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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

SUPERANNUATION LEGISLATION AMENDMENT BILL 2010

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Deputy Prime Minister and
Treasurer, the Hon Wayne Swan MP)

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Glossary

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

Abbreviation	***Definition***
APRA	Australian Prudential Regulation Authority
ATO	Australian Taxation Office
Commissioner	Commissioner of Taxation
IT(TP) Act	*Income Tax (Transitional Provisions) Act 1997*
ITAA 1936	*Income Tax Assessment Act 1936*
ITAA 1997	*Income Tax Assessment Act 1997*
S(UMLM) Act	*Superannuation (Unclaimed Money and Lost Members) Act 1999*
SG	superannuation guarantee
SIS Act 1993	*Superannuation Industry (Supervision) Act 1993*
SIS Regulations 1994	*Superannuation Industry (Supervision) Regulations 1994*
SMSF	self managed superannuation fund
TPD	total and permanent disability

General outline and financial impact

Superannuation unclaimed money

Schedule 1 to this Bill amends the *Superannuation (Unclaimed Money and Lost Members) Act 1999*, and the *Income Tax Assessment Act 1997* to:

- facilitate state and territory authorities and public sector superannuation schemes paying unclaimed superannuation moneys to the Commissioner of Taxation (Commissioner); and
- enable the Commissioner to accept, and subsequently pay out, amounts transferred by state and territory authorities and public sector superannuation schemes.

Date of effect: This measure commences the day after Royal Assent.

Proposal announced: This measure was announced in the 2010-11 Budget.

Financial impact: This measure will have an ongoing gain to revenue over the forward estimates period as follows:

2009-10	***2010-11***	***2011-12***	***2012-13***	***2013-14***
Nil	Nil	$28.8m	$0.4m	$0.4m

Compliance cost impact: Low.

Superannuation — transitional relief for income tax deductibility of total and permanent disability insurance premiums paid by superannuation funds

Schedule 2 and clause 4 of this Bill provide transitional relief for income tax deductibility of total and permanent disability (TPD) insurance premiums paid by superannuation funds by amending the *Income Tax (Transitional Provisions) Act 1997* and the *Income Tax Assessment Act 1997*.

The transitional relief will provide complying superannuation funds, for the 2004-05 to 2010-11 income years, with a greater scope to deduct premiums paid for insurance cover commonly regarded as TPD insurance.

Date of effect: The income years 2004-05 to 2010-11.

Proposal announced: This measure was announced in the then Minister for Financial Services, Superannuation and Corporate Law's Media Release No. 027 of 13 October 2009.

Financial impact: Nil.

Compliance cost impact: Unquantifiable. No quantitative figure is available as there is no information on the likely new fee structure required to meet the proposal on the deductibility of TPD premiums. However, this transitional arrangement will reduce the compliance costs associated with the proposal as superannuation funds will not need to engage actuaries during the transitional period.

Superannuation and relationship breakdowns

Schedule 3 to this Bill amends the *Superannuation Industry (Supervision) Act 1993* (SIS Act 1993) to allow the trustee of a regulated superannuation fund to acquire an asset *in specie* from a related party of the fund, following the relationship breakdown of a member of the fund, without contravening the prohibition against related party acquisitions.

This Schedule also amends Subdivision D of Division 1 of Part 8 of the SIS Act 1993 to ensure equitable application of the transitional arrangements in relation to in-house assets where an asset transfer occurs as the result of the relationship breakdown of a member of the fund.

Date of effect: These amendments will apply in relation to assets acquired by a superannuation fund trustee or investment manager on or after the date of Royal Assent.

Proposal announced: This measure was introduced into Parliament on 24 June 2010 as part of this Bill, which lapsed when Parliament was prorogued.

Financial impact: Unquantifiable, but expected to be small.

Compliance cost impact: Low.

Other superannuation amendments

Schedule 4 to this Bill makes a number of minor amendments to improve the operation of the superannuation sections of the income tax legislation. These amendments include:

- allowing a deduction for eligible contributions to be claimed from successor superannuation funds after 1 July 2011;
- increasing the time-limit for deductible employer contributions made for former employees;
- clarifying the due date of the shortfall interest charge for the purposes of excess contributions tax;
- allowing the Commissioner of Taxation to exercise discretion for the purposes of excess contributions tax before an assessment is issued;
- providing a regulation making power to specify additional circumstances when a benefit from a public sector superannuation scheme will have an untaxed element; and
- streamlining references to the Immigration Secretary and Immigration Department.

Date of effect: These amendments generally commence on the day after Royal Assent.

Proposal announced: These amendments were announced in the 2010-11 Budget.

Financial impact: These amendments will have an ongoing unquantifiable revenue impact.

Compliance cost impact: Low.

Chapter 1
Superannuation unclaimed money

Outline of chapter

1.1 Schedule 1 to this Bill amends the *Superannuation (Unclaimed Money and Lost Monies) Act 1999* (S(UMLM) Act), and the *Income Tax Assessment Act 1997* (ITAA 1997) to facilitate the transfer of unclaimed superannuation moneys from state and territory authorities and public sector superannuation schemes to the Commissioner of Taxation (Commissioner) and to enable the Commissioner to accept, and subsequently pay out amounts transferred by state and territory authorities and public sector superannuation schemes.

1.2 All references to legislative provisions in this chapter are references to the S(UMLM) Act unless otherwise stated.

Context of amendments

1.3 Private sector superannuation funds are currently required to pay unclaimed superannuation moneys to the Commissioner. The term 'unclaimed superannuation moneys' refers to three types of unclaimed money:

- 'general' unclaimed superannuation money;
- unclaimed superannuation of former temporary residents; and
- lost member accounts, that is, small accounts of lost members and inactive accounts of unidentifiable members.

1.4 State and territory public sector superannuation providers, on the other hand, are not required to report and pay 'general' unclaimed superannuation moneys or lost member accounts to the Commissioner provided they comply with a state or territory law which requires their unclaimed money be reported and paid to the relevant state or territory authority. Nor are they required to pay unclaimed superannuation of former temporary residents to the Commissioner.

1.5 If the state or territory law does not require payment to the state or territory authority, regulated public sector superannuation schemes are

required to report and pay general unclaimed superannuation moneys and lost member accounts to the Commissioner.

1.6 State and territory authorities may also currently hold some older private sector unclaimed superannuation paid to them prior to implementation of the current unclaimed superannuation money arrangements for private sector funds.

1.7 The amendments in Schedule 1 will allow both state and territory authorities and public sector superannuation schemes to transfer unclaimed superannuation moneys to the Commissioner.

1.8 For amounts transferred to the Commissioner, individuals will still be able to claim back their money from the Commissioner at any time.

1.9 The amendments will facilitate more uniform treatment of unclaimed money across the private and public sectors and assist in the central administration of unclaimed superannuation moneys.

Summary of new law

1.10 Schedule 1 amends the operation of the S(UMLM) Act to permit participating public sector superannuation schemes as well as state and territory authorities to comply with the S(UMLM) Act in the same way as a superannuation provider.

1.11 This will allow public sector superannuation schemes and authorities to transfer unclaimed superannuation money to the Commissioner.

1.12 The amendments will also enable the Commissioner to subsequently pay out, for entitled individuals, amounts transferred from the States and Territories and Commonwealth public sector schemes.

1.13 Amendments to the ITAA 1997 will extend the application of the ITAA 1997 to cover the transfer of unclaimed superannuation moneys from the States and Territories to the Commissioner as well as subsequent payment by the Commissioner for individuals entitled to the amounts transferred. Amendments to the ITAA 1997 also clarify that the rules for working out the tax components of unclaimed money payments apply to a benefit which is an unclaimed superannuation money payment by a state or territory authority.

Comparison of key features of new law and current law

New law	***Current law***
Prescribed state and territory public sector superannuation schemes will be permitted, but not required to pay 'general' unclaimed superannuation moneys to the Commissioner. State and territory authorities will be able to pay to the Commissioner unclaimed superannuation moneys.	State and territory public sector superannuation providers do not have to pay 'general' unclaimed superannuation to the Commissioner provided they comply with a state or territory law which requires their unclaimed money be reported and paid to the relevant state or territory authority. If the state or territory law does not require payment to the state or territory authority, regulated public sector superannuation schemes are required to report and pay unclaimed superannuation to the Commissioner.
The Commissioner will be permitted to give a notice about former temporary residents to the trustees of prescribed public sector superannuation schemes and prescribed unfunded public sector schemes.	The Commissioner is not able to give notices about former temporary residents to trustees of state and territory public sector superannuation schemes or to trustees of unfunded public sector schemes.
Prescribed state and territory public sector superannuation schemes will be permitted, but not required to pay former temporary resident unclaimed moneys to the Commissioner.	State and territory public sector superannuation providers do not have to pay former temporary resident unclaimed superannuation to the Commissioner.
Prescribed state and territory public sector superannuation schemes will be permitted, but not required to pay small accounts of lost members and inactive accounts of unidentifiable members to the Commissioner.	State and territory public sector superannuation providers do not have to pay small accounts of lost members and inactive accounts of unidentifiable members to the Commissioner provided they comply with a state or territory law which requires their unclaimed money be reported and paid to the relevant state or territory authority.
Superannuation unclaimed moneys held by state and territory authorities that are transferred to the Commissioner will be treated in the same way as amounts transferred by prescribed state and territory public sector superannuation schemes.	No equivalent.

