The Parliament of the Commonwealth of Australia

Advisory Report on the Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013

House of Representatives
Standing Committee on Economics

May 2013
Canberra

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Chair’s foreword

The committee supports