



## **Income Tax (TFN Withholding Tax (ESS)) Bill 2009**

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Note: This Digest is an historical Digest, published after the Bill was read a third time in the Senate on 2 December 2009. The Bill was passed by both Houses unamended.

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## Income Tax (TFN Withholding Tax (ESS)) Bill 2009

**Date introduced:** 21 October 2009

**House:** House of Representatives

**Portfolio:** Treasury

**Commencement:** The formal parts commence on Royal Assent. Sections 3 and 4 commence at the same time as Schedule 1 to the *Tax Laws Amendment (2009 Budget Measures No. 2) Act 2009* (which is the later of the days when the current Bill or that Act receives Royal Assent).

**Links:** The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

### Purpose

This Bill imposes income tax on certain amounts relating to employee share schemes (ESSs). Specifically, it imposes a withholding tax on employees who have received amounts from a company under an ESS but have not quoted a Tax File Number (TFN) or Australian Business Number (ABN) to the company by the end of the income year.

### Background

Section 55 of the Australian Constitution provides that laws imposing taxation shall only deal with the imposition of taxation. Any provision of a law that imposes taxation that deals with any other matter shall be of no effect. Thus, even though the Tax Laws Amendment (2009 Budget Measures No. 2) Bill 2009 (which was introduced at the same time as the current Bill) also deals with the issue of ESSs, and it would seem to make sense to include all aspects of ESSs in the one Bill, a separate Bill is required to impose taxation on certain amounts related to ESSs.

In short, an ESS is a scheme under which interests (in the form of shares or rights etc) in a company are provided by the company to its employees or their associates.<sup>1</sup> The reader is referred to the Bills Digest for the Tax Laws Amendment (2009 Budget Measures No. 2) Bill 2009 for further information about ESSs, particularly proposed changes to the tax treatment of the shares or rights received by employees under the schemes.

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1. The term 'employee' includes past, present and future employees of the company.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

## Main provisions

**Clause 3** imposes income tax on amounts mentioned in paragraph 14–155(1)(b) of Schedule 1 to the *Taxation Administration Act 1953*. That paragraph is inserted by item 2 of Schedule 1 to the Tax Laws Amendment (2009 Budget Measures No. 2) Bill 2009. Essentially **proposed section 14–155** deals with liability for TFN withholding tax. It provides that TFN withholding tax is payable (under the current Bill) if a company provides one or more interests to an individual under an ESS, and as a result an amount is included in the individual's assessable income under proposed Division 83A of the *Income Tax Assessment Act 1997* (ITAA 1997), and the individual has not quoted his or her ABN or TFN to the company by the end of the income year.<sup>2</sup>

**Clause 4** imposes tax at the rate worked out by applying the formula:

Highest rate specified in the table in Part I of  
Schedule 7 to the *Income Tax Rates Act 1986* + 1.5%

Schedule 7 to the *Income Tax Rates Act 1986* sets out general rates of tax, and Part I deals specifically with resident taxpayers. Currently the highest rate in the table in Part I of Schedule 7 is 45 per cent (in the context that both resident and non-resident taxpayers pay income tax at the rate of 45 per cent on the part of their ordinary taxable income that exceeds \$180 000).

Thus under **clauses 3 and 4**, a taxpayer who receives interests under an ESS and includes the amount in his or her assessable income, but who fails to provide his or her TFN or ABN to the company, will pay income tax on the amount at the rate of 46.5 per cent.

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2. Specifically **proposed paragraph 14–155(1)(b)** is the paragraph that mentions the amount being included in the individual's assessable income under Division 83A of the ITAA 1997. In including the amount under Division 83A, **proposed subsection 14–155(2)** says that **proposed section 83A–35** is to be disregarded. That section deals with the reduction of amounts included in the taxpayer's assessable income. The ABN is only relevant if the individual acquired the interests in the ESS in relation to any services provided to the company (or the company's subsidiary) in the course or furtherance of an enterprise carried on by the individual, who holds an ABN.

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