Detailed explanation of new law

1.14 Regulated state and territory public sector superannuation schemes are currently not required to pay unclaimed superannuation moneys to the Commissioner provided they comply with a state or territory law which requires their unclaimed money be reported and paid to the relevant state or territory authority.

1.15 Currently, the Commissioner is not able to issue notices in relation to former temporary residents, that is, a section 20C notice, to either state and territory public sector superannuation schemes or unfunded public sector schemes.

1.16 Where state or territory law does not require payment of unclaimed money to a state or territory authority, regulated public sector superannuation schemes are required to report and pay unclaimed superannuation to the Commissioner.

1.17 In the case of Commonwealth public sector superannuation schemes, only regulated schemes are currently required to pay 'general' unclaimed money to the Commissioner. The provisions relating to former temporary resident unclaimed money currently only apply to funded regulated Commonwealth public sector schemes while the lost member account provisions currently do not apply to Commonwealth public sector superannuation schemes which support or relate to defined benefit interests.

1.18 These amendments will allow prescribed public sector superannuation schemes, as well as state and territory authorities, to transfer unclaimed superannuation to the Commissioner. Individuals will still be able to claim back their money from the Commissioner at any time.

1.19 These amendments will facilitate more uniform treatment of unclaimed money across the private and public sectors and assist in the central administration of unclaimed monies.

1.20 Participating Commonwealth, state and territory public sector superannuation schemes will be prescribed in regulations. The schemes to be listed will be determined in consultation with the States and Territories and relevant agencies. Schemes will be able to prescribe for the purposes of any, or all, of the different elements of unclaimed money. State and territory authorities do not need to be prescribed to be able to transfer superannuation unclaimed money amounts to the Commissioner.

1.21 The simplified outline of the operation of the S(UMLM) Act will be amended to reflect that state and territory public sector

superannuation schemes will be permitted to pay superannuation unclaimed money to the Commissioner in the same way as superannuation providers. ***[Schedule 1, items 1 and 2, section 7]***

1.22 Section 8 is amended to revise or insert definitions for the following concepts:

- *Commonwealth public sector superannuation scheme* means a superannuation scheme established by or under a Commonwealth law or a municipal corporation or other local governing body or public authority established under the authority of the Commonwealth or under a Commonwealth law ***[Schedule 1, item 3, section 8]***;

- *Public sector superannuation scheme* means either a Commonwealth public sector superannuation scheme or a state or territory public sector superannuation scheme ***[Schedule 1, item 4, section 8]***;

- *State or territory public sector superannuation scheme* has the meaning used for the purposes of section 18 ***[Schedule 1, item 5, section 8]***; and

- *Unfunded public sector schemes* has the meaning given by the *Superannuation Guarantee (Administration) Act 1992* ***[Schedule 1, item 6, section 8].***

1.23 Under Part 3 of the S(UMLM) Act superannuation providers are required to give the Commissioner a statement of unclaimed money and pay unclaimed money amounts to the Commissioner. Under section 18, these requirements do not currently apply in relation to superannuation providers who are trustees of state and territory public sector superannuation schemes provided they comply with a state or territory law which requires their unclaimed money be reported and paid to the relevant state or territory authority. Unregulated public sector schemes, that is, schemes which do not satisfy the definition of superannuation provider, are also not required to pay 'general' unclaimed superannuation moneys to the Commissioner.

1.24 Section 18AA is inserted to extend the application of the ‘general’ unclaimed money provisions of the S(UMLM) Act to public sector superannuation schemes that are prescribed in the regulations for the purposes of this section.

- Broadly, ‘general’ unclaimed superannuation arises when:
  - an individual reaches eligibility age and does not claim their superannuation;
  - the member is deceased and the superannuation provider is unable to ensure that the benefit is received by the person who is entitled to receive it; or
  - a payment split applies and the superannuation provider is unable to ensure that the non-member spouse or their legal personal representative receives the amount.

1.25 Only those schemes that have been nominated by the Commonwealth or the States and Territories will be listed in the regulations. It will be possible, for example, for a particular state to specify that some of the state’s schemes, but not others, are prescribed schemes for the purposes of section 18AA.

1.26 Subsection 18AA(1) provides that those public sector schemes that have been prescribed in the regulations and which are not funds, as defined for the purposes of the S(UMLM) Act, will be treated in the same way as other superannuation funds for the purposes of sections 6, 10 to 12,14,16,17, 18A to C and subsections 19(1) to (3), 24C(6), 24E(5) and 25(2) of the S(UMLM) Act. ***[Schedule 1, item 7, subsection 18AA(1)]***

1.27 Subsection 18AA(2) provides that prescribed state and territory public sector superannuation schemes are permitted but not required to give a statement to and pay an amount to the Commissioner provided that such a payment and statement are not prohibited by the governing rules of the scheme. Permitting, rather than requiring, the States and Territories to pay unclaimed superannuation moneys to the Commissioner reflects the voluntary nature of these provisions.

1.28 Prescribed, regulated state and territory public sector superannuation schemes that do not comply with a state or territory law which requires their unclaimed money be reported and paid to the relevant state or territory authority will continue to be subject to section 18 and therefore will not have the option of not giving a statement to and paying an amount to the Commissioner.

1.29 Part 3A of the S(UMLM) Act requires the Commissioner to give a written notice (section 20C notice) to a superannuation provider for a fund if the Commissioner is satisfied that a former temporary resident has a superannuation interest in the fund. The effect of a provider receiving a notice from the Commissioner under section 20C is the requirement to give a statement and make a payment to the Commissioner by a certain time. These requirements do not currently apply in relation to superannuation providers who are trustees of state and territory public sector superannuation schemes or to unfunded public sector schemes.

1.30 Subsection 20C(3) is amended to allow the Commissioner to give a notice under subsection 20C(1) to both prescribed state or territory public sector superannuation schemes and prescribed unfunded public sector schemes ***[Schedule 1, item 8, subsection 20C(3)].*** Only those schemes agreed by the Commonwealth, States and Territories will be prescribed in the regulations.

1.31 Section 20JA is inserted to extend the application of the former temporary resident unclaimed money provisions to public sector superannuation schemes that are prescribed in the regulations for the purposes of this section.

1.32 Subsection 20JA(1) provides that those public sector superannuation schemes that have been prescribed in the regulations for the purposes of this section will be treated in the same way as other superannuation funds for the purposes of section 6, subsections 16(7), 17(2A), 19(1) and (3), Part 3A (other than 20F(5) and (6)) and subsections 24C(6), 24E(5) and 25(2A). ***[Schedule 1, item 9, subsection 20JA(1)]***

1.33 Subsection 20JA(2) provides that where the trustee of a state or territory public sector superannuation scheme receives a 20C notice, they are permitted, but not required, to provide a statement to the Commissioner and permitted but not required to pay amounts to the Commissioner provided that such a payment and statement are not prohibited by the governing rules of the scheme. ***[Schedule 1, item 9, subsection 20JA(2)]***

1.34 Part 4A of the S(UMLM) Act requires superannuation providers to give the Commissioner a statement of small accounts of lost members and inactive accounts of unidentifiable members and to pay these accounts to the Commissioner. Under section 24H, these requirements do not currently apply to state and territory public sector superannuation schemes that report and pay unclaimed moneys to the relevant state or territory authority.

1.35 Section 24HA is inserted to extend the application of the lost member account provisions to public sector superannuation schemes prescribed in the regulations for the purposes of this section.

1.36 Subsection 24HA(1) provides that those public sector superannuation schemes that have been prescribed in the regulations for the purposes of this section, will be treated in the same way as other superannuation funds for the purposes of section 6, subsections 19(1) to (3), Part 4A (other than section 24F and 24HA) and subsections 25(3) and (4). ***[Schedule 1, item 13, subsection 24HA(1)]***

1.37 Subsection 24HA(2) provides that the trustee of a state or territory public sector superannuation scheme is permitted, but not required, to provide a statement of lost member accounts and pay those accounts to the Commissioner provided that such a payment and statement are not prohibited by the governing rules of the scheme. ***[Schedule 1, item 13, subsection 24HA(2)]***

1.38 Subsection 24HA(3) is inserted to ensure that a state or territory scheme that is prescribed for the purposes of this section, but which is also required to report and pay unclaimed superannuation to the Commissioner because it does not report and pay unclaimed superannuation moneys to the relevant state or territory authority, continues to be required to make a statement of unclaimed money and pays an amount to the Commissioner in accordance with subsections 16(1) and 17(1). ***[Schedule 1, item 13, subsection 24HA(3)]***

1.39 Section 49A is inserted to enable state and territory authorities to transfer unclaimed superannuation moneys to the Commissioner.

1.40 Where unclaimed superannuation moneys have been paid to a state or territory authority (from either public sector or private sector sources) the authority will be treated as if it were the trustee of a prescribed state or territory public sector superannuation scheme, thus enabling state and territory authorities to transfer all unclaimed superannuation moneys to the Commissioner. ***[Schedule 1, item 14, section 49A]***

Consequential amendments

1.41 There are also amendments tidying up assorted references, notes and other matters that need to be changed because of the changes made to enable the transfer of unclaimed superannuation moneys from state and territory authorities and public sector superannuation schemes to the Commissioner. ***[Schedule 1, items 10 to 12, subsection 24C(1) (note 1), subsection 24E(1) (note 1), section 24H]***

Amendments to the *Income Tax Assessment Act 1997*

1.42 Section 306-20 of the ITAA 1997 specifies that an unclaimed money payment paid to the Commissioner paid in accordance with the S(UMLM) Act is not assessable and is not exempt income. This section is amended to extend its application to capture unclaimed money payments paid to the Commissioner by state and territory public sector schemes and authorities. ***[Schedule 1, item 15, section 306-20 of the ITAA 1997]***

1.43 Subsection 307-5(1) of the ITAA 1997 currently defines a 'superannuation benefit' as including unclaimed money payments paid to an individual under specified sections of the S(UMLM) Act.

