivision 328-C of the ITAA 1997 to test whether it is a small business entity.

In particular, Horse Farm Pty Ltd will use section 328-115 of that Subdivision to calculate its aggregated turnover and will not need to apply the new special rule (new section 152-48) for calculating aggregated turnover that applies where the asset-owning entity is not carrying on a business (other than as a partner in partnership).

The application of the net assets test is as outlined in Example 2.3.

CGT assets to which the new affiliate rule applies

2.44 The rule treating an individual's spouse or child (under 18 years of age) as an affiliate of the individual applies in relation to any capital gain from any CGT asset owned by the individual, an affiliate of the individual or an entity connected with the individual. This means in Examples 2.3 and 2.4 that, if Crystal sells a CGT asset, the rule will treat Philip as Crystal's affiliate. ***[Schedule 2, item 14, paragraph 152-47(4)(a)]***

2.45 This means that the individual or entity faces the same set of aggregation rules for the purposes of the maximum net asset value test or the aggregated turnover test regardless of which CGT asset the individual is seeking to claim the small business CGT concessions for. However, the rule does not apply for the purposes of determining eligibility for the other small business concessions such as the concessional rules for fringe benefits tax and pay as you go instalments. ***[Schedule 2, item 14, paragraph 152-47(4)(a)]***

Example 2.13

> Assume the same facts as in Example 2.4 and Horse Farm Pty Ltd owns another parcel of land that it uses in its business. It sells this asset during the year and is testing its eligibility for the small business CGT concessions via the small business entity test. As it owns an asset that is being used in the business of an entity that is connected with it as a result of applying the new affiliate rule, Horse Farm Pty Ltd will bring in the turnovers of Pig Farm Pty Ltd and Carrot Pty Ltd in calculating its aggregated turnover using the relevant provisions in Subdivision 328-C of the ITAA 1997.

2.46 A spouse is only an affiliate of the taxpayer while they are still a spouse. Likewise, a child will only be an affiliate while the child is under 18 years. This caters for situations where an individual's circumstances change during the income year such as the ending of a spousal relationship. ***[Schedule 2, item 14, paragraph 152-47(4)(b)]***

Working out the taxpayer's aggregated turnover for the purposes of applying the small business CGT concessions to passively held CGT assets

2.47 The small business entity test includes rules for determining what turnovers to include in calculating the $2 million turnover test. The purpose of this test is to include the turnover of entities that are connected with, or affiliates of, the taxpayer who owns the CGT asset as these entities are, in effect, part of the same business operation.

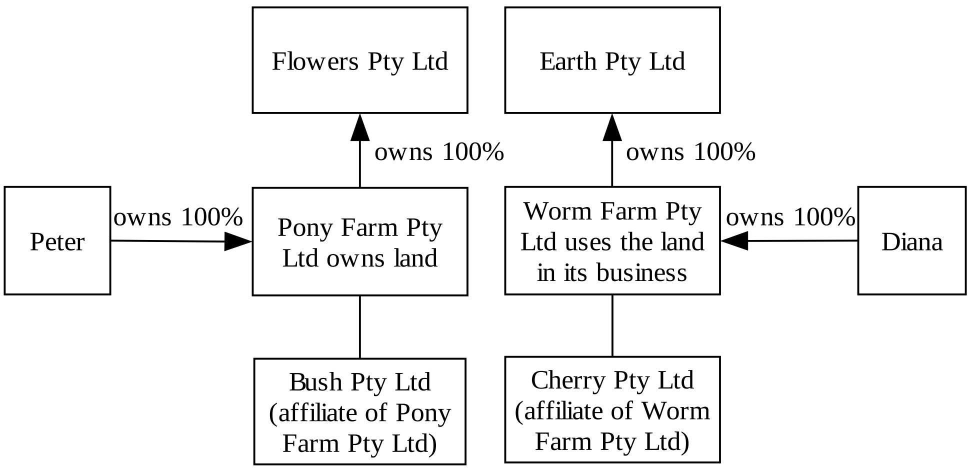
2.48 The amendments insert special rules for calculating aggregated turnover for passively held assets, which are assets covered by new subsection 152-10(1A) or (1B), that apply in addition to the standard aggregated turnover rules in Subdivision 328-C of the ITAA 1997. ***[Schedule 2, item 14, section 152-48]***

2.49 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. ***[Schedule 2, item 14, subsection 152-48(2)]***

2.50 This special rule for owners of passively held CGT assets that are used in the business of the asset owner's affiliate or entity connected with the asset owner ensures that the amendments have sufficient integrity and minimises tax planning opportunities by including the turnover of all entities that are, in effect, part of the same business operation.

Example 2.14

Peter owns Pony Farm Pty Ltd. Pony Farm Pty Ltd owns land. Peter's spouse, Diana, owns Worm Farm Pty Ltd. Worm Farm Pty Ltd uses the land in its business. Neither Peter nor Diana carries on a business. Bush Pty Ltd is an affiliate of Pony Farm Pty Ltd. Pony Farm Pty Ltd wholly owns Flowers Pty Ltd so the two entities are connected. Cherry Pty Ltd is an affiliate of Worm Farm Pty Ltd. Worm Farm Pty Ltd wholly owns Earth Pty Ltd so the two entities are connected. Worm Farm Pty Ltd is not an affiliate of Pony Farm Pty Ltd under section 328-130 of the ITAA 1997.



For the purposes of the small business CGT provisions, Diana and Peter are affiliates because of the new affiliate rule (new section 152-47). Therefore, Diana and Peter are connected with Worm Farm Pty Ltd, Pony Farm Pty Ltd, Flowers Pty Ltd, and Earth Pty Ltd. This makes each of these companies connected with each other. Of particular significance is that Pony Farm Pty Ltd and Flowers Pty Ltd are connected with Worm Farm Pty Ltd.

Pony Farm Pty Ltd sells its land and seeks to qualify for the small business CGT concessions via the small business entity test by satisfying the conditions in new subsection 152-10(1A).

In these circumstances, the 'test entity' in the special rule is Worm Farm Pty Ltd because it needs to be a small business entity for the purposes of new subsection 152-10(1A).

The special rule takes Bush Pty Ltd to be an affiliate of Worm Farm Pty Ltd because Bush Pty Ltd, the deemed entity, is not otherwise an affiliate of, or connected with, Worm Farm Pty Ltd and Bush Pty Ltd is an affiliate of Pony Farm Pty Ltd (the asset owner). Therefore, Worm Farm Pty Ltd would treat Bush Pty Ltd as its affiliate during an income year while it is an affiliate of Pony Farm Pty Ltd during the income year. Worm Farm Pty Ltd would calculate its aggregated turnover in Subdivision 328-C on this basis but this calculation of aggregated turnover only applies for accessing the small business CGT provisions.

Working out aggregated turnover where a taxpayer's asset is used in more than one partnership of which they are a partner

2.51 The amendments insert another special rule to deal with situations where a taxpayer makes their CGT asset available for use in the business of more than one partnership of which they are a partner. The purpose of this rule is to limit tax planning opportunities that may otherwise be available to such taxpayers in these circumstances. These opportunities arise because the partnerships do not have to be connected with the taxpayer to obtain access to the concessions via new subsection 152-10(1B). If the partnerships are not connected with each other and they are not connected with the taxpayer, each partnership would calculate its aggregated turnover without having to include the annual turnover of any of the other partnerships. ***[Schedule 2, item 14, subsection 152-48(3)]***

2.52 The new rule for taxpayers in these circumstances treats each partnership that is not already connected with the test entity as being connected with the test entity. ***[Schedule 2, item 14, subsection 152-48(3)]***

Example 2.15

Steven owns a CGT asset that he makes equally available for use in the businesses of two partnerships, Partnership One and Partnership Two, that he is a partner in. The partnerships are not connected with each other or Steven.

Steven sells the asset. The conditions in new subsection 152-10(1B) are satisfied (apart from the condition that each partnership is a small business entity in the income year the CGT event happens) for the asset (being each of Steven's interests in the asset) that is used separately in the businesses Steven carries on in the two partnerships.

Because the partnerships are not otherwise connected with each other, they are taken to be connected with each other under the new subsection 152-48(3). This means that the aggregated turnover of Partnership One will include the annual turnover of Partnership Two; and the aggregated turnover of Partnership Two will include the annual turnover of Partnership One.

Applying the rules where an entity is an affiliate of the test entity and connected with the test entity at different times

2.53 There may occasionally be situations where an entity is, for example, an affiliate of the test entity at one time during an income year, while it neither is an affiliate of, nor connected with, the asset-owning entity; and at another time in the income year the entity is connected with the asset-owning entity, while it neither is an affiliate of, nor connected with, the test entity.

2.54 Applying the special rule in new subsection 152-48(2) to the situation described in the preceding paragraph leads to the entity that is connected with the asset-owning entity being taken to be connected with the test entity for that part of the income year that it is neither an affiliate of, nor connected with, the test entity. This means that the same entity is an affiliate of the test entity and is connected with the test entity at different times during the income year. ***[Schedule 2, item 14, subsection 152-48(2)]***

2.55 In calculating the aggregated turnover of the test entity in Subdivision 328-C, the annual turnover of an entity that is both connected with and an affiliate of the test entity at different times in an income year is included only once. This ensures that the entity's annual turnover is not counted twice in calculating the aggregated turnover of the entity being tested.

Businesses that are winding up and passively held assets

2.56 The amendments in new subsections 152-10(1A) and (1B) to increase access to the small business CGT concessions for passively held assets via the small business entity test rely on the CGT event happening in an income year in which the asset is being used in, held ready for use in, or inherently connected with a business carried on by:

- the taxpayer's affiliate;
- an entity connected with the taxpayer; or
- the taxpayer in partnership.

2.57 The existing law provides, for non-passively held assets, a rule in subsection 328-110(5) to permit access to the concessions where the CGT event happens in a later year than that in which the asset owner ceased to carry on a business. This rule provides access to the small business CGT concessions via the small business entity test for the asset owner where the CGT event occurs in a year that the business is being wound up.

2.58 To provide comparable access to the small business CGT 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. ***[Schedule 2, item 14, section 152-49]***

2.59 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. ***[Schedule 2, item 14, subsection 152-49(1)]***

2.60 If the conditions in the preceding paragraph apply, the new rule treats the:

- entity (including a partner) as carrying on the business at a moment in time in the CGT event year; and
- CGT asset as being used in, held ready for use in, or inherently connected with the business at that same time in the CGT event year.

[Schedule 2, item 14, subsection 152-49(2)]

2.61 If the entity that is taken to be carrying on the business in the new paragraph 152-49(2)(a) is the taxpayer (as a partner in a partnership), an affiliate of the taxpayer, or an entity connected with the taxpayer, the CGT asset now:

- satisfies paragraph 152-40(1)(a) or (b) (in their proposed new form) and the asset is an active asset at the time the business is taken to be carried on in the CGT event year; and
- can potentially satisfy new paragraph 152-10(1A)(d) or (1B)(e) in the CGT event year depending on whether the business entity is a small business entity (although the partner is taken to carry on the business in partnership, the partnership has to qualify as a small business entity).

[Schedule 2, item 14, subsection 152-49(2)]

2.62 The relevant business entity will need to satisfy subsection 328-110(5) to be a small business entity in the CGT event year.

Subsection 328-110(5) takes an entity to carry on a business in an income year if:

- the entity is winding up a business it formerly carried on; and
- it was a small business entity in the income year that it stopped carrying on the business.

2.63 If the relevant business entity was a small business entity in the year it stopped carrying on a business, that entity would be deemed to carry on a business in the CGT event year. The relevant business entity would need to meet the aggregated turnover test in the CGT event year for it to be a small business entity in that year.

Example 2.16

Assume the same facts as in Example 2.1 but Foxxy Farm Pty Ltd ceases operations in an income year (and was a small business entity in that year) and Peter sold his land in a later income year when Foxxy Farm Pty Ltd is still winding up its business.

The new rule applies because:

- Peter sold his land in an income year that Foxxy Farm Pty Ltd was still winding up; and
- Foxxy Farm Pty Ltd used the land in its business in the income year it stopped carrying on its business.

As the new rule applies, it will take Foxxy Farm Pty Ltd to:

- carry on the business in the income year that the land is sold; and
- take the land as being used in, or held ready for use in, the business Foxxy Farm Ptd Ltd is taken to carry on in that income year.

This means that Peter's land is an active asset at a time in the CGT event year because it is used in the business of an entity (Foxxy Farm Pty Ltd) that is connected with the asset owner (Peter) — that is, it satisfies the new proposed form of paragraph 152-40(1)(a).

Subsection 328-110(5) will also take Foxxy Farm Pty Ltd to be carrying on a business in the year the land is sold because it is a wind up year and Foxxy Farm Pty Ltd was a small business entity in the year it ceased to carry on a business. If Foxxy Farm Pty Ltd's aggregated turnover is less than $2 million in the CGT event year (worked out using Subdivision 328-C as modified by the new aggregated turnover rules for passively held assets in new section 152-48), it will be a small business entity in the year the land is sold.

Peter’s land can now satisfy new paragraph 152-10(1A)(d) because Foxxy Farm Pty Ltd is a small business entity in the year the land is sold (as required by new paragraph 152-10(1A)(a)); and Foxxy Farm Pty Ltd carries on the business referred to in new subparagraph 152-40(1)(a)(iii) at a time in the year the land is sold.

As Peter does not carry on any business, he will be able to get access to the small business CGT concessions for any capital gain made on the sale of his land depending on whether:

- his land satisfies the active asset test over the period that he has owned the land; and
- Foxxy Farm Pty Ltd’s aggregated turnover in the income year the land is sold is less than $2 million.

Example 2.17

Amy is a partner of a partnership named Tasty Eats. Amy has made some land she owns available for use in the partnership and the land is not ‘an asset of the partnership’ (ie, the partners do not own the CGT asset in accordance with their fractional interest in the partnership or in accordance with their respective interests as specified in the partnership agreement). Amy does not carry on any other business.

In the 2010-11 income year when Amy’s land is still made available for the partnership, Amy (and the partnership) stops carrying on a business. Tasty Eats is a small business entity in the year it stops carrying on a business. In a later income year, the business Amy carried on in partnership (Tasty Eats) is winding up and Amy sells her land in that year.

The new rule applies because:

- Amy sold her land in an income year that the business she carried on in partnership (Tasty Eats) is winding up; and
- Amy used the land in carrying on the business in partnership in the income year she stopped carrying on a business.

As the new rule applies, it will take Amy to:

- carry on a business in partnership in the income year that the land is sold; and
- take the land as being used in, or held ready for use in, the business Amy is taken to carry on in partnership in that income year.

This means that Amy’s land is an active asset at a time in the CGT event year because it is used in the business she caries on in partnership — that is, it satisfies paragraph 152-40(1)(a).

Subsection 328-110(5) will also take Tasty Eats to be carrying on a business in the year the land is sold because it is a wind up year and Tasty Eats was a small business entity in the year it ceased to carry on a business. If Tasty Eat's aggregated turnover is less than $2 million in the CGT event year (worked out using Subdivision 328-C as modified by the new aggregated turnover rules for passively held assets in new section 152-48), it will be a small business entity in the year the land is sold.

Amy's land can now satisfy new paragraph 152-10(1B)(e) because the business Amy carries on as a partner in partnership in the year the land is sold (as referred to in paragraph 152-10(1B)(a)) is the business Amy carries on in partnership referred to in the new proposed form of subparagraph 152-40(1)(a)(i) at a time in the year the land is sold.

As Amy does not carry on any other business, she will be able to get access to the small business CGT concessions for any capital gain made on the sale of her land depending on whether:

- her land satisfies the active asset test over the period that she has owned the land; and
- Tasty Eat's aggregated turnover in the income year the land is sold is less than $2 million.

Other amendments

2.64 Schedule 2 also makes a number of minor changes to the small business CGT concession provisions to refine the provisions and to overcome a number of existing problems with those provisions.

Net asset test — liabilities related to interests in affiliates or entities connected with the taxpayer

2.65 In applying the maximum net asset value test, the net value of CGT assets of an entity is determined broadly by subtracting from the market value of the assets the liabilities related to the assets (and certain provisions).

2.66 This calculation of net asset value disregards certain assets, such as personal use assets and main residences, under subsection 152-20(2) of the ITAA 1997. Where an asset is disregarded, any related liability is also disregarded as such liabilities are not related to any asset included in the net asset value calculation.

2.67 Paragraph 152-20(2)(a) of the ITAA 1997 disregards the value of interests in entities connected with the taxpayer or the taxpayer's affiliates to avoid double counting in the net assets calculation, as the assets underlying these interests are already counted.

2.68 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. This disadvantages taxpayers as it excludes liabilities that are indirectly related to assets whose gross value has been included in the net asset calculation.

2.69 The amendment provides that liabilities relating to disregarded interests in entities connected with the taxpayer or the taxpayer's affiliates are taken into account in calculating the net asset value. ***[Schedule 2, item 25, paragraph 152-20(2)(a)]***

Example 2.18

> 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 Pty Ltd'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 allows Danny to include the $500,000 liability in the calculation, resulting in a maximum net asset value of $5.7 million.

2.70 The amendment applies to CGT events that happen on or after the day on which the amending legislation receives Royal Assent. ***[Schedule 2, item 42]***

Active asset — main use to derive rent

2.71 Schedule 2 amends the active asset test in section 152-40 of the ITAA 1997 to ensure that all the uses of an asset (apart from personal use of an asset by the taxpayer or an individual who is the taxpayer's affiliate) are considered in determining whether it is an active asset for the purpose of the small business CGT concessions. ***[Schedule 2, item 26, paragraph 152-40(4)(e); and item 27, subsection 152-40(4A)]***

2.72 Paragraph 152-40(4)(e) of the ITAA 1997 excludes assets whose main use is to derive rent or certain other forms of passive income from being active assets. However, 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. Example 2.11 illustrates this possibility.

Example 2.19

Kiki owns a property and rents out 90 per cent of the floor area to Lost Dog Pty Ltd that is neither her affiliate nor connected with her. Kiki earns 90 per cent of the revenue derived from owning the property from renting it to Lost Dog Pty Ltd.

Beaglehole Pty Ltd, which carries on a dog grooming business, uses the remaining 10 per cent of the floor area of the property as its business premises and pays Kiki rent for using it (this rent forms 10 per cent of the revenue Kiki earns from owning the property). As Kiki owns 60 per cent of Beaglehole Pty Ltd, Beaglehole Pty Ltd is connected with Kiki.

Under the current law, the main use of the property in Beaglehole Pty Ltd's business (being the business mentioned in subsection 152-40(1) of the ITAA 1997) is not to derive interest, an annuity or rent. As such, the property is an active asset despite its main use overall (the 90 per cent that is rented to Lost Dog Pty Ltd) being to derive rent.

2.73 The amendments remove the focus on the main use of an asset in the course of carrying on the business mentioned in subsection 152-40(1) of the ITAA 1997 and focus instead on the main use of the asset by the taxpayer. ***[Schedule 2, item 26, paragraph 152-40(4)(e)]***

2.74 The amendments adopt an attribution approach in relation to the use of an asset by a taxpayer's affiliate or an entity connected with the taxpayer. This approach treats the use of the asset by the affiliate or the entity connected with the taxpayer as though it were the use of the taxpayer. ***[Schedule 2, item 27, paragraph 152-40(4A)(b)]***

2.75 This attribution approach, therefore, treats any business use by the taxpayer's affiliate or an entity connected with the taxpayer as business use by the taxpayer irrespective of whether the taxpayer receives rental income from the affiliate or entity connected with the taxpayer. 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. ***[Schedule 2, item 27, paragraph 152-40(4A)(b)]***

2.76 The amendments exclude any personal use of an asset by the taxpayer who owns the asset and any personal use by an individual who is the taxpayer's affiliate from the determination of the main use of the asset. In the affiliate case, this is achieved by treating the affiliate's personal use of the asset as the taxpayer's use. ***[Schedule 2, item 27, paragraphs 152-40(4A)(a) and (b)]***

Example 2.20

Further to Example 2.8:

The amendments ensure that the determination of the main use of Kiki's property takes into account the 90 per cent rental use to Lost Dog Pty Ltd, which neither is Kiki's affiliate nor is connected with her.