1.44 Subsection 307-5(1) of the ITAA 1997 is amended to extend the definition of superannuation benefit to also include an unclaimed money payment paid to a state or territory public authority and amounts paid by a state or territory authority as mentioned in, respectively, subsections 18(4) and (5) of the S(UMLM) Act. ***[Schedule 1, item 16, subsection 307-5(1) (item 5 in the table)]***

1.45 The rules to work out the tax-free and taxable components of a superannuation benefit that is a payment by the Commissioner under the S(UMLM) Act are set out in section 307-142 of the ITAA 1997. Like any other superannuation benefit, a payment from the Commissioner can consist of a 'tax-free' component and a 'taxable component'.

1.46 Subsection 307-142(1) is amended to ensure the rules for working out the tax components of a superannuation benefit apply to payments by a state or territory authority as mentioned in subsection 18(5) of the S(UMLM) Act. ***[Schedule 1, item 17, subsection 307-142(1) of the ITAA 1997]***

1.47 The rules to calculate the tax-free components of a superannuation benefit that is an unclaimed money payment are set out in subsection 307-142(3). This section is amended to include superannuation benefits that are unclaimed money payments by state and territory authorities. ***[Schedule 1, items 18 and 19, subsection 307-142(3) of the ITAA 1997]***

1.48 Subsection 307-142(3A) is inserted to set the tax-free component of an unclaimed money payment by the Commissioner as nil if the unclaimed money payment is an amount paid to the Commissioner by a state or territory public sector superannuation scheme or authority and the Commissioner has not been provided with sufficient information to work out the tax-free component of the payment. ***[Schedule 1, item 20, subsection 307-142(3) of the ITAA 1997]***

1.49 Where state and territory public sector schemes and authorities provide the Commissioner with details of the tax-free and taxable components of transferred unclaimed superannuation moneys, those components will be determined in accordance with that information.

1.50 If a taxpayer is able to produce information that shows that the tax-free amount should be an amount other than nil, the Commissioner is able to use the information provided to determine the tax-free component of the unclaimed money payment.

Application provision

1.51 Changes relating to the transfer of unclaimed superannuation moneys to the Commissioner by state and territory authorities will apply in relation to transfers occurring, before, on or after the commencement of this item. ***[Schedule 1, item 21, subparagraph 49A(1)(b)(i)]***

1.52 Changes to section 307-142 of the ITAA 1997 will apply in relation to payments made on or after the commencement of this item. ***[Schedule 1, item 21, section 307-142 of the ITAA 1997]***

Chapter 2
Superannuation — transitional relief for income tax deductibility of total and permanent disability insurance premiums paid by superannuation funds

Outline of chapter

2.1 Schedule 2 and clause 4 of this Bill provide transitional relief for income tax deductibility of total and permanent disability (TPD) insurance premiums paid by superannuation funds by amending the *Income Tax (Transitional Provisions) Act 1997* (IT(TP) Act) and the *Income Tax Assessment Act 1997* (ITAA 1997).

2.2 The transitional relief will provide complying superannuation funds, for the 2004-05 to 2010-11 income years, with a greater scope to deduct premiums paid for insurance cover commonly regarded as TPD insurance.

2.3 All legislative references in this chapter are to the IT(TP) Act unless otherwise stated.

Context of amendments

Insurance provided through superannuation funds

2.4 Superannuation funds commonly take out death and disability insurance policies to insure their risk for a liability they may incur to their members. How a fund insures that risk (for example, in whole or in part, with or without other risks) may vary among funds and policies.

2.5 Superannuation funds obtaining death and disability insurance for this purpose is consistent with the key objective of superannuation. That is, to provide benefits to members in retirement or, in the event of the member's death, to the member's beneficiaries.

2.6 Disability insurance taken out by superannuation funds includes TPD insurance. The definition of the TPD cover provided can vary across insurance policies. For example, insurance policies can include TPD cover based on a definition of 'permanent disability' as the inability of the member to perform 'any occupation', or as the inability of the member to continue to perform his or her 'own occupation'. Other TPD cover is known as 'loss of independence', 'home duties' or 'loss of limbs/sight'.

2.7 As the fund contracts with an insurance provider, any payout under the insurance policy due to the occurrence of an insured event will be made to the fund.

2.8 A fund can only provide a benefit referable to that payment (and any other preserved benefits) to the member if a condition of release of benefits has been satisfied. These conditions are contained in the *Superannuation Industry (Supervision) Regulations 1994* (SIS Regulations 1994), and include retirement, attaining the age of 65, death, permanent incapacity and temporary incapacity.

2.9 There may be circumstances where, as a consequence of the definition of 'permanent disability' used in the policy, a fund receives an insurance payment due to the occurrence of an insured event but no condition of release has been satisfied. In these cases, the fund will retain the proceeds of the insurance payment in the fund until a condition of release is met.

Example 2.1

Bill is a member of ABC Super which took out a TPD insurance policy to cover its members in the event of them being permanently disabled by a 'loss of limb'. Bill had an accident which resulted in a loss of limb, but after a period of rehabilitation could still perform his regular employment duties.

ABC Super received a payout under the insurance contract. However, it could not pay this amount to Bill immediately as the permanent incapacity condition of release had not been met. ABC Super could pay the money to Bill only in the event of a condition of release, for example, retirement.

Outline of existing law

Income Tax Assessment Act 1997

2.10 As part of the 2007 *Better Super* reforms, the provisions regarding deductibility of TPD insurance premiums paid by superannuation funds were transferred from Division 3 of Part IX of the *Income Tax Assessment Act 1936* (ITAA 1936) to Division 295 of the ITAA 1997, with effect from the 2007-08 income year.

2.11 Subsection 295-465(1) of the ITAA 1997 provides a tax deduction for all or part of a TPD insurance premium paid by a complying superannuation fund in certain circumstances. A fund is allowed to deduct a premium paid for an insurance policy for a liability of the fund to provide a ***disability superannuation benefit***. This is defined in the ITAA 1997 to mean a 'superannuation benefit' if:

- the benefit is paid to a person because he or she suffers from ill-health (whether physical or mental); and

- two legally qualified medical practitioners have certified that, because of the ill-health, it is unlikely that the person can ever be gainfully employed in a capacity for which he or she is reasonably qualified because of education, experience or training.

2.12 This definition is similar to the definition of 'permanent incapacity' in the SIS Regulations 1994 which is a condition of release of benefits.

2.13 Where part of an insurance premium is specified in the policy as wholly giving rise to a liability of the fund to provide a 'disability superannuation benefit', as defined, a fund can fully deduct that portion of the premium.

2.14 Partial deductibility arises where the TPD definition in the insurance policy differs from the definition of 'disability superannuation benefit' in the ITAA 1997. Under subsection 295-465(3), if apportioning is required, an actuary's certificate must be obtained which specifies how much of the policy premium is attributable to the liability of the fund to provide disability superannuation benefits.

Income Tax Assessment Act 1936

2.15 The now repealed provisions of the ITAA 1936 allowed a deduction for the whole or part of the premium for 'death or disability benefits', if the whole or part of the premium is specified in the policy as being wholly attributable to a liability of the fund to provide disability benefits to members. An actuary's certificate was required if no amount was specified or if only part of the amount specified was attributable to the liability of the fund to provide death or disability benefits to members.

2.16 In the ITAA 1936, ***death or disability benefits*** was defined to include a benefit provided to the member in the event of the permanent disability of the member. No definition of 'permanent disability' was provided.

Summary

2.17 The current law provides that TPD insurance premiums are deductible only to the extent the policies have the necessary connection to a liability of a fund to provide permanent incapacity benefits. Where proportioning is necessary, an actuary's certificate is required to support the deduction claimed. This was also the case under the previous ITAA 1936 provisions.

Industry views and practice

2.18 Industry representatives have indicated they consider that, under the ITAA 1936 provisions, the premium was fully deductible if paid for a policy insuring against some form of permanent disability. Industry has advised that this practice has continued after the 2006-07 income year under the provisions of the ITAA 1997.

2.19 Industry has raised concerns about the application of the provisions of the ITAA 1997. For example, for industry practice to become aligned with the law, changes to insurance policies, premiums, systems, disclosure and actuarial certification practices would be necessary.

Consistency with retirement income policy objectives

2.20 Under the ITAA 1997, a tax deduction is provided in relation to TPD benefits that would satisfy the 'permanent incapacity' condition of release (or in effect provide benefits in retirement). This is consistent with one of the underlying objectives of retirement income policy — that superannuation funds must generally be maintained for the sole purpose of providing benefits on a member's retirement (or on or after the occurrence of earlier contingencies such as death or ill-health).

2.21 It appears industry's practice under the ITAA 1936 was to claim deductions for premiums relating to TPD policies — notwithstanding that, in some cases, claims under such policies may result in payouts to the fund trustee in circumstances where the member could not satisfy the 'permanent incapacity' release condition.

2.22 In such cases, the moneys are held in the fund until the member satisfies a condition of release, such as retirement at or after preservation age (see Example 2.1). This results in a tension with retirement income policy, as it provides a tax concession to a fund for that portion of the cost of an insurance policy that may give rise to payments to the funds which are not directly or immediately related to a liability of the fund to provide death and disability benefits to members.

Announcement of transitional relief

2.23 The Government has recognised the concerns raised by industry regarding its ability to immediately begin deducting TPD premiums in accordance with the ITAA 1997.

2.24 On 13 October 2009, the Minister for Financial Services, Superannuation and Corporate Law announced amendments to the tax law to provide transitional relief to complying superannuation funds for the deduction of TPD insurance premiums. The Minister noted that the transitional relief will minimise disruption to the industry and allow enough time for funds to make the necessary administrative changes.

Summary of new law

2.25 Schedule 2 and clause 4 of this Bill amend the ITAA 1997 and the IT(TP) Act, and contain stand-alone provisions altering the operation of the ITAA 1936, to provide transitional relief for income tax deductibility of TPD insurance premiums paid by superannuation funds for the income years from 2004-05 to 2010-11.

2.26 The transitional relief allows complying superannuation funds to deduct in full the insurance premiums commonly regarded as TPD policy premiums. This is achieved by allowing, in the transitional period, broader definitions of 'death or disability benefits' in the ITAA 1936 and 'disability superannuation benefit' in the ITAA 1997 to the extent they relate to the deductibility of TPD insurance premiums.

2.27 For the transitional relief to apply to a TPD insurance policy premium, the insured permanent disability must be one that is described in regulations made for the purposes of the transitional provisions.

2.28 The amendments do not limit the operation of the current law. The current provisions of the ITAA 1997 will apply throughout the transitional period; however, the definition of 'disability superannuation benefit' will be broadened by the transitional arrangements.

Comparison of key features of new law and current law

New law	***Current law***
For the transitional period (the income years from 2004-05 to 2010-11), complying superannuation funds may claim a deduction for TPD insurance premiums that provide cover for the permanent disability of the member. Permanent disabilities will be described in regulations.	Complying superannuation funds can claim an income tax deduction for premiums to the extent that the policy has the necessary connection to a liability of the fund to provide permanent incapacity benefits.
For the transitional period, the meanings of 'disability superannuation benefit' and 'death or disability benefits' will be broadened by regulation.	A fund is able to deduct a premium paid for an insurance policy for a liability of the fund to provide a 'disability superannuation benefit' (in the ITAA 1997) or 'death or disability benefits' (in the ITAA 1936).
For the transitional period, a policy that has specified a portion of a premium to be for the liability to provide TPD benefits under the *broader meaning*, will not require actuarial certification to claim a deduction for the specified TPD insurance premium.	When an unknown part of a specified amount of a premium is attributable to the liability of the fund to provide the above benefits to members, an actuary's certificate is required to support the deduction claimed as an actuary is required to determine the deductable amount.

Detailed explanation of new law

2.29 Schedule 2 and clause 4 of this Bill provide transitional relief for income tax deductibility of TPD insurance premiums paid by superannuation funds. The transitional relief will provide complying superannuation funds, for the 2004-05 to 2010-11 income years, with a greater scope to deduct premiums paid for insurance cover commonly regarded as TPD insurance.

2.30 This is achieved by amending the IT(TP) Act and the ITAA 1997, and enacting stand-alone provisions altering the operation of the ITAA 1936.

2.31 A new section 295-466, inserted into the IT(TP) Act, provides an expanded meaning for the term, 'disability superannuation benefit' with effect for the income years from 2007-08 to 2010-11. ***[Schedule 2, item 5]***

2.32 The stand-alone provisions in this Schedule provide an expanded meaning for the term 'death or disability benefits' with effect for the income years 2004-05 to 2006-07. ***[Schedule 2, item 1]***

Scope of the transitional arrangements

2.33 The transitional relief applies to a complying superannuation fund if the fund pays a premium for a TPD insurance policy in the income years 2004-05 to 2010-11. The policy must be wholly or partly to cover the liabilities of the superannuation fund, whether they are current or contingent, to provide benefits to members. ***[Schedule 2, subitem 1(1) and item 5, subsection 295-466(1)]***

Operation of the transitional arrangements

The expanded meaning of 'disability superannuation benefit' and 'death or disability benefits'

2.34 The terms 'disability superannuation benefit', in the ITAA 1997, and 'death or disability benefits', in the ITAA 1936 are expanded for the transitional period 2004-05 to 2010-11. ***[Schedule 2, subitem 1(2) and item 5, subsection 295-466(2)]***

2.35 A benefit is to be treated as a 'disability superannuation benefit' if it is a superannuation benefit that is conditional on the disability of the member and the disability to which it relates is described as a permanent disability in regulations made for the purposes of the new section 295-466 of the IT(TP) Act. ***[Schedule 2, item 5, subsection 295-466(2)]***

2.36 The scope of the expanded meaning of 'death or disability benefits' in the ITAA 1936 is exactly the same as that for 'disability superannuation benefit' in the ITAA 1997. Benefits are treated as 'death or disability benefits' if they are conditional on the disability of the member and the disability is described as a permanent disability for the regulations made for the purposes of section 295-466 of the IT(TP) Act. ***[Schedule 2, subitem 1(2)]***

2.37 Regulations made for the purpose of section 295-466 of the IT(TP) Act will describe particular *permanent disabilities*. The regulations will be drafted after consultation with industry and cover meanings of 'disability' commonly considered permanent disabilities in TPD insurance policies in the relevant incomes years, 2004-05 to 2010-11. ***[Schedule 2, item 1, paragraph (2)(b) and item 5, paragraph 295-466(2)(b)]***

Example 2.2

Extra Super Fund pays premiums to Bonus Insurance in the income years 2004-05 to 2010-11. The policy specifies that a certain portion of the insurance is to cover Extra's liabilities to its members in the event of the permanent disability of Extra's members. The insurance contract between Extra and Bonus states that 'permanent disability' means a disability which prevents a member performing his or her occupation.

A disability that prevents a member from performing his or her own occupation is described as a permanent disability in regulations made for the purposes of section 295-466 of the IT(TP) Act.

For the income years 2004-05 to 2010-11, under the transitional arrangements, Extra will be able to claim a deduction for the whole premium. This is because the meaning of 'permanent disability' given in the policy corresponds to the expanded meanings of 'death or disability benefits' in the ITAA 1936 and 'disability superannuation benefit' in the ITAA 1997. The same would apply if 'permanent disability' in the insurance contract had encompassed any disability described as a permanent disability in the regulations made for the purposes of section 295-466 of the IT(TP) Act.

Entitlement to deduction

2.38 The expanded meanings of 'disability superannuation benefit' and 'death or disability benefits' apply to the sections of the ITAA 1997 and the ITAA 1936 which allow superannuation funds to deduct TPD insurance premiums. ***[Schedule 2, item 5, section 295-466 and item 1]***

2.39 Overall, the broadening of the terms 'disability superannuation benefit' and 'death or disability benefits' allows complying

superannuation funds to claim deductions for insurance premiums for the 2004-05 to 2010-11 income years under the expanded meanings of these terms. By expanding these terms to broadly align with industry's view of 'permanent disability', the requirement for superannuation funds to obtain extra actuarial certification when claiming a deduction for TPD benefits is removed. A superannuation fund will be required to obtain actuarial certification when no amount is specified in the policy and there is no current apportionment by an actuary in line with the broader definition. ***[Schedule 2, subitem 1(3) and item 5, subsection 295-466(3)]***

Example 2.3

> FunTime Super Fund takes out specific TPD insurance policies to cover its members in the event of them being permanently disabled. The definition of permanently disabled in the policy covered members for 'loss of limb'.
>
> 'Loss of limb' insurance is not clearly aligned with the SIS Regulations 1994 permanent incapacity condition of release.
>
> For FunTime to correctly claim a deduction under the *current law*, FunTime must engage an actuary to determine how much of the policy premium relates to the narrow definition of 'disability superannuation benefit' under the ITAA 1997 (item 6 in the table in subsection 295-465(1) of the ITAA 1997).
>
> However, under the *transitional provisions*, 'loss of limb' is considered a permanent disability for the purposes of the expanded meaning of 'disability superannuation benefit'. This means that the whole of Funtime's premium is deductible. Hence, under the transitional provisions, Funtime's situation falls under item 5 in the table in subsection 295-465(1) of the ITAA 1997 as the policy specifies the amount of premium and no actuarial certification is necessary.

Nexus between deductibility and insured events under the transitional arrangements

2.40 In effect, the current law provides that premiums for a TPD policy will only be deductible if an event that triggers a payout under the insurance policy would also trigger the permanent incapacity condition of release of benefits in SIS Regulations 1994. (For more details, see paragraphs 2.4 to 2.9.)

2.41 The transitional provisions mean that there would not be a necessary nexus between the payout by the insurer to the fund and the satisfaction of the permanent incapacity condition of release of benefits to members.