The amendments treat Beaglehole Pty Ltd's use of that part of the property rented to it as Kiki's use because Beaglehole Pty Ltd is connected with Kiki. Because Beaglehole Pty Ltd uses that part of the property as its business premises, Kiki is treated as using that part as business premises. This means that the rent Beaglehole Pty Ltd pays to Kiki is not treated as rent for the purposes of determining Kiki's main use of the property.

Kiki's main use of the property is to derive rent, because 90 per cent of the revenue she derives from the property is rent received from Lost Dog Pty Ltd.

Therefore, Kiki's property is not an active asset in these circumstances for the purpose of section 152-40 in its proposed new form.

Example 2.21

John owns a property that he rents 80 per cent of the floor area of to an affiliate, Peter, and the remaining 20 per cent John uses in his business. John earns 80 per cent of the revenue derived from owning the property from renting it to Peter.

Peter uses 60 per cent of the floor area of that part of the property rented to him in his business and rents the remaining 40 per cent to an entity that neither is John's affiliate nor is connected with John.

Peter earns 40 per cent of the revenue he derives from the property from his on renting to the third party.

The amendments treat Peter's use of that part of the property rented to him as John's use. Therefore, John is treated as renting 40 per cent of that part of the property to an entity that is neither his affiliate nor is connected with him and 60 per cent as being used in a business by John.

The main use of the property by John is not to derive interest, an annuity, rent, royalties or foreign exchange gains. This is because 32 per cent (80% × 40%) of John's property is treated as being used to derive rent and the remaining 68 per cent is either actually used in John's business (20 per cent) or is treated as being used in a business by John (48 per cent).

Therefore, John's property is an active asset in these circumstances for the purpose of section 152-40 in its proposed new form. John's asset would still have to satisfy the active asset test in section 152-35 of the ITAA 1997 over the period that he has owned the asset.

Example 2.22

Neil owns a property that he rents 60 per cent of the floor area to an affiliate, Andrea. Neil uses 15 per cent of the floor area in his business and the remaining 25 per cent is for his own personal use.

Because personal use of an asset by the owner or an affiliate of the owner is ignored in determining its main use, the proportions of 60 per cent and 15 per cent have to be adjusted so that they add up to 100 per cent of the use of the asset. This adjustment is made by multiplying the 60 per cent and 15 per cent each by 100/75 as this factor adjusts the two percentages so that they add up to 100 per cent but maintain their current proportionality to each other, which is 4:1.

Following the adjustments, Neil rents 80 per cent (60% × 100/75) of the non-personal use floor area of the property to Andrea and uses 20 per cent (15% × 100/75) of the non-personal use floor area in his business.

Neal earns 80 per cent of the revenue derived from owning the property from renting it to Andrea.

Andrea uses 50 per cent of that part of the property rented to her in her business and rents the remaining 50 per cent to an entity that neither is Neil's affiliate nor is connected with Neil. Andrea earns 50 per cent of the revenue she derives from the property from her on renting to the third party.

The amendments treat Andrea's use of that part of the property rented to her as Neil's use. Therefore, Neil is treated as renting 50 per cent of that part of the property to an entity that is neither his affiliate nor is connected with him and 50 per cent as being used in a business by Neil.

The main use of the property is not to derive interest, an annuity, rent, royalties or foreign exchange gains. This is because 40 per cent

(80% × 50%) of Neil's property is treated as being used to derive rent; and the remaining 60 per cent either is actually used in Neil's business (20 per cent) or is treated as being used in a business by Neil (40 per cent).

Therefore, Neil's property is an active asset in these circumstances for the purpose of section 152-40 in its proposed new form. Neil's asset would still have to satisfy the active asset test in section 152-35 of the ITAA 1997 over the period that he has owned the asset.

2.77 The amendments apply to CGT events that happen on or after the day on which the amending legislation receives Royal Assent. ***[Schedule 2, item 42]***

Joint tenants and testamentary trusts — section 152-80 of the ITAA 1997

2.78 Schedule 2 also amends the law to extend access to the small business CGT concessions to capital gains relating to assets acquired on the death of a joint tenant and 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. ***[Schedule 2, items 30 to 32, section 152-80]***

2.79 Section 152-80 of the ITAA 1997 applies if a CGT asset forms part of the estate of a deceased individual and devolves to their legal personal representative or passes to a beneficiary.

2.80 This section allows the legal personal representative or the beneficiary to access the small business CGT concessions if the deceased could have accessed the concessions.

2.81 However, if the parties are joint tenants and one dies, the surviving joint tenant(s) is taken to have acquired the deceased's interest in the asset under subsection 128-50(2) of the ITAA 1997. The deceased's interest in the asset does not devolve to the legal personal representative or pass to a beneficiary.

2.82 This denies access to the small business CGT concessions for any capital gains made on this interest acquired by a surviving joint tenant(s) who does not continue with the business they owned as joint tenants with the deceased.

2.83 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. ***[Schedule 2, items 30 to 32, subparagraphs 152-80(1)(a)(ii) and (b)(iii); and paragraph 152-80(2A)(c)]***

2.84 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. ***[Schedule 2, items 30 to 32, subparagraph 152-80(1)(b)(i) and paragraph 152-80(2A)(d)]***

2.85 The amendments apply to CGT events that happen in the 2006-07 income year and later income years. ***[Schedule 2, item 43]***

Retirement exemption and proceeds received in instalments

2.86 Schedule 2 inserts a rule to apply the retirement exemption to capital proceeds received in instalments by individuals. ***[Schedule 2, item 34, subsection 152-305(1A)]***

2.87 Schedule 2 removes the duplicate provision for receipt of capital proceeds in instalments by companies and trusts in subsection 152-310(3) of the ITAA 1997. ***[Schedule 2, item 36, subsection 152-310(3)]***

2.88 These changes correct an unintended effect on the operation of the retirement exemption made by Schedule 2 to the *Superannuation Legislation Amendment (Simplification) Act 2007*. Those amendments inadvertently removed the rule relating to the receipt of capital proceeds in instalments for individuals and introduced a second rule for capital proceeds received in instalments by companies and trusts.

2.89 The amendment to reinsert the rule for capital proceeds received by individuals in instalments, which favours taxpayers, applies for capital proceeds received in instalments in the 2007-08 and later income years, which ensures that the amendments have the same date of effect as the amendments mentioned in the preceding paragraph. ***[Schedule 2, item 44]***

2.90 The amendment that repeals the duplicate provision for capital proceeds received in instalments by companies and trusts applies to payments made on or after the day on which the amending Bill receives Royal Assent. ***[Schedule 2, item 46]***

Retirement exemption — CGT events J5 and J6

2.91 *Tax Laws Amendment (2006 Measures No. 7) Act 2007* altered the operation of the small business CGT roll-over to allow a taxpayer to choose the roll-over before acquiring a replacement asset or making an improvement to an existing asset. It is evident from that legislation and its explanatory memorandum that the retirement exemption was intended to be available for capital gains made from CGT events J5 and J6:

- CGT event J5 happens if the taxpayer does not acquire a replacement asset or incur relevant improvement expenditure by the end of the two-year replacement asset period.
- CGT event J6 happens if the cost of the replacement asset or the amount of the improvement expenditure (or both) is less than the amount of the capital gain originally deferred.

2.92 The retirement exemption is currently not available for CGT events J5 or J6 as those capital gains cannot satisfy the basic conditions as required by paragraphs 152-305(1)(a) and (2)(a) of the ITAA 1997.

2.93 The basic conditions include:

- a CGT event happens in relation to a CGT asset of the taxpayer in an income year (paragraph 152-10(1)(a) of the ITAA 1997); and
- the CGT asset satisfies the active asset test (paragraph 152-10(1)(d) of the ITAA 1997).

2.94 If no replacement asset has been acquired or no improvement expenditure has been spent, within the two-year period, there is no CGT asset that CGT event J5 happens to for satisfying either paragraph 152-10(1)(a) or (1)(d) of the ITAA 1997.

2.95 CGT event J6 happens because the taxpayer did not acquire a replacement asset of sufficient cost base or incur sufficient improvement expenditure. Thus, the event happens in relation to the non-acquisition of a replacement asset of sufficient cost base rather than in relation to the replacement asset. Therefore, a capital gain from CGT event J6 also cannot satisfy either paragraph 152-10(1)(a) or (1)(d) of the ITAA 1997.

2.96 Schedule 2 inserts a new provision to modify the operation of paragraphs 152-305(1)(a) and (2)(a) of the ITAA 1997 to make satisfying the basic conditions for the small business retirement exemption unnecessary if the gain arises from CGT events J5 or J6. ***[Schedule 2, item 35, subsection 152-305(4)]***

2.97 The amendment reduces compliance costs for taxpayers because they do not have to calculate their maximum net asset value or aggregated turnover at the time of the J5 or J6 event.

Example 2.23

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.

2.98 This amendment favours taxpayers and applies to CGT events that happen in the 2006-07 income year and later income years, which ensures that the amendments have the same date of effect as the 2007 amendments mentioned in paragraph 2.91. ***[Schedule 2, item 45]***

Retirement exemption payments to CGT concession stakeholders through interposed entities

2.99 The 2007 amendments mentioned in paragraph 2.91 enabled indirect ownership to be used to qualify an individual as a CGT concession stakeholder, but the payment requirement for the small business retirement exemption in subsection 152-325(1) of the ITAA 1997 was not updated to allow indirect payments.

2.100 Schedule 2 amends the law to allow a company or trust to make a retirement exemption payment indirectly through one or more interposed entities to a CGT concession stakeholder. ***[Schedule 2, item 37, subsection 152-325(1)]***

2.101 The amendments overcome practical difficulties, such as breaching non-tax laws, of complying with the requirement to make a payment directly to a CGT concession stakeholder under the retirement exemption where that CGT concession stakeholder is traced indirectly.

2.102 To ensure that there is no tax impact on the interposed entity, the amendments also provide that the indirect payments are:

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

[Schedule 2, item 36, subsection 152-310(3); and item 38, subsections 152-325(9) and (10)]

2.103 The amendments also exclude small business retirement exemption payments made under section 152-325 of the ITAA 1997 from the operation of section 109 and Division 7A of the *ITAA 1936* (the 'deemed dividend provisions'). ***[Schedule 2, item 38, subsection 152-325(11)]***

2.104 The amendments repeal subsection 152-325(9) of the ITAA 1997. This subsection treated payments made by a company or trust to an employee of an amount exempted under the retirement exemption as being payments made in respect of the termination of employment of the relevant CGT concessions stakeholder. ***[Schedule 2, item 38]***

2.105 The deemed dividend provisions aim to restrict a company from unreasonably reducing its taxable income. Section 109 deems excessive payments to shareholders, directors and associates as a dividend paid by the company and Division 7A prevents private companies from making tax-free distributions of profits to shareholders or their associates in the form of payments, loans or forgiven debts.