2.42 For the purposes of applying former subsections 279(1) and (3) of the ITAA 1936, the benefits are to be treated as 'death or disability benefits', in broader circumstances than the former law allowed, as the term 'death or disability benefits' has an extended meaning. That is, the member being permanently disabled — according to the disability described in the regulations as permanent disability — is a necessary but not a sufficient condition for the release of benefits to the member. ***[Schedule 2, subitems 1(2) (including the note) and (3)]***

2.43 Similarly, for the purposes of applying subsection 295-465(1) and paragraph 295-460(b) of the ITAA 1997, the benefits are to be treated as a 'disability superannuation benefit' to the extent that the disability on which the policy is conditional is described in the regulations as a permanent disability. ***[Schedule 2, item 5, subsections 295-466(2) (including the note) and (3)]***

2.44 Thus the transitional arrangements ensure there is no requirement that a permanent disability event, which triggers an insurance payout, also triggers an immediate liability of the fund to pay benefits to a member of the fund. Rather, other events might have to occur after the permanent disability of the members before the fund pays the benefits to the members. For example, the members might have to satisfy a condition of release of benefits specified in a standard made under paragraph 31(2)(h) of the *Superannuation Industry (Supervision) Act 1993*, such as attaining age 65 or reaching preservation age.

Example 2.4

Triple D Super Fund takes out TPD insurance policies with Help Insurer to cover its liabilities to its members in the event of them being permanently disabled and unable to perform their 'own occupation'.

Nina is a member of Triple D. The premium for the insurance policy relating to an injury Nina might suffer was paid by Triple D to Help in the income years 2005-06 to 2008-09.

Nina is a hairdresser. In a nasty accident she loses three fingers from her right hand. The injury prevents Nina from performing her own occupation; however, Nina takes up a role as a sales representative for hair products.

Nina's accident triggers a payout under the policy by Help to Triple D. Triple D does not make a payment to Nina because she has not retired. The monies remain in the fund until Nina retires at the age of 65.

The event of Nina's accident triggered an insurance payout, but did not immediately trigger a liability of Triple D to provide benefits to Nina. Despite this, the whole of the premium relating to TPD is tax

deductible by Triple D Super fund under the transitional arrangements as applied to section 279 of the ITAA 1936 and as they apply to subsection 295-465(1) of the ITAA 1997.

Relation between the transitional arrangements and the current law

2.45 The transitional measure explicitly does not limit the operation of the current law. It merely broadens the circumstances in which superannuation funds may claim a tax deduction for a premium paid for a TPD insurance policy. ***[Schedule 2, item 1, paragraph (3)(b), and item 5, paragraph 295-466(3)(b)]***

2.46 A fund that has been applying the current law and specifying what portion of a policy premium, for a TPD insurance policy, is wholly responsible for the liability to provide a 'disability superannuation benefit' under the narrower meaning in the current law will not be disadvantaged. Such a fund will be able to claim a greater deduction if a greater portion of the policy is for the liability to provide a 'disability superannuation benefit' due to that term's expanded meaning. However, if there is no way of working out the amount of the extra deduction by the information specified in the policy, the fund will be required to obtain actuarial certification. This is because the situation will fall under item 6 in the table in subsection 295-465(1).

Example 2.5

Sunshine Super Fund takes out TPD insurance policies to cover its liabilities to its members in the event of them being unable to continue performing their 'own occupation'. 'Own occupation' insurance is not clearly aligned with the SIS Regulations 1994 permanent incapacity condition of release.

Sunshine engages an actuary who estimates under item 6 of subsection 295-465(1) that 80 per cent of the payouts would relate to conditions where the member can be re-employed in another occupation for which they are reasonably qualified by education, experience and training and only 20 per cent would satisfy the SIS Regulations 1994 permanent incapacity condition of release which requires that the member cannot be re-employed in another occupation for which they are reasonably qualified. Thus the proportion of the insurance premium that relates to a liability of the fund to provide TPD benefits is 20 per cent.

Sunshine Super Fund has been applying the current law and claiming only 20 per cent of the TPD insurance premium as a deduction in line with the actuarial estimate.

Under the transitional arrangements, Sunshine Super Fund could continue to deduct 20 per cent in line with its established practice.

Alternatively, it could claim the full deduction for the income years 2004-05 to 2010-11 since a disability that prevents a member from performing his or her own occupation is described in the regulations made for the purposes of section 295-466 of the IT(TP) Act as a permanent disability.

Example 2.6

Rainbow Super Fund takes out TPD insurance policies to cover its liabilities to its members in the event of them being unable to perform 'any occupation'. The 'any occupation' permanent disability event is aligned with the SIS Regulations 1994 permanent incapacity condition of release. Rainbow Super Fund has been claiming a full deduction for the premiums.

Under both the transitional arrangements and the current law Rainbow Super Fund has correctly been claiming the full deduction. No actuarial certificate has been or will be required.

This is because under the current law, Rainbow had specified in the policy a premium which aligned with the narrow definition of 'disability superannuation benefit'. The expanded meaning of 'disability superannuation benefit' in the transitional provisions will not affect a narrow policy such as the policy Rainbow has for it's liability to provide benefits to members.

Amendment of assessments

2.47 Section 170 of the ITAA 1936 limits the ability of the Commissioner of Taxation (Commissioner) to amend tax assessments. By the time these transitional arrangements receive Royal Assent, the four-year period for making amended assessments for the 2004-05 income year will have closed and will be near closing for the 2005-06 income year. Thus, section 170 would prevent superannuation funds, which have claimed a deduction for past years in accordance with the current law, from choosing the broader deduction allowed under the transitional provisions.

2.48 To counter this, the transitional amendments preclude the application of section 170 to allow a superannuation fund to claim the broader tax deduction allowed by the expanded definition of 'permanent incapacity'. Section 170 is precluded if the amendment is made for the purpose of giving effect to the transitional arrangements, the original assessment was made before the commencement of the transitional arrangements, and the amendment is made within two years of commencement of the transitional arrangements. A window of two years after Royal Assent of the transitional provisions provides a

reasonable time for amended assessments to be made. ***[Clause 4 and Schedule 2, item 5, subsection 295-466(4)]***

Consequential amendments

2.49 A note is inserted after paragraph 295-460(b) of the ITAA 1997 alerting the reader to transitional provisions in the IT(TP) Act. ***[Schedule 2, item 2]***

2.50 Item 5 in the table in subsection 295-465(1) is permanently amended, to clarify the operation of the item in the table. Under item 5, a deduction will be allowed for a premium specified in the policy as being wholly for the liability to provide *certain benefits*, if those benefits are referred to in section 295-460. Hence all that is needed to be specified in a policy are the *type* of benefits, not that the benefits are literally 'wholly for the liability to provide benefits referred to in section 295-460'. ***[Schedule 2, item 3]***

2.51 The heading of section 295-465 of the IT(TP) Act is amended to accommodate the insertion of the transitional provisions contained in this Bill and to make the headings in the IT(TP) Act consistent with the headings in the ITAA 1997. ***[Schedule 2, item 4]***

Commencement

2.52 Commencement is to be by proclamation which will be timed to coincide with the commencement of the regulations. ***[Clause 2, item 2, item 3 in the table]***

2.53 This is appropriate as the extended meanings of the terms 'disability superannuation benefit' (in the ITAA 1997) and 'death or disability benefits' (in the ITAA 1936) are dependant on the description of 'permanent' disability which will be contained in regulations.

Repealing provision

2.54 The transitional amendments to the IT(TP) Act and the note inserted in paragraph 295-460(b) of the ITAA 1997 will be repealed on 1 January 2017. By such time any amendments to tax assessments for the period that the transitional arrangements apply (2004-05 to 2010-11 income years) will have been made, given the four-year amendment period for tax assessments. Such tax assessments will no longer be amendable by the Commissioner. ***[Schedule 2, items 2 (note in paragraph 295-460(b) of the ITAA 1997), 6 and 7, section 295-466]***

Chapter 3
Superannuation and relationship breakdowns

Outline of chapter

3.1 Schedule 3 to this Bill amends the *Superannuation Industry (Supervision) Act 1993* (SIS Act 1993) to allow the trustee of a regulated superannuation fund to acquire an asset *in specie* from a related party of the fund, following the relationship breakdown of a member of the fund, without contravening the prohibition against related party acquisitions.

Context of amendments

3.2 Subsection 66(1) of the SIS Act 1993 generally prohibits a trustee from acquiring assets from a related party of the fund.

3.3 Paragraphs 66(2)(a) to (c) respectively provide exceptions relating to listed securities, business real property, and assets acquired under a merger of two regulated funds. Subsection 66(2A) provides an exception for certain in-house assets. Paragraph 66(2)(d) empowers the regulators, by legislative instrument, to create further exceptions.

3.4 Part VIIIB of the *Family Law Act 1975* allows, on the breakdown of a marriage or a de facto relationship, certain payments that are payable in respect of a person's superannuation interests to be allocated between the parties to the relationship. This may be achieved in various ways, for example, the *Superannuation Industry (Supervision) Regulations 1994* (SIS Regulations 1994) contain rules that facilitate the creation of separate superannuation interests for the non-member spouse and the acquisition of these interests by the trustee of another regulated fund.

3.5 Subsection 66(5) of the SIS Act 1993 provides that accepting money is not considered to be acquiring an asset. However, in the event of a relationship breakdown many small superannuation funds may not have sufficient cash to make a payment to another fund. As a result, trustees may wish to separate the superannuation interests of the parties by making an *in specie* transfer.

3.6 This is facilitated to some extent by the Australian Taxation Office (ATO) Determination SPR 2006/MB1, made on 28 August 2006. The Determination ensures that a trustee of a self managed superannuation fund (SMSF) does not breach section 66 of the SIS Act 1993 when it acquires an asset from another regulated superannuation fund following the marriage breakdown of a member of the SMSF, even where it is acquired from a related party.

3.7 The ATO Determination has a number of limitations:

- it does not apply to opposite-sex or same-sex de facto relationships (and is therefore inconsistent with legislative developments to avoid discrimination toward opposite-sex and same-sex de facto relationships in superannuation, taxation and family law); and
- by virtue of the scope of the Commissioner of Taxation's regulatory powers under the SIS Act 1993, it does not cover transfers or roll-overs made to funds regulated by the Australian Prudential Regulation Authority (APRA).

3.8 With these gaps, subsection 66(1) of the SIS Act 1993 can have the effect of preventing certain *in specie* acquisitions resulting from a relationship breakdown.

3.9 In addition, the ATO Determination is not consistent with recent legislative developments to extend the capital gains tax marriage breakdown roll-over (including for opposite-sex de facto relationships), to *in specie* transfers of personal superannuation interests from a small superannuation fund to another complying superannuation fund.

Summary of new law

3.10 Schedule 3 amends section 66 of the SIS Act 1993 so that a trustee or investment fund manager of a regulated superannuation fund is not prohibited from acquiring an asset from a related party of the fund where the acquisition occurs as the result of the relationship breakdown of a member of the fund.

3.11 This Schedule also amends Subdivision D of Division 1 of Part 8 of the SIS Act 1993 to ensure equitable application of the transitional arrangements in relation to in-house assets where an asset transfer occurs as the result of the relationship breakdown of a member of the fund.

3.12 Relationship covers those in respect of marriage, and opposite-sex and same-sex de facto relationships.

3.13 These amendments will ensure that section 66 is not an impediment to separating partners achieving a 'clean break' from each other in terms of their superannuation arrangements, and does not discriminate against opposite-sex and same-sex de facto relationships.

Comparison of key features of new law and current law

New law	***Current law***
An exception to the subsection 66(1) prohibition is provided through a provision in the SIS Act 1993.	An exception to the subsection 66(1) prohibition is provided through ATO Determination SPR 2006/MB1.
A trustee or investment manager of a regulated superannuation fund may acquire an asset *in specie* from a related party of the fund, following the relationship breakdown of a member of the fund. Relationship breakdown covers those in respect of marriage, and opposite-sex and same-sex de facto relationships. The asset may be acquired from a trustee or investment manager of another regulated superannuation fund.	A trustee of an SMSF may acquire an asset *in specie* from a related party of the fund, following the marriage breakdown of a member of the fund. The asset may be acquired from a trustee or investment manager of another regulated superannuation fund.
Where a transferred asset would have been subject to the in-house asset transitional exemption provisions had it always been held by the receiving fund, that exemption will apply to the asset in the receiving fund even where it did not in the transferring fund.	Where a transferred asset is subject to the in-house asset transitional exemption provisions in the transferring fund, that exemption no longer applies to the asset in the receiving fund.

Detailed explanation of new law

3.14 These amendments allow for a trustee or investment manager of a regulated superannuation fund to acquire assets from a related party where the acquisition occurs as the result of the relationship breakdown of a member. ***[Schedule 3, item 2, subsections 66(2B) and (2C)]***

3.15 They also allow for the application of the transitional exemption provisions in relation to in-house assets where assets are acquired as the result of a relationship breakdown. ***[Schedule 3, item 3, section 71EA]***

Scope of the measure

3.16 Subsection 66(1) of the SIS Act 1993 does not prohibit a trustee or investment manager acquiring an asset from a related party of the fund if:

- the asset is acquired for the benefit of a particular member of the acquiring fund from the trustee or investment manager of another regulated superannuation fund ***[Schedule 3, item 2, paragraph 66(2B)(a)]***;
- at the time of the acquisition: the member and his or her spouse or former spouse are separated and there is no reasonable likelihood of cohabitation being resumed ***[Schedule 3, item 2, paragraph 66(2B)(b)]***;
- the acquisition occurs because of reasons directly connected with the breakdown of the relationship ***[Schedule 3, item 2, paragraph 66(2B)(c)]***; and
- the asset represents the whole, or a part, of either:
  - the member's own interests in the transferring fund ***[Schedule 3, item 2, paragraph 66(2B)(d)]***; or
  - the member's entitlements as determined under Part VIIIB of the *Family Law Act 1975* in relation to the interests of the member's spouse, or former spouse, in the transferring fund ***[Schedule 3, item 2, paragraph 66 (2B)(d)].***

Relationship breakdown

3.17 For the purposes of subsections 66(2B) and 71EA(3), the question whether the spouses, or former spouses, have separated is to be determined in the same way as it is for the purposes of section 48 of the *Family Law Act 1975* (as affected by sections 49 and 50 of that Act). ***[Schedule 3, item 2, subsection 66(2C) and item 3, subsection 71EA(2)]***

3.18 The mere fact that two separated people live in the same home (that is, they are genuinely separated but living under one roof) does not amount to 'cohabitation' for this purpose.

Transitional arrangements in relation to in-house assets

3.19 The effect of section 71EA is that for the purpose of applying Subdivision D of Division 1 of Part 8 (Transitional arrangements in relation to in-house assets) to an asset acquired by the trustee or investment manager of a fund as mentioned in subsection 71EA(1), treat:

- the acquisition as having occurred at the time the trustee or investment manager of the transferring fund acquired the asset ***[Schedule 3, item 3, paragraph 71EA(3)(a)]***;
- anything done by, for or in relation to the transferring fund in relation to the asset before the acquisition time, as having been done by, for or in relation to the acquiring fund ***[Schedule 3, item 3, paragraph 71EA(3)(b)]***; and
- anything done by, for or in relation to the trustee or investment manager of the transferring fund in relation to the asset before the acquisition time, as having been done by, for or in relation to the trustee or investment manager of the acquiring fund ***[Schedule 3, item 3, paragraph 71EA(3)(c)].***

3.20 Consequently, where an asset is transferred as the result of a relationship breakdown, it will be considered to be an in-house asset in relation to the acquiring fund only to the same extent it would have been had that asset always been held by the trustee or investment manager of that fund.

Example 3.1

Seamus and Lucy each have a personal interest in a regulated superannuation fund. The fund is subject to a payment splitting order which requires that the trustee transfer all of the assets reflecting Seamus's personal interest to another regulated superannuation fund for Seamus.

The assets reflecting Seamus's personal interest include a unit in a related trust acquired by the fund prior to 11 August 1999 and covered by the in-house asset transitional exemption provisions.

If the trustee transfers the unit in the related trust to the other regulated superannuation fund it would continue to be exempt from the in-house asset rules, even if the unit trust is a related trust of the other regulated superannuation fund.

Note: This would be the outcome even if the unit was transferred for Lucy's benefit.

Example 3.2

Harry is a member of an SMSF which holds an asset consisting of a partly paid unit in a related trust. Since a payment was made on the unit to the issuer after 30 June 2009, the asset is an in-house asset but has a reduced value for the purposes of working out the total value of in-house assets in the fund, according to the formula set out in subsection 71A(3).

As a result of a relationship breakdown the asset is transferred to a superannuation fund in which Harry's former partner Matthew is a member. The unit trust is a related trust of the regulated superannuation fund of which Matthew is a member. Any payments made on the asset while in the hands of Harry's fund would now be taken to have been made by the trustee of Matthew's fund, with the result that the asset would have the same value for the purpose of working out the total value of in-house assets in the fund as it did in Harry's fund.

Example 3.3

Paul is the sole member of an SMSF which holds an asset subject to an uninterrupted series of lease agreements which commenced before 11 August 1999 with a partnership, in which his spouse Rachael, but not himself, is a partner. Under this arrangement the asset is not an in-house asset of the SMSF.

As a result of a relationship breakdown the asset in question is transferred to an SMSF of which Rachael is the sole member and continues to be leased to the partnership. The asset would now be considered to be an in-house asset. However, as the lease agreements would be taken to have commenced before 11 August 1999, the asset would be covered by the in-house asset transitional exemption provisions even though they did not apply in the hands of the transferring fund.

Example 3.4

Paul is the sole member of an SMSF which holds an asset that is subject to a lease agreement which commenced on 1 July 2009 with a partnership, in which his spouse Rachael, but not himself, is a partner. Under this arrangement the asset is not an in-house asset of the SMSF.

As a result of a relationship breakdown the asset in question is transferred to an SMSF of which Rachael is the sole member and continues to be leased to the partnership. The asset is an in-house asset of Rachel's SMSF. This is the case despite the fact that the asset was not an in-house asset of Paul's SMSF.

The transferring fund must give any section 71E election to the acquiring fund

3.21 If the trustee of the transferring fund has a duty under subsection 103(2A) to retain an election or a copy of an election, under section 71E, the trustee must, within 14 days of the asset being acquired by the acquiring fund, give the election or copy of the election to a trustee or investment manager of the acquiring fund. If the trustee fails to do so, they commit an offence of strict liability. ***[Schedule 3, item 3, subsections 71EA(4) to (6)]***

3.22 Given the difficult circumstances of relationship breakdown it is necessary to ensure the trustee of the transferring fund is compelled to comply with the requirement to provide a copy of an election to the acquiring fund. This may be particularly relevant for assets transferred from a single member fund.

3.23 A ‘regulated superannuation fund’ has the meaning given in subsection 19(1) of the SIS Act 1993.

3.24 Under subsection 10(1) of the SIS Act 1993, a ***related party*** of a superannuation fund means any of the following:

- a member of the fund or a Part 8 associate of a member; or
- a standard employer-sponsor of the fund or a Part 8 associate of a standard employer-sponsor of the fund.