2.106 The application of the deemed dividend provisions to the small business retirement exemption is counter to the policy objective of the exemption, which is to allow small business operators to sell their small business assets and provide for their retirement as their business and its assets may be their sole retirement asset (to a $500,000 lifetime limit).

2.107 Excluding the application of section 109 and Division 7A will reduce uncertainty and complexity for taxpayers utilising the small business retirement exemption. It will also remove any potential conflict between the amendments that treat indirect retirement exemption payments between interposed entities as if they were neither a dividend nor a frankable distribution and section 109 or Division 7A. ***[Schedule 2, item 38, subsection 152-325(10)]***

2.108 The amendments apply to payments that are made on or after the day on which the amending Bill receives Royal Assent. ***[Schedule 2, item 46]***

Partners and small business entities

2.109 When the small business entity regime was introduced the clear intention was that a partner in a partnership could not in their capacity as a partner be a small business entity. It is only the partnership that could be a small business entity.

2.110 This creates uncertainty because a partner could argue that, as they are considered to carry on a business for CGT purposes (consistent with the general law position), they could be a small business entity where their aggregated turnover is less than $2 million.

2.111 Section 328-110 of the ITAA 1997 specifies the meaning of small business entity for applying the small business concession rules.

2.112 Schedule 2 amends section 328-110 of the ITAA 1997 (meaning of small business entity) to provide that a partner in a partnership cannot be a small business entity in their capacity as a partner. This applies for the small business concessions generally and not just for the small business CGT concessions. ***[Schedule 2, item 39, subsection 328-110(6)]***

2.113 The amendment removes current uncertainty about whether a partner in a partnership can be a small business entity.

2.114 The small business entity regime had effect from the 2007-08 income year so the amendment applies to assessments for the 2007-08 income year and later income years. The amendment applies retrospectively as it aligns the legislation with administrative practice. ***[Schedule 2, item 47]***

Application and transitional provisions

Application of the main amendments

2.115 The main amendments apply to CGT events happening in the 2007-08 income year and later income years to align with the date of effect of the small business entity regime amendments. ***[Schedule 2, subitem 41(1)]***

2.116 In this regard, the amendments will generally be beneficial to taxpayers. The amendments have been actively sought by industry and will increase access to the small business CGT concessions.

2.117 However, some taxpayers may be disadvantaged under these amendments by the repeal of subsection 152-40(1A) and the introduction of the new affiliate rule that treats an individual's spouse or child (under

18 years of age) as an affiliate of the individual in particular circumstances.

2.118 In particular, some taxpayers may have been able to qualify for the small business CGT concessions under subsection 152-40(1A) of the ITAA 1997 repealed by these amendments and may not qualify under the new rule for treating an individual's spouse or child (under 18 years of age) as their affiliate.

2.119 Taxpayers in these circumstances can still qualify for the small business CGT concessions for CGT events happening up to but not including the day on which the amending Bill is introduced into the Parliament. ***[Schedule 2, subitems 41(2) and (3)]***

Transitional extension of time limit for making choices

2.120 Taxpayers that become eligible to make a choice under Division 152 of the ITAA 1997 due to Schedule 2 to this Bill will have an extended time period, under a transitional rule, to make such a choice in relation to CGT events happening before the day on which this Bill receives Royal Assent. ***[Schedule 2, item 48]***

2.121 The small business CGT concessions require taxpayers to make choices. For example, the small business retirement exemption and small business roll-over are available only if the taxpayer chooses to obtain them.

2.122 Subsection 103-25(1) of the ITAA 1997 limits the date for making a choice to the day the entity lodges its income tax return for the income year in which the relevant CGT event happened or a later date allowed by the Commissioner.

2.123 The transitional rule extends the time limit for a choice an entity becomes eligible to make as a result of this Schedule to the latest of:

- the day the entity lodges its income tax return for the income year in which the relevant CGT event happened;
- 12 months after the day on which this Bill receives Royal Assent; and
- a later day allowed by the Commissioner.

[Schedule 2, subitem 48(2)]

2.124 The way in which the taxpayer prepares their income tax return is sufficient evidence of the making of this choice.

Chapter 3
Tax benefits and capital gains tax

Outline of chapter

3.1 Schedule 3 to this Bill amends the *Income Tax Assessment Act 1997* (ITAA 1997) to provide a general exemption from capital gains tax (CGT) for capital gains or capital losses arising from a right or entitlement to a tax offset, deduction or similar benefit.

Context of amendments

3.2 Subsection 118-37(1) of the ITAA 1997 disregards the capital gain or capital loss you make from a CGT event as a result of a number of specified events or programs.

3.3 This measure covers capital gains or capital losses you make from a CGT event as a result of receiving a tax offset, deduction or other similar benefit.

Summary of new law

3.4 Subsection 118-37(1) of the ITAA 1997 disregards the capital gain or capital loss you make from a CGT event as a result of a number of specified events or programs.

3.5 The amendment disregards capital gains or capital losses you make from a CGT event as a result of receiving a tax offset, deduction or other similar benefit.

Detailed explanation of new law

3.6 A highly technical interpretation of the income tax law may result in a capital gain or capital loss arising to taxpayers who have a right to receive an urban water tax offset on the satisfaction of the right.

3.7 This measure puts beyond doubt that a capital gain or capital loss would not arise for taxpayers in such circumstances, or in other circumstances where a tax offset, deduction or other taxation benefit arises under a scheme.

3.8 The opportunity is taken to extend this treatment to taxpayers who have the right to receive other types of tax offsets, deductions or other taxation benefits. For example, this treatment would be extended to the 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. ***[Schedule 3, item 1, paragraph 118-37(1)(h)]***

Application and transitional provisions

3.9 This measure applies to relevant CGT events happening in the 2009-10 income year and later income years. ***[Schedule 3, item 2]***

Chapter 4
National Urban Water and Desalination Plan — urban water tax offset

Outline of chapter

4.1 Schedule 4 to this Bill amends the *Income Tax Assessment Act 1997* (ITAA 1997) to provide a refundable tax offset in relation to certain projects approved under the National Urban Water and Desalination Plan (plan).

Context of amendments

4.2 The Government is committed to working cooperatively with the States and Territories to improve the security of water supplies to Australia's major cities. The Government's Water for the Future plan builds on the National Water Initiative by bringing rural and urban water reforms together.

4.3 The plan is an important component of Water for the Future and will support initiatives that drive investment in diverse water supply options and encourage industry and the community to save and use water more efficiently.

4.4 The aim of the plan is to increase the security of water supplies to Australia's cities. This will be achieved by supporting major desalination, water recycling and stormwater harvesting projects that contribute significantly to improving the security of water supplies to Australia's cities.

4.5 The Minister for Climate Change and Water (Water Minister) is responsible for approving financial assistance under the plan. The plan will be administered by the Department of the Environment, Water, Heritage and the Arts (Water Department).

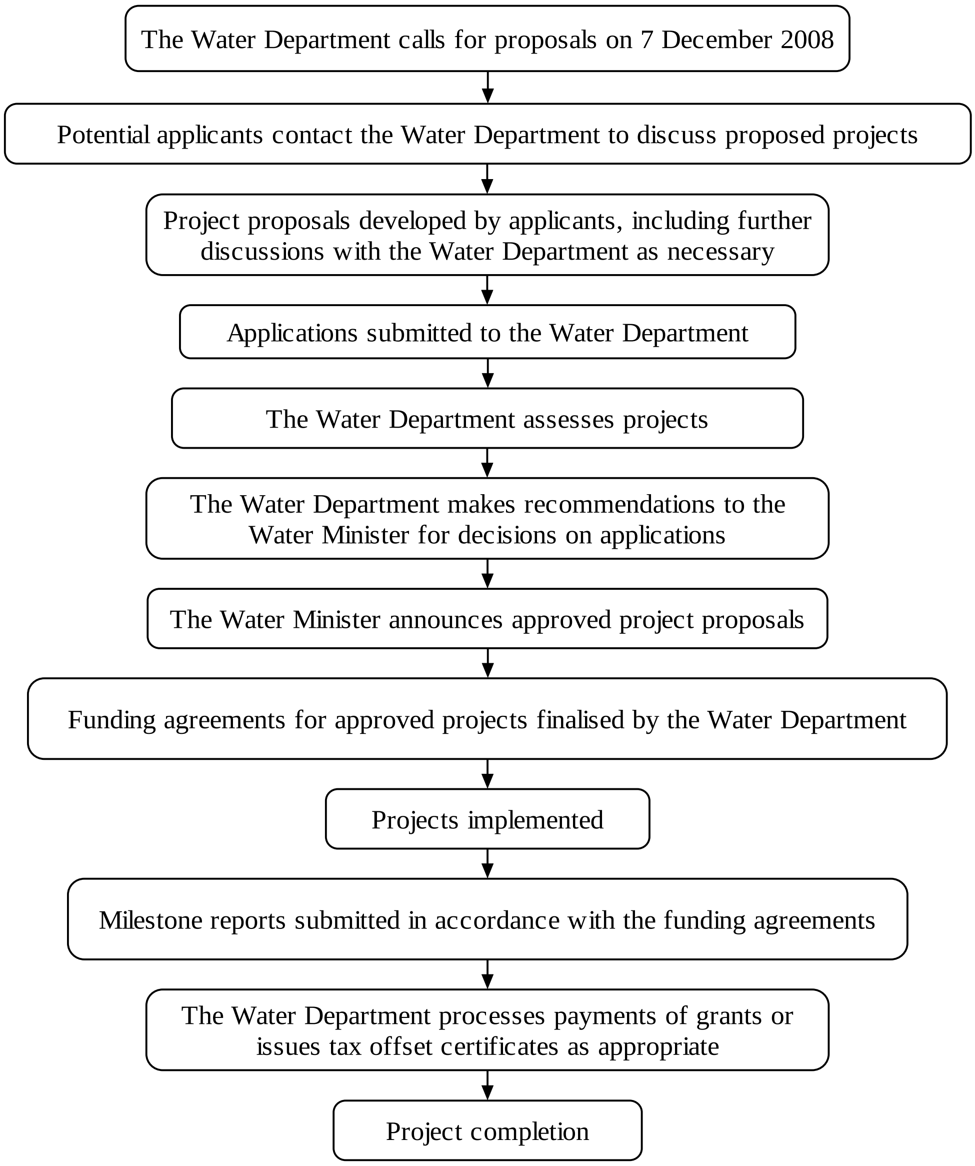
4.6 Financial assistance under the plan will be determined through a competitive process and is capped at 10 per cent of eligible up-front capital costs up to a maximum of $100 million per project. To ensure the plan focuses on major projects, projects must have eligible capital costs of at least $30 million. Special rules apply to stormwater harvesting projects (see paragraph 4.14).