3.25 Under subsection 10(1) of the SIS Act 1993 a ***spouse*** of a person includes:

- another person (whether of the same sex or a different sex) with whom the person is in a relationship that is registered under a law of a state or territory prescribed for the purposes of section 22B of the *Acts Interpretation Act 1901* as a kind of relationship prescribed for the purposes of that section; and
- another person who, although not legally married to the person, lives with the person on a genuine domestic basis in a relationship as a couple.

[Schedule 3, item 1, definition of ‘spouse’ in subsection 10(1)]

Application and transitional provisions

3.26 These amendments will apply in relation to assets acquired by a superannuation fund trustee or investment manager on or after the date of Royal Assent.

Chapter 4
Other superannuation amendments

Outline of chapter

4.1 Schedule 4 to this Bill modifies the operation of the superannuation sections of the income tax law to:

- allow a deduction for eligible contributions to be claimed from successor superannuation funds after 1 July 2011;
- increase the time-limit for deductible employer contributions made for former employees;
- clarify the due date of the shortfall interest charge for the purposes of excess contributions tax;
- allow the Commissioner of Taxation (Commissioner) to exercise discretion for the purposes of excess contributions tax before an assessment is issued;
- provide a regulation-making power to specify additional circumstances when a benefit from a public sector superannuation scheme will have an untaxed element; and
- streamline references to the Immigration Secretary and Immigration Department.

Context of amendments

Background

Deduction notices for successor fund transfers

4.2 A person can generally claim a tax deduction for personal superannuation contributions if they are less than 75 years of age, earned less than 10 per cent of their total income as an employee during the financial year and notified their superannuation provider of their intention to claim a deduction.

4.3 Superannuation funds are permitted to transfer a member's benefit from the original fund to a successor fund where the successor fund confers equivalent rights to those that the member had under the original fund in respect of the benefits. Successor fund transfers commonly occur where funds are merged, for example, following a corporate restructure.

4.4 Trustees of superannuation funds are not obliged to advise their members that a successor fund transfer is about to occur. Members who are moved from one superannuation fund to another as a result of a successor fund transfer are not able to provide a successor superannuation fund with a valid notice of intent to deduct a contribution as they are no longer a member of the superannuation fund to which the contribution was made. Similarly, a member is not able to vary a notice of intention to claim a deduction.

4.5 *Tax Laws Amendment (2009 Measures No. 6) Act 2010* permits a member in a fund to provide a deduction notice to a successor fund even though the contribution was made to the original fund. This applies in relation to transfer events that happen on or after 24 December 2008 and before 1 July 2011.

Deductibility of employer contributions for former employees

4.6 Employers are entitled to a deduction for certain superannuation contributions made on behalf of former employees. These include:

- contributions to satisfy superannuation guarantee (SG) obligations;
- one-off salary sacrifice contributions that relate to a period when the person was an employee; and
- contributions made in lieu of salary or wages that relate to a period of service during which they were an employee if made within two months of them ceasing employment.

4.7 The *Superannuation Guarantee (Administration) Act 1992* requires that employers pay SG contributions within 28 days of the end of the quarter, and as such, employers may pay superannuation every four months. However, contributions made by an employer on behalf of a former employee are not deductible where the contribution is made more than two months after the person ceased employment.

Deductibility of employer contributions to defined benefit interests on behalf of former employees

4.8 As outlined above, there are restrictions on when an employer can claim a deduction for a superannuation contribution. Defined benefits funds may require additional funding from employer sponsors to fund the pensions of retired members several months, or years after the employee ceased employment in order to ensure the fund remains solvent. However, it is not clear that these contributions are deductible if they are made more than two months after the person ceased employment.

Clarify the due date for shortfall interest charge relating to excess contributions tax

4.9 The taxation laws currently do not provide a due date for the shortfall interest charge in relation to excess contributions tax.

Amend the timing of the Commissioner's discretion relating to excess contributions tax

4.10 Excess contributions tax applies to superannuation contributions that exceed the concessional or non-concessional contributions cap. The Commissioner can disregard or allocate to another financial year all or part of a person's contributions for the purposes of excess contributions tax. Such discretion can be exercised only where there are special circumstances and doing so is consistent with the purposes of the law in relation to excess contributions tax. However, the Commissioner cannot exercise this discretion without first issuing an excess contributions tax assessment.

Summary of new law

4.11 Schedule 4 to this Bill modifies the operation of the income tax law to:

- allow an individual to give a notice of intent to deduct a contribution (made to an original fund) to a successor superannuation fund;
- allow employers to claim a deduction for superannuation contributions made in respect of a former employee within four months of the employee ceasing employment and at any time after the employee ceases employment for defined benefit interests;

- clarify the due date of the shortfall interest charge for the purposes of excess contributions tax is 21 days after the Commissioner provides notice of the amount payable;
- allow the Commissioner to exercise discretion to disregard or allocate to another financial year all or part of a person's contributions for the purposes of excess contributions tax before an assessment is issued;
- provide a regulation-making power to specify additional circumstances when a benefit from a public sector superannuation scheme will have an untaxed element; and
- streamline references to the Immigration Secretary and Immigration Department in relation to disclosure of migration and citizenship information for the legislated purposes.

Comparison of key features of new law and current law

New law	***Current law***
Members of a successor fund can provide a deduction notice to the fund for contributions made to the original fund.	Members of a successor fund can provide a deduction notice to the fund for contributions made to the original fund before 1 July 2011.
Employers can claim a deduction for superannuation contributions made in respect of a former employee within four months of the employee ceasing employment and at any time after the employee ceases employment for defined benefit interests.	Employers can claim a deduction for contributions made in lieu of salary or wages in respect of former employees within two months of them ceasing employment.
Shortfall interest charge, in relation to excess contributions tax, is due 21 days after the Commissioner gives notice of the amount payable.	Shortfall interest charge in relation to excess contributions tax does not currently have a clear due date.
The Commissioner can exercise the discretion to disregard (or reallocate) contributions for the purposes of excess contributions tax without first issuing an excess contributions tax assessment.	The Commissioner can only exercise discretion to disregard or reallocate contributions for the purposes of excess contributions tax after issuing an assessment.

New law	*Current law*
There will be scope to specify in regulations additional circumstances in which benefits will have an untaxed element.	There is no scope to specify in regulations additional circumstances in which benefits will have an untaxed element.
The Immigration Secretary, within the meaning of the *Income Tax Assessment Act 1936* or an Australian Public Service employee in the Immigration Department (within the meaning of that Act) may disclose migration and citizenship information for the legislated purposes.	The Secretary of a Department administered by a Minister administering a provision of the *Migration Act 1958* or the *Australian Citizenship Act 2007* or an Australian Public Service employee in such a Department may disclose migration and citizenship information for the legislated purposes.

Detailed explanation of new law

Deduction notices for successor funds

4.12 This amendment will allow members of the original superannuation fund to provide a deduction notice to the successor superannuation fund for contributions made to the original fund after 1 July 2011. ***[Schedule 4, Part 1, item 3, subsection 290-170(5) of the Income Tax Assessment Act 1997 (ITAA 1997)]***

4.13 There are no other changes to the existing requirements to claim a deduction. That is, a person can generally claim a tax deduction for personal superannuation contributions if they are less than 75 years of age, earned less than 10 per cent of their total income as an employee during the financial year and notified their superannuation provider of their intention to claim a deduction.

4.14 The provision requires that after making the contribution, all of the member's superannuation interest in the original fund (to which the contribution was made for which the notice is given) must be transferred to the successor fund and the member must not have previously provided a valid notice to any superannuation provider in relation to the contribution. ***[Schedule 4, Part 1, item 3, paragraphs 290-170(5)(c) and (d) of the ITAA 1997]***

4.15 The amendment will permit the member to vary a valid deduction notice, however a valid notice cannot be revoked or withdrawn. The variation can only reduce the contribution amount stated. ***[Schedule 4, Part 1, item 4, subsection 290-180(5) of the ITAA 1997]***. This means that a member can vary a deduction notice in relation to a contribution made to the original fund by giving the variation notice to the successor fund. The

other existing conditions for giving a variation notice remain unchanged. That is, the time limits for giving the variation apply, you must be a member of the successor fund, the successor fund must hold the contributions and an income stream must not have commenced to be paid.

Example 4.1: Variation of a deduction notice

> Mary makes a contribution to Fund A. As she satisfies all the deduction requirements, she advises Fund A that she wishes to claim a deduction for the contribution. The trustee acknowledges receipt of the notice. At a later date, Mary is advised that her entire superannuation interest has been transferred to Fund B. Mary wishes to vary the original deduction notice which she gave to Fund A. She can do this by giving the variation notice to Fund B.

Contribution cap effects

4.16 This amendment clarifies that if the contribution is ultimately deductible it will be a concessional contribution. ***[Schedule 4, Part 1, item 5, paragraph 292-25(2)(b) of the ITAA 1997]***

4.17 This amendment also clarifies that if the contribution is not ultimately deductible it will remain a non-concessional contribution. ***[Schedule 4, Part 1, item 6, paragraph 292-90(2)(b) of the ITAA 1997]***

Fund income tax effects

4.18 A contribution transferred in a roll-over superannuation benefit to a successor fund must be included in the assessable income of the successor fund where:

- the contribution made to the original fund in the current or previous financial year was not covered by a valid and acknowledged notice given to any provider; and
- while the benefit, which includes the contribution made to the original fund, is held by the successor fund, the contribution becomes covered by a valid and acknowledged notice given to the superannuation provider of the successor fund.