4.7 Financial assistance will be provided as refundable tax offsets, unless the applicant receiving the assistance is outside the tax system, in which case they will receive a grant.

4.8 Financial assistance for approved projects will be available from the 2009-10 income year. Financial assistance will be provided upon completion of agreed milestones, and projects must be completed by 30 June 2013 in order to receive the agreed assistance in full. 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.

4.9 The Water Department issued implementation guidelines on 7 December 2008, which explain the application and approval processes for funding under the plan. The following diagram illustrates the process.

Diagram 4.1: Funding process



Detailed explanation of new law

Entitlement to the tax offset

4.10 A company is entitled to a refundable tax offset under the plan for an eligible project if the Water Minister has issued a valid certificate for the project. ***[Schedule 4, item 10, section 402-755]***

4.11 Private sector entities, water utilities and governments are eligible to apply for assistance under the plan. As only the private sector falls within the income tax system (and may therefore receive a tax offset), there is no need to include entities other than companies in these provisions. The other entities will be able to apply for grants under the plan.

4.12 The amount of the offset is 10 per cent of eligible up-front capital costs up to a maximum of $100 million. ***[Schedule 4, item 10, subsection 402-765(4)]***

4.13 This amount may be paid over several certificates, recognising the attainment of project milestones, and therefore relate to different income years.

Example 4.24

Pinderburge Pty Ltd is building a desalination plant in south-eastern Australia. The project is approved for funding of $50 million under the plan.

In 2009-10, Pinderburge did not meet any milestones, so no assistance was paid to the company. In 2010-11, the company achieved two milestones and claimed eligible capital expenditure of $370 million, for which the Water Department issued certificates for tax offsets totalling $37 million. In 2011-12, the final milestone was achieved, and $200 million of eligible capital expenditure was claimed. As only $50 million of funding was approved, the final certificate for a tax offset was limited to the balance of $13 million.

4.14 For stormwater harvesting projects, the amount of the offset is up to 50 per cent of eligible capital costs to a maximum of $20 million. ***[Schedule 4, item 10, subsection 402-765(3)]***

Certificates

4.15 A certificate may be issued by the Water Minister if a project has satisfied the requirements set out in the guidelines. ***[Schedule 4, item 10, subsection 402-760(1)]***

4.16 The guidelines will provide details of the steps in the certification process.

4.17 A certificate may be revoked under certain circumstances outlined in the guidelines. ***[Schedule 4, item 10, section 402-770]***

4.18 Where a certificate is revoked, it is taken as if the certificate was never issued. This means that, for the income year which the certificate relates to, the tax return of the company would need to be amended.

4.19 A certificate which has been issued cannot be varied. To vary a certificate, the Water Minister must revoke the existing certificate and issue a new one. ***[Schedule 4, item 10, subsection 402-770(7)]***

Administrative Appeals Tribunal Review

4.20 A company may apply to the Administrative Appeals Tribunal (AAT) for review of the Water Minister's decision in relation to:

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

[Schedule 4, item 10, section 402-775]

4.21 Where a review by the AAT is an option available to a company in relation to the matters specified above, any correspondence from the Water Minister or the Water Department must include information on the company's rights to appeal to the AAT. ***[Schedule 4, item 10, subsections 402-760(6), 402-765(4) and 402-770(4)]***

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

Guidelines

4.23 The Water Minister must make guidelines in relation to the issuing and revoking of certificates. These guidelines will be registered as a legislative instrument. ***[Schedule 4, item 10, subsection 402-780(1)]***

4.24 Subsection 14(2) of the *Legislative Instruments Act 2003* prevents legislative instruments from referring to material not contained in the enabling legislation unless the contrary intention is specified in the legislation. This contrary intention, at subsection 402-780(2), is necessary as the guidelines will rely to an extent on material produced by the Water Department in relation to the plan. ***[Schedule 4, item 10, subsection 402-780(2)]***

4.25 The guidelines do not have effect until the period in which they can be disallowed by Parliament has elapsed. This prevents a disallowed guideline from having effect between the date of tabling in Parliament and the date of disallowance. ***[Schedule 4, item 10, subsection 402-780(3)]***

Water Minister and Water Department

4.26 For consistency, the defined terms ***Water Minister*** and ***Water Department*** will be added to the income tax law. ***[Schedule 4, items 11 and 12]***

4.27 Currently, as noted in paragraph 4.5, the Water Minister is the Minister for Climate Change and Water, and the Water Department is the Department of Environment, Water, Heritage and the Arts.

Application and transitional provisions

4.28 This measure applies for the 2009-10, 2010-11, 2011-12 and 2012-13 income years. ***[Schedule 4, item 10, subsection 402-760(2)]***

4.29 A certificate can only be issued for one income year, but a company can receive multiple certificates within and across different income years.

4.30 The legislation for this measure will become inoperative once the plan finishes in 2013-14. As a result, the provisions are repealed with effect from 1 July 2014. ***[Schedule 4, items 16 to 18]***

4.31 To allow the revocation of certificates after the provisions are repealed, the legislation will specifically preserve the operation of the revocation provisions, as well as the appeal rights of the taxpayer, for 10 years after repeal. ***[Schedule 4, item 19]***

Consequential amendments

4.32 A reference to the urban water tax offset is added to the list of tax offsets in section 13-1 of the ITAA 1997. ***[Schedule 4, item 2, section 13-1]***

4.33 Section 67-25 of the ITAA 1997 currently lists all refundable tax offsets in various subsections. For clarity, the existing subsections are repealed and rewritten into a table. A reference to the urban water tax offset is added to this table. ***[Schedule 4, items 3 and 6]***

4.34 Due to the shift of the table into section 67-23, a number of references to refundable tax offsets in various Acts are amended to reflect this. ***[Schedule 4, items 1, 7 to 9 and 13 to 15]***

4.35 The heading of section 67-25 is amended to reflect the content of what remains in that section. ***[Schedule 4, items 4 and 5]***

4.36 This Schedule amends the ITAA 1997 to provide a general exemption from capital gains tax for capital gains arising from a right or entitlement to a tax offset, deduction or similar benefit. That measure would also apply to the tax offsets detailed in this Schedule.

Chapter 5
Deductible gift recipients

Outline of chapter

5.1 Schedule 5 to this Bill amends the *Income Tax Assessment Act 1997* (ITAA 1997) to update the list of the deductible gift recipients (DGRs) to include four new entities and to extend the time period of three organisations currently listed in the ITAA 1997.

Context of amendments

5.2 The income tax law allows taxpayers who make gifts of $2 or more to DGRs to claim income tax deductions. To be a DGR, an organisation must fall within one of the general categories set out in Division 30 of the ITAA 1997, or be listed by name under that Division.

5.3 DGR status assists eligible funds and organisations to attract public support for their activities.

Summary of new law

5.4 The amendments add four organisations to the list of specifically listed DGRs and extend the time period for which deductions are allowed for gifts made to three organisations. Gifts of $2 or more that are made to organisations during their period of specific listing, are tax deductible.

Detailed explanation of new law

5.5 Schedule 5 allows deductions for gifts to the organisations listed in Table 5.1. ***[Schedule 5, items 1, 3, 4 and 7]***

Table 5.1

Name of Fund	***Date of Effect***	***Special Conditions***
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 February 2009.	The gift must be made after 2 February 2009 and before 1 January 2010.

5.6 The Grattan Institute is a policy research institute that will be established at the University of Melbourne. The Institute is being established as a research body providing an independent voice in Australian public policy debate and will not be aligned with any political movement. The Institute will focus on the major challenges and opportunities facing Australia as a liberal democracy in a globalised economy.

5.7 The Australasian College for Emergency Medicine is the administrative institution in Australia and New Zealand for the practice of emergency medicine. The College is distinguished as an educational institution for the teaching and accreditation of physicians in the speciality of emergency medicine. The College's specialist education program in emergency medicine aims to improve standards and training in emergency departments in hospital systems across Australia and New Zealand.

5.8 PWR Melbourne 2009 Limited (The Parliament of the World's Religions) is an international forum which aims to promote interfaith interaction and to encourage peace and understanding between different faiths and people with no faith. The Parliament is held every five years in different locations around the world. The Parliament's conference in Melbourne in 2009 will be specifically listed as a DGR in the tax law until 31 December 2009.

5.9 Crime Stoppers is a crime information operation, which enables anyone with information about any crime and who wishes to remain anonymous to pass that information to Police. Crime Stoppers operates in all states and territories of Australia. ACT Region Crime Stoppers Limited is a partnership between the community, media and police. Like all Crime Stoppers programs, ACT Region Crime Stoppers Limited is a program designed to assist in the detection, and hence the reduction of crime.

Extended listings

5.10 Schedule 5 extends the period for which deductions are allowed for gifts to the organisation listed in Table 5.2. ***[Schedule 5, items 2, 5 and 6]***

Table 5.2

Name of Fund	***Date of Effect***	***Special Conditions***
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.

5.11 Yachad Accelerated Learning Project Limited is a program of educational intervention aimed at raising the scholastic achievements of students in remote and rural locations in Australia. Under Yachad, Israeli educators work with Indigenous communities and their local leaders, as well as school principals and their staff, to combat patterns of educational disadvantage.

5.12 The Bunbury Diocese Cathedral Rebuilding Fund was established to rebuild the St. Patrick's Cathedral in Bunbury, Western Australia which was destroyed by a tornado in 2005. Extending the period of DGR status of the Fund recognises the heritage significance of the St. Patrick's Cathedral.

5.13 St. George's Cathedral Restoration Fund is undertaking the restoration of the St. George's Cathedral precinct which involves urgent repairs and conservation work to the Cathedral, the Burt Memorial Hall and the Deanery. The St. George's Cathedral precinct has significant historical and heritage significance and has been permanently listed on the Western Australia Register of Heritage since 1995.

Application and transitional provisions

5.14 The amendments to list the organisations listed in Table 5.1 and Table 5.2 apply from the dates of effect shown in those tables.

Consequential amendments

5.15 A number of changes have been made to update the index to include the new entities. ***[Schedule 5, items 8, 9, 11 and 12]***

Chapter 6
Australian Business Register

Outline of chapter

Australian Business Register amendments

6.1 Part 1 of Schedule 6 to this Bill amends the *A New Tax System (Australian Business Number) Act 1999* (ABN Act) to improve the integrity and efficiency of the Australian Business Register (ABR). These amendments help position the Registrar of the ABR (Registrar) to take on the role of Multi-agency Registration Authority (see Part 2).

Multi-agency Registration Authority amendments

6.2 Part 2 of Schedule 6 to this Bill amends the ABN Act to allow the Registrar of the ABR to act as the Multi-agency Registration Authority to enable representatives of businesses to be identified for the purpose of communicating electronically with multiple government agencies on behalf of the business.

Context of amendments

Australian Business Register amendments

6.3 The Registrar already registers businesses in order for businesses to identify themselves reliably in all their dealings with the Australian Government, including for the purposes of the taxation laws. The existing legislation provides that applications for an ABN must be in a form approved by the Registrar. While the application can require name and address and other information about associates of the business the Registrar cannot always enforce the identification of associates of the business.

6.4 An entity that is dissatisfied with a decision of the Registrar does not have any formal objection rights but must apply to the Administrative Appeals Tribunal (AAT) as the only initial dispute mechanism. Section 14 of the ABN Act requires entities to update certain details that are outlined in section 25, such as an address for service of notices. Section 15 of the ABN Act permits the Registrar to require the entity to provide certain information to him. However, there is no provision to enable the Registrar to update those details either from information obtained that is publicly available or from his own resources. As a result of this, the Registrar has had difficulty in utilising opportunities to achieve and maintain an accurate register.

Multi-agency Registration Authority amendments

6.5 Many businesses have reporting obligations with multiple government agencies. Currently, if they wish to interact with multiple agencies online, they need to undergo multiple identity establishment processes, and then need to manage multiple credentials. This is one of the barriers for business to take up online communication with government.

6.6 The ABR is in a unique position to establish the identity of a business person based on their tax file number (TFN), as well as to establish a link between the person and the business they represent in order to facilitate business to government online interaction.

6.7 Registration Authorities, such as the Registrar, provide a verification of identity and relationship service when applicants register for electronic credentials to allow online transactions. Registration Authorities also play a role in maintaining registrant's information and to administering requests for credential renewals and revocations.

6.8 This new role of the ABR was envisaged when the ABR was established. One of the benefits of establishing the ABR was to reduce administrative costs for small business by limiting the number of times a business would be asked for similar information by different agencies. This would result in a reduction in the number of forms and other procedural obligations that are a burden for businesses.

Summary of new law

Australian Business Register amendments

6.9 The ABN Act is being amended to permit the Registrar to use the approved form provisions outlined in section 388-50 in Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) for a range of purposes. The amendments improve the integrity of the ABR.

6.10 The purposes of the approved forms include the application for an ABN which requires the identification of the entity and its associates;

notification of changes to various details recorded on the ABR in respect of the entity; an obligation for the entity or an associate to provide certain information in respect of the entity or an associate respectively; and for the entity to request the cancellation of the entity's ABN.

6.11 The Registrar would also be given the power to update details on the ABR, where he is satisfied that the details entered in relation to an entity are incorrect, and replace them with information that he believes to be correct.

6.12 The introduction of objection rights for a range of decisions of the Registrar assists entities to receive a low cost review of decisions rather that having to apply for review of the decision to the AAT. If the entity is not satisfied with the decision of an objection the entity is able to take the matter to the AAT or the Courts.

6.13 Section 10 of the ABN Act outlines the conditions that must be met before the Registrar must register an entity in the ABR. The amendments include an additional condition to be satisfied before the Registrar must register an entity. The additional condition allows the Registrar to be satisfied that the identity of an associate of the entity has been established. The approved form for registration requests details about associates of the entity.

Multi-agency Registration Authority amendments

6.14 The amendments allow for the Registrar to register and maintain details about representatives of businesses to enable electronic communication with one or more government agencies. The amendments allow the Registrar to identify representatives of businesses as part of the registration process. The amendments also require the entity or the representative to update the details on the Register. The Registrar is able to use public information and information provided by third parties on a voluntary basis to update and correct the Register in respect of details of representatives.

6.15 Part 1 of the Schedule introduces objection rights for entities. Part 2 extends the objection rights of entities to cover decisions in respect of representatives, where the entity is dissatisfied with a decision of the Registrar.

6.16 The amendments further extend the use of the approved form provisions in the TAA 1953 for a range of purposes related to representatives of the entity including applications for registration of a representative. Such applications may request, but not compel, the provision of the TFN of a nominating individual and that of the representative. A request for cancellation of a representative's registration by the entity uses the approved form provisions. In addition, an obligation to provide the Registrar with information relevant to confirm the representative's identity, or the details in relation to the representative entered in the ABR, requires the use of an approved form.

6.17 Two new offence provisions are included in Part 2, one for impersonating a registered representative of the enterprise, and the other 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.

Comparison of key features of new law and current law

Australian Business Register amendments

New law	*Current law*
The approved form provisions contained in the TAA 1953 are used for a wide range of purposes.	Applications for registration to obtain an ABN must be in a form approved by the Registrar.
Where details about an associate of the entity were requested in the approved form for registration, the Registrar may require that the identity of the associate is established, in addition to the existing conditions, before the Registrar must register the entity in the ABR.	The Registrar must register an entity in the ABR if satisfied that a number of conditions apply to the registration. These are: the entity has applied under section 9 of the ABN Act; the entity is or will be entitled to an ABN; the identity of the entity has been established; and the entity is not already registered in the Register.
In addition to the existing details entered in the ABR, details about an entity's associate must be entered in the ABR where details about the associate of the entity were requested in the approved form for registration.	The Registrar must enter in the ABR the following details: the entity's name; the entity's ABN, the date of effect of the registration; an address for services of notices under the Act; and the details prescribed in the regulations.

New law	*Current law*
Objection rights are to be included in respect of certain decisions of the Registrar. Use of the provisions in Part IVC of the TAA 1953 means that appeal rights to the AAT and the Courts are retained.	Applications for review of certain decisions can only be made to the AAT in the first instance.
Where the Registrar is satisfied that the details entered in the ABR for an entity are incorrect, the Registrar may adjust those details if he has access to details that the Registrar believes are correct.	The Registrar cannot, without advice from the entity, update the details entered in the Register where he is satisfied that they are incorrect, despite having access to information which he believes to be correct. He can only adjust details as advised by the entity.

Detailed explanation of new law

Australian Business Register amendments

6.18 The new law introduces the approved form provisions that are contained in section 388-50 in Schedule 1 to the TAA 1953 and those provisions will be used for a variety of purposes. The definition to be inserted into section 41 of the ABN Act of 'approved form' states that it has the same meaning as in the *Income Tax Assessment Act 1997* (ITAA 1997). Section 995-1 of the ITAA 1997 states that 'approved form' has the meaning given by section 388-50 in Schedule 1 to the TAA 1953. ***[Schedule 6, item 28, section 41]***

6.19 The approved form definition in the TAA 1953 is quite comprehensive as to the possible content of the form, whereas the existing provision in the ABN Act is vague and only states that the application for an ABN must be in a form approved by the Registrar. The new law improves clarity as to the content of the approved form. The approved form provisions are used in the application for registration of an enterprise in the ABR. Upon registration, an ABN is issued to the entity. ***[Schedule 6, item 2, subsection 9(2)]***

6.20 The approved form provisions do not contain any mention of the use of TFNs in the form. The approved form for registration of an entity for an ABN permits the use of TFNs for both the entity and of an associate, but respect for an individual's privacy is maintained by providing that the quotation of TFNs is voluntary. ***[Schedule 6, item 2, subsection 9(3)]***

6.21 The approved form provisions would apply to the notification of changes to matters set out in the ABR. Previously, there was no particular form to lodge any amendments to those details. ***[Schedule 6, item 9, paragraph 14(2)(b)]***

6.22 The approved form provisions also apply to requests by the Registrar to entities that are registered in the ABR to confirm various aspects of the registration in the ABR. Previously, there was no particular form for such requests. ***[Schedule 6, item 11, paragraph 15(3)(b)]***

6.23 An associate who had not been identified upon registration of an entity may also be affected by the approved form provisions as the Registrar may require an associate of an entity to give the Registrar information that is relevant to confirming the associate's identity. This also applies to new associates of the entity after registration. This form is subject to the offence provision under section 8C of the TAA 1953, if the associate fails to comply with the request. ***[Schedule 6, item 11, item 2 in the table in subsection 15(1)]***

6.24 Similarly, there is an approved form for an entity to apply for cancellation of its registration in the ABR. The previous form for this purpose is a form approved by the Registrar. ***[Schedule 6, item 17, subsection 18(4)]***

6.25 To improve the integrity of the ABR, the Registrar may require that the identity of an associate is established before an entity is registered on the ABR. This applies where details about an associate were requested in the approved form for registration of the entity. ***[Schedule 6, item 3, paragraph 10(1)(ca)]***

6.26 To assist the Registrar to identify associates, he is able to request the entity to provide specified information or a specified document in respect of an associate. ***[Schedule 6, item 4, paragraph 10(2)(b)]***

6.27 Previously, an entity could make an application to the AAT for a review of certain decisions, where they were dissatisfied with the decision of the Registrar. This was a reasonable arrangement given that the initial focus of the Registrar was to encourage all eligible entities to apply for an ABN. Objection rights were available to entities in respect of both the goods and services tax and income tax matters.