[Schedule 4, Part 1, items 7 and 8, subsection 295-190(1) of the ITAA 1997]

4.19 In addition, the successor provider must include this contribution in the assessable income of the fund in the income year in which the transfer is received (provided that the notice is received by the time the trustee lodges its income tax return for that financial year). Otherwise, it

is included in the income year in which the notice is received. ***[Schedule 4, Part 1, item 11, subsections 295-190(5) and (6) of the ITAA 1997]***

Variation notice effects on the fund's income tax

4.20 Where the successor provider receives a variation notice *before* its income tax return is lodged in the year in which the benefit was transferred, the relevant contribution is not included in the assessable income to the extent that the relevant contribution has been reduced by the variation notice. ***[Schedule 4, Part 1, item 14, subsections 295-197(1) and (2) of the ITAA 1997]***

4.21 Where the variation notice is received *after* the provider has lodged its income tax return, the successor provider has a choice as to how to treat the benefit amount (as reduced by the variation notice). The successor provider is entitled to a deduction in the income year in which it is notified. Alternatively, the successor provider has the option to amend its tax return for the income year in which the contribution was transferred, but only if that would result in a greater reduction in tax for that year than the reduction in tax that would occur for the income year in which the notice is received. ***[Schedule 4, Part 1, items 14 and 16, subsections 295-197(3)and (4) and subsection 295-490(1) of the ITAA 1997]***

Deductibility of employer contributions for former employees, including to defined benefit interests.

4.22 This amendment will allow an employer to claim a deduction for a superannuation contribution made in respect of a former employee (or group of employees) where the contribution is made within four months of the employee's cessation of employment, providing the existing requirements are met. ***[Schedule 4, Part 2, item 21, subsection 290-85(1AA) of the ITAA 1997]***

4.23 This amendment will allow an employer to claim a deduction for a superannuation contribution made in respect of a former employee to fund a defined benefit interest which accrued whilst the member was an employee regardless of when those contributions are made ***[Schedule 4, Part 2, item 21, subsection 290-85(1AB) of the ITAA 1997].*** The existing deduction requirements must still be met and the definition of a defined benefit interest is outlined in section 292-175 of the ITAA 1997.

4.24 The contribution made by the employer must relate to a benefit which accrued while the member was an employee. ***[Schedule 4, Part 2, item 21, subsections 290-85(1AA) and (1AB) of the ITAA 1997]***

4.25 The employer can claim a deduction if the contribution:

- would have been deductible if the employer had made it at a time when the other person was their employee; and
- would have been deductible *if* the current law had applied when the person was employed by the employer.

[Schedule 4, Part 2, item 21, subsections 290-85(1AA) and (1AB) of the ITAA 1997]

Example 4.2: Claiming a deduction under the current law

Nick finishes employment with his employer in 2002. Nick's employer makes a contribution to a defined benefit interest in 2012. The contribution made by Nick's employer relates to a benefit which accrued while Nick was an employee. Assuming the other laws that apply to deductibility in 2012 are also met, then the contribution is deductible. Therefore, Nick's employer is entitled to a deduction for the contribution.

4.26 The term contribution is not defined and as such, it may include superannuation guarantee contributions or a payment in lieu of salary or wages.

4.27 To ensure the integrity of this measure, a number of safeguards have been put in place, including:

- the employer must be at arm's length with the former employee in relation to the contribution; and
- actuarial verification is required to confirm that additional contributions are required

[Schedule 4, Part 2, item 21, subsection 290-85(1AB) of the ITAA 1997]

4.28 A deduction is also available for a contribution made where an employer makes a contribution for a person who is an employee of a company in which the employer has a controlling interest ***[Schedule 4, Part 2, item 23, subsections 290-85(1B) and (1C) of the ITAA 1997]***. The current controlling interest deduction rules in section 290-90 of the ITAA 1997 continue to apply.

Clarify the due date for the shortfall interest charge relating to excess contributions tax

4.29 This amendment will clarify that any shortfall interest charge that a taxpayer is liable to pay, in relation to excess contributions tax, is due and payable 21 days after the day on which the Commissioner gives the taxpayer notice of the amount of the shortfall interest charge. ***[Schedule 4, Part 3, item 25, section 280-102A in Schedule 1 (note) of the Taxation Administration Act 1953]***

Amend the Commissioner's discretion relating to excess contributions tax

4.30 This amendment will allow the Commissioner to make a determination to disregard (or reallocate) contributions for the purposes of excess contributions tax without first issuing an excess contributions tax assessment. This will thus facilitate administration of the timing of the use of the discretionary power. ***[Schedule 4, Part 4, item 27, paragraphs 292-465(2)(a) and (b) of the ITAA 1997]***

4.31 The Commissioner can only make a determination after all of the contributions to be disregarded or reallocated have been made. If you receive an excess contributions tax assessment the existing application period of 60 days following the receipt of the assessment applies, or a longer period as determined by the Commissioner. ***[Schedule 4, Part 4, item 27, paragraphs 292-465(2)(a) and (b) of the ITAA 1997]***

4.32 The Commissioner may include notice of a determination made in a notice of assessment. The amendments also clarify that a person may object to an excess contributions tax assessment on the grounds that they are dissatisfied with the Commissioner's determination or the Commissioner's decision not to make a determination. In addition, the making of a determination is a decision forming part of the process of making an assessment of tax for the purposes of the *Administrative Decisions (Judicial Review) Act 1977*. ***[Schedule 4, Part 4, item 28, subsections 292-465(8) and (9) of the ITAA 1997]***

4.33 There is no change to the criteria used to determine whether the determination should be made. Specifically, the current law outlines that the Commissioner may make the determination only if he or she considers that:

- there are special circumstances; and
- making the determination is consistent with the object of Division 292 of the ITAA 1997.

Untaxed elements in Public Sector Super Schemes

4.34 This amendment provides a regulation-making power to specify additional circumstances in which a benefit will consist of an untaxed element. ***[Schedule 4, Part 5, item 29, section 307-297 of the ITAA 1997]***

Amendment in relation to the disclosure of migration and citizenship under the *Superannuation (Unclaimed Money and Lost Members) Act 1999*

4.35 Part 6 of Schedule 4 amends the administration provisions of Part 3A of the *Superannuation (Unclaimed Money and Lost Members) Act 1999* (S(UMLM) Act).

4.36 Specifically, paragraphs 20N(2)(a) and (b) of the S(UMLM) Act are amended to incorporate references to the 'Immigration Secretary' and the 'Immigration Department' within the meaning of the *Income Tax Assessment Act 1936* (ITAA 1936). While the references are replaced, there is no material change in the criteria used for disclosure of migrant and citizenship information.

4.37 This follows the approach taken in *Tax Laws Amendment (2009 Measures No. 4) Act 2009* (Schedule 4, Part 1), which inserted streamlined references to Ministers, Departments and Secretaries. Item 38 of Schedule 4 to that amending Act inserted into the ITAA 1936 the definition of 'Immigration Department'; item 40 inserted the definition of 'Immigration Secretary'. ***[Schedule 4, Part 6, item 30, paragraphs 20N(2)(a) and (b)]***

Application and transitional provisions

Application provisions

4.38 The amendments made by Part 1 of Schedule 4 apply to:

- deduction notices for personal contributions given on or after commencement of this item;
- notices of variation of deduction notices for personal contributions given on or after commencement of this item (whether the notices being varied were given before, on or after commencement of this item)

4.39 The amendments made by Part 2 of Schedule 4 apply to employer contributions made for former employees on or after commencement of this item.

4.40 The amendments made by Part 4 of Schedule 4 apply to applications made for the exercise of the Commissioner's discretion for the purposes of excess contributions tax on or after commencement of this item. ***[Schedule 4, Part 7, item 31]***

Transitional provisions

4.41 If the Commissioner has granted a taxpayer an extension of time to apply for a determination for the exercise of the Commissioner's discretion before commencement of the amendments in Part 4 of Schedule 4, transitional provisions allow this extension of time to continue to apply after commencement of those amendments. ***[Schedule 4, Part 7, item 32]***

Consequential amendments

4.42 A number of consequential amendments are made to adjust the wording to incorporate successor and original funds in the legislation, including the definition of a successor fund. ***[Schedule 4, Part 2, item 1, subparagraph 290-170(2)(d)(ii); item 2, subsection 290-170(4); item 9, subsection 295-190(1A); item 10 before subsection 295-190(2); item 12, section 295-195 (heading); item 13, subsections 295-195(1) and (2); item 15, subsection 295-490(1); cell at item 2 in the table, column headed 'can deduct' and item 17, subsection 995-1(1) of the ITAA 1997]***

4.43 Two provisions from the *Tax Laws Amendment (2009 Measures No. 6) Act 2010* are repealed as they are no longer required. ***[Schedule 4 Part 2, item 18]***

4.44 A number of consequential amendments are made to adjust the wording to incorporate the additional deduction provisions for employer contributions in the legislation. ***[Schedule 4, Part 2, item 19 paragraph 290-85(1)(b); item 20, paragraph 290-85(1)(c); item 22, subparagraph 290-85(1A)(d)(iii); and item 24, paragraph 290-85(3)(a) of the ITAA 1997]***

4.45 A wording change is required to incorporate the changes to the Commissioner's determination for excess contributions tax. ***[Schedule 4, Part 4, item 26, subsection 292-465(2) of the ITAA 1997]***

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