6.28 However, to improve the integrity of the ABR, in recent times the Registrar has introduced an online eligibility tool which automatically rejects applications that do not appear to be carrying on an enterprise. The Registrar has also been more active in identifying and cancelling registrations of entities that are not or are no longer eligible. It is therefore appropriate that persons who are dissatisfied with that decision are able to access a low cost review process. Accordingly, the entity has objection rights using the provisions set out in Part IVC of the TAA 1953. Those provisions use the approved form provisions contained in section 388-50 of Schedule 1 to the TAA 1953. The objection rights extend to all of the previous types of decisions for which an entity could seek review of the decision of the Registrar by applying to the AAT. ***[Schedule 6, item 22, section 21]***

6.29 Should an objection decision be unfavourable to the entity, the entity is able to seek a review of the decision from the AAT or appeal to the Federal Court against the decision. These choices result from the use of the provisions in Part IVC of the TAA 1953. The term 'reviewable ABN decision' is inserted into the definition section of the ABN Act to refer to certain decisions made by the Registrar that are subject to objection rights. ***[Schedule 6, item 31, section 41]***

6.30 Although the Registrar may enter in the ABR any details that he has obtained, there are certain details outlined in section 25 of the ABN Act that the Registrar must enter in the ABR. The amendments include a provision to require the Registrar to enter in the ABR details about the entity's associates that were requested in the approved form for registration in the ABR. Due to section 14, an entity has to advise of any change to its associates that are entered on the ABR. ***[Schedule 6, item 23, paragraph 25(2)(aa)]***

6.31 Previously, where the entity did not advise of a change in details in accordance with the requirement under section 14 of the ABN Act and where the Registrar has been unable to obtain correct details from the entity, the Registrar had limited ability to update the ABR. The Schedule contains a new provision to permit the Registrar to amend the details entered in relation to the entity in the ABR based upon his own information. This occurs where he considers that the details entered in the ABR are incorrect and he has access to other details that he considers to be correct. Such information could be obtained from publicly available sources or other accessible information. If the information obtained was subject to the secrecy provisions that apply to a government entity, the information would usually remain subject to those secrecy provisions. This amendment maintains the integrity of the ABR. ***[Schedule 6, item 27, section 29A]***

Multi-agency Registration Authority amendments

6.32 As the Multi-agency Registration Authority, the Registrar establishes the identity of a representative of an entity and the relationship between a business and its representative. Following registration of the representative, the representative is able to communicate electronically on behalf of the business with multiple government agencies depending upon the extent of their authority from the entity.

6.33 The role of the Multi-agency Registration Authority forms an integral part of the Standard Business Reporting (SBR) program. SBR is a multi-agency program that aims to reduce reporting burdens for business through eliminating unnecessary or duplicated reporting and improve the interface between businesses and government agencies.

6.34 The Registrar is well placed to act as the Multi-agency Registration Authority as the Registrar already identifies businesses that apply for an ABN (section 10 of the ABN Act).

- The Registrar also confirms the identity of associates of the entity based on their TFN and other information disclosed by the Australian Taxation Office under paragraph 16(4)(a) of the *Income Tax Assessment Act 1936.*

- Paragraph 8WB(1A)(a) of the TAA 1953 deems the disclosure of TFN information to the Registrar not to be an offence as it is required or permitted for the purposes of a taxation law.

6.35 However, as the legislation previously read, the Registrar was not able to use TFNs and other information from the Commissioner of Taxation (Commissioner) for the purposes of other government agencies. The objects clause is broadened to allow the Registrar to create and maintain a register of representatives of businesses for the purpose of facilitating electronic dealings by those businesses with government entities. The amendment allows the Registrar to use such information to register representatives of businesses. ***[Schedule 6, item 37, subsection 3(4)]***

6.36 This amendment satisfies Principle 1 of the Information Privacy Principles listed in section 14 of the *Privacy Act 1988*. Principle 1 of the Information Privacy Principles precludes an agency from collecting personal information for inclusion in a record unless it is collected for a lawful purpose directly related to a function or activity of that agency.

6.37 Enterprises are able to nominate individuals to be registered as representatives of the enterprise for the purpose of facilitating the entity’s electronic dealings with government entities. The application must be in the approved form and that form may request the TFN of the representative and of the individual who nominates the representative of that enterprise. It is not compulsory for either party to quote their TFN. However, quotation of the TFN would mean that a representative could be registered in real time in the one electronic session. ***[Schedule 6, item 39, section 9A]***

6.38 A note has been included in the legislation to make the reader aware that the offence provisions contained in subsection 8WB(1) of Schedule 1 to the TAA 1953 do not apply to the recording or disclosing of another person's TFN on the approved form. This is because an exception applies under paragraph 8WB(1A)(a) of the TAA 1953. That paragraph permits the recording or disclosure of another person's TFN to the extent required or permitted by a taxation law.

6.39 The amendments outline the criteria to be satisfied before the Registrar must register a representative of an entity in the ABR. An application must have been made in accordance with the provisions in section 9A. The Registrar has to be satisfied that the identity of the nominating individual who has signed the declaration on the authorised form has been established. Where a representative is to nominate other representatives, the Registrar needs to be satisfied that the identity of the representative has been established. The last criterion provides that the Registrar is not forced to register multiple registrations of a representative for the same entity. ***[Schedule 6, item 40, subsection 10A(1)]***

6.40 Where the Registrar needs to establish the identity of a representative, the Registrar is able to request the entity, or the proposed representative, to provide the Registrar with specified information or a specified document to satisfy the Registrar of the identity of the proposed representative. It should be noted that where the representative provides the Registrar with their TFN there would usually be no need for the Registrar to use this provision. ***[Schedule 6, item 40, subsection 10A(2)]***

6.41 The Registrar registers a representative by entering certain details in the ABR in relation to the entity. The details are the name of the representative, the representative's email address and the date of effect of the registration. ***[Schedule 6, item 42, section 11A]***

6.42 The Registrar is able to enter any details into the ABR but section 25 specifies certain details that must be entered in the ABR. In respect of a representative of an entity, the Registrar must enter the name of the representative, the representative's email address and the date of effect of the registration of the representative. ***[Schedule 6, item 55, subsection 25(3)]***

6.43 To allow specification of additional details that must be recorded in the ABR in the future, a provision is included to permit such details to be prescribed in the regulations rather than having to amend the law. ***[Schedule 6, item 55, subsection 25(4)]***

6.44 Where the Registrar refuses to register an individual as a representative of an entity, the Registrar must give the entity written notice of the refusal and the reasons for the refusal. ***[Schedule 6, item 43, subsection 13(1)]***

6.45 If the Registrar has not decided an entity's application for an individual to be a representative of the entity within 28 days after the application was made, the entity may give the Registrar written notice that it wishes to treat the application as having been refused. Subsection 13(4) outlines the method of measuring the 28 day period, which is the same as for an application for an ABN. As the application has been effectively refused, the entity is entitled to lodge an objection under section 21 of the ABN Act. ***[Schedule 6, item 45, subsection 13(2)]***

6.46 To preserve the integrity of the ABR, the Registrar has the power to request the entity, or a representative of the entity, to provide the Registrar with information that is relevant to confirming the identity of the representative, or information relevant to the details entered in the ABR in relation to the representative of the entity. Failure to provide such information is subject to the offence provisions contained in section 8C of the TAA 1953. ***[Schedule 6, item 47, item 3 in the table in subsection 15(1)]***

6.47 The Registrar is able to cancel the registration of a representative of the entity where he is satisfied that one of a number of situations is satisfied. The situations covered include where the registration of the entity is cancelled; or the representative no longer represents the entity; the representative is registered under an identity that is not the representative's true identity; or the representative's identity is no longer satisfactorily established. Examples of situations where the representative no longer represents the entity are where the representative advises that they no longer wish to represent the entity or where the representative is no longer capable of representing the entity. ***[Schedule 6, item 48, subsection 18(1A)]***

6.48 An entity can request the Registrar to cancel the registration of a representative of an entity by completing an application in the approved form and forwarding it to the Registrar. ***[Schedule 6, item 49, paragraph 18(4)(b)]***

6.49 A number of additional reviewable ABN decisions are included in the table in subsection 21(2) of the ABN Act. These are for refusing to register the entity's representative; cancelling the registration of the entity's representative; refusing to cancel the registration of the entity's representative; and setting the date of effect of a cancellation. ***[Schedule 6, item 51, subsection 21(2)]***

6.50 The Registrar must reinstate the registration of a representative in the ABR if the Registrar is satisfied that the registration should not have been cancelled. This could occur where the Registrar realised that a mistake had been made; or as a result of an objection; a request for review; or an appeal; determined that the registration of the representative should not have been cancelled, or the application refused. The Registrar must give written notice of such reinstatement to the entity. ***[Schedule 6, item 50, subsection 19(1)]***

6.51 An offence provision is included in the amendments to discourage a person from impersonating a person who is registered under the ABN Act as a representative of an entity. The penalty for such an offence is two years imprisonment. ***[Schedule 6, item 54, subsection 23(3)]***

6.52 Where the Registrar is satisfied that the details of representatives of entities entered in the ABR are incorrect, and the Registrar has access to details that he believes to be correct, the Registrar is able to correct the details on the ABR. If the information obtained was subject to the secrecy provisions that apply to a government entity, the information would usually remain subject to those secrecy provisions. The Registrar is able to update his records to maintain the integrity of the register. ***[Schedule 6, item 56, paragraph 29A(1)(b)]***

6.53 The disclosure provisions contained in section 30 are amended to permit the Registrar to disclose information concerning a representative, who is registered, or has been registered in the Register, provided it is for the purpose of facilitating an entity's dealings with government entities, or for the purpose of maintaining details registered under the ABN Act. ***[Schedule 6, item 57, paragraph 30(3)(e)]***

Commencement date

Australian Business Register amendments

6.54 These amendments commence on the day on which this Bill receives Royal Assent.

Multi-agency Registration Authority amendments

6.55 These amendments commence on a single day to be fixed by Proclamation, but limited to a day not later than 12 months after Royal Assent. The reasons for such a commencement date are outlined in the following paragraphs.

6.56 The Government announced that the SBR program would be available to businesses from 1 July 2010. The SBR Authentication solution that allows for the registration of individuals, as representatives of businesses, for the purpose of enabling electronic dealings with government agencies, is just one component of the wider SBR program. The registration aspect facilitates the issue of an electronic identity that enables business representatives to authenticate their transactions when reporting to government agencies for the purposes for which they are authorised.

6.57 The Government agencies in the SBR program need to be able to receive communications authenticated by the electronic identity issued to business representatives. The SBR program will need to ensure that all components of the system are working properly, including (but not limited to):

- the commercial software which is being developed to pre-fill government forms directly from the client's accounts/records;
- SBR Core Services, which will validate the information on the forms and the version of the forms being transmitted, confirm the identity used to transmit the information, provide confirmation of receipt back to the client and direct the forms to the right agencies; and
- systems of participating agencies being able to receive the electronic forms and be accepted by their processing systems.

6.58 Although the authentication solution will need to be delivered ahead of the broader SBR implementation deadline, a specific date is not yet known. The delivery of the authentication solution is dependant on its end-to-end testing and its integration with the other key components of the SBR program. It is therefore dependant on the successful delivery of these other components.

6.59 Other key dependencies which may impact on the Registrar's ability to meet a fixed date of effect for the legislative amendments include the significant IT development work required to support the outcomes of this Bill. This work includes the development of the registration process, as well as developments required in taxation systems to deliver the functionality introduced in this Bill, such as the use of TFN information to streamline identity verification processes. Access to this information will be dependant on, and become part of, the major systems refresh currently being undertaken by the Commissioner. Slippage in the delivery of this refresh could impact on the successful delivery of the registration process.

6.60 The success of the SBR program is dependant upon all aspects of the program being available at the same time. Businesses must be able to experience a smooth registration process for its representatives and receive their associated electronic identity and be able to interact with the various agencies involved in the SBR program. In turn, the agencies need to be able to receive and process the information supplied by businesses.

6.61 For these reasons, the legislation provides for a commencement date to be a single day to be fixed by Proclamation but limited to a day not later than 12 months after Royal Assent. The actual date will be dependent upon all aspects of the SBR program being successfully integrated and tested.

Application and transitional provisions

Australian Business Register amendments

6.62 Where the approved form provisions contained in section 388-50 of the TAA 1953 replace the existing form approved by the Registrar or the approved form replaces a document that does not have any special requirements, the new form applies after the commencement of the relevant provisions, that is, Royal Assent.

6.63 Items 1 to 4, 23 and 28 are relevant to the approved form for applications for an ABN. Those items apply to applications using the new approved form from their commencement, that is, Royal Assent.

6.64 Item 17 refers to the new approved form to apply to cancel the registration of the ABN. As above, the provision apply to applications for cancellation of an ABN from the commencement of the item, that is, Royal Assent.

6.65 An approved form is introduced to enable entities and associates to update information contained in the ABR concerning the entity or an associate. At present, such information can be provided in any format. The new provision regarding the approved form applies from commencement of items 9 and 10, that is, Royal Assent.

6.66 Item 11 introduces an approved form for the Registrar to request entities and associates to update items in the ABR, or to confirm the identity of either associates or entities, or the entitlement of entities to be registered in the ABR. The approved form for these purposes applies to requests by the Registrar after the commencement of that item, that is, Royal Assent. ***[Schedule 6, item 32]***

Consequential amendments

Australian Business Register amendments

6.67 Two consequential amendments are included to more appropriately identify the authority for the use of the phrase ‘address shown in the Register’. The first instance of this occurs in paragraph 57(1)(a) of the *Product Grants and Benefits Administration Act 2000*. The words ‘under subsection 25(2) of the *A New Tax System (Australian Business Number) Act 1999*’ are to be added to the phrase ‘address shown in the Register’. ***[Schedule 6, item 33, paragraph 57(1)(a) in the Product Grants and Benefits Administration Act 2000]***

6.68 The second instance occurs in paragraph 105-140(1)(a) in Schedule 1 to the TAA 1953 where the same words included in the above amendment are also included in this provision. ***[Schedule 6, item 34, paragraph 105-140(1)(a) in Schedule 1 to the TAA 1953]***

Chapter 7
Removing the Greenhouse Challenge Plus Programme condition for fuel tax credits

Outline of chapter

7.1 Schedule 7 to this Bill amends the *Fuel Tax Act 2006* to remove the restriction that businesses may not claim more than $3 million of fuel tax credits in a financial year unless they are a member of the Greenhouse Challenge Plus Programme (GCPP).

Context of amendments

7.2 Under Division 45 of the *Fuel Tax Act 2006*, businesses may not claim more than $3 million of fuel tax credits in a financial year unless they are a member of the GCPP, or another program determined by the Minister for the Environment, Heritage and the Arts.

7.3 The GCPP provision in the *Fuel Tax Act 2006* was originally included so that large fuel users would monitor and take measures to reduce their carbon emissions. This outcome will be better achieved through the Government's Carbon Pollution Reduction Scheme. The GCPP will cease after 30 June 2009 and a suitable replacement program can not be identified for the purpose of the *Fuel Tax Act 2006*.

7.4 Without an amendment removing the GCPP condition from the *Fuel Tax Act 2006*, businesses will be unable to claim fuel tax credits in excess of $3 million in a financial year. These businesses will then not be given relief from fuel tax on their inputs, which would be inconsistent with the policy intent of the fuel tax credit system.

Summary of new law

7.5 This measure removes the provision in the *Fuel Tax Act 2006* that businesses may not claim more than $3 million of fuel tax credits in a financial year unless they are a member of the GCPP, or another program determined by the Minister for the Environment, Heritage and the Arts.

Comparison of key features of new law and current law

New law	***Current law***
Businesses will be able to claim their fuel tax credit entitlement including for amounts more than $3 million in a financial year.	After the termination of the GCPP on 30 June 2009, businesses' fuel tax credits will be capped at $3 million in a financial year regardless of their fuel tax credit entitlement.

Detailed explanation of new law

7.6 This measure removes the provision in Division 45 of the *Fuel Tax Act 2006* that specifies that businesses may not claim more than $3 million of fuel tax credits in a financial year unless they are a member of the GCPP, or another program determined by the Minister for the Environment, Heritage and the Arts.

7.7 Currently under the Act, businesses which are not a member of the GCPP (and consequently not able to claim their fuel tax credit entitlements that are in excess of $3 million), can join the GCPP within four years and make a decreasing adjustment to account for these credits. From 1 July 2009 these businesses will be unable to join the GCPP and therefore, to enable them to make a decreasing adjustment for credits prior to 1 July 2009, Part 3 of Schedule 7 deems businesses not a member of the GCPP to be a member of the GCPP immediately prior to its termination.

7.8 Under section 105-55 in Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953), businesses will then have four years to make this adjustment — which will remain an adjustment for the June 2009 tax period. It will not matter whether or not the taxpayer has already claimed the original fuel tax credits, as subsections 45-5(1) and 65-5(5) of the *Fuel Tax Act 2006* will continue to apply to those credits.

Example 7.25

Bill's Mining Company has monthly tax periods and has fuel tax credit entitlements. Bill's Mining Company's fuel tax credits for the financial year ending 30 June 2009 totals $2,960,000. Bill's Mining Company is not a member of the GCPP.

In September 2009 Bill's Mining Company becomes aware it is entitled to half a fuel tax credit entitlement for taxable fuel it acquires for use in its light vehicles used on its mining site. These entitlements arise in the financial year ending June 2009 and totals $100,000. Bill's Mining Company's fuel tax credit entitlements for the financial year exceed $3 million by $60,000.

Division 45 of the *Fuel Tax Act 2006* continues to apply to the $60,000 in fuel tax credit entitlements that are in excess of the $3 million. Bill's Mining Company must become a member of the GCPP to claim the fuel tax credits as a decreasing fuel tax adjustment.

Under the amendments Bill's Mining Company is deemed to be a member of the GCPP as at 30 June 2009.

Bill's Mining Company will therefore have a decreasing fuel tax adjustment for the $60,000 in fuel tax credit entitlements. The adjustment is attributable to the tax period ending 30 June 2009.

Under section 105-55 in Schedule 1 to the TAA 1953 Bill's Mining Company will have four years from the end of the tax period ending 30 June 2009 to claim the fuel tax credit entitlements to the tax period.

Application and transitional provisions

7.9 Application provisions are outlined in paragraphs 7.7 and 7.8.

Consequential amendments

7.10 As well as the amendments to remove Division 45 and references to Division 45 of the *Fuel Tax Act 2006*, minor amendments are required to Schedule 3 to the *Fuel Tax (Consequential and transitional Provisions) Act 2006*. ***[Schedule 7, Part 2]***

Chapter 8
Tax exemption for certain grants to businesses affected by the Victorian bushfires

Outline of chapter

8.1 Schedule 8 to this Bill amends the *Income Tax Assessment Act 1997* (ITAA 1997) to provide an exemption from tax for the Clean-up and Restoration Grants paid to small businesses and primary producers affected by the Victorian bushfires.

Context of amendments

8.2 On 18 February 2009, the Australian Government, in conjunction with the Victorian Government, announced a $51 million package to assist small businesses and primary producers affected by the Victorian bushfires.

8.3 This package includes a $5,000 Clean-up and Restoration Grant, which can be increased up to $25,000 in cases where the applicant has suffered significant damage.

8.4 Generally, such grants are treated as assessable income under the income tax law. Expenses related to the carrying on of a business (ie, those funded by using the grant) would generally be deductible.

Detailed explanation of new law

8.5 This measure defines the Clean-up and Restoration Grants as non-assessable non-exempt income. This approach ensures that the grant is exempt from tax, while avoiding interactions with other areas of tax law. ***[Schedule 8, item 2]***

8.6 While the Australian and Victorian Governments have announced a number of measures to assist both individuals and businesses to recover from the Victorian bushfires, this measure only applies to the Clean-up and Restoration Grants.

Consequential amendments

8.7 The table in section 11-55 of the ITAA 1997 is amended to add the Clean-up and Restoration Grants to the list of payments that are non-assessable non-exempt income. ***[Schedule 8, item 1]***

8.8 Given the short period for which the grants would be paid, a sunsetting clause is included to repeal this measure with effect from 1 July 2011. ***[Schedule 8, items 3 and 4]***

Application and transitional provisions

8.9 This measure applies to grants paid in the 2008-09 and 2009-10 income years. ***[Schedule 8, item 5]***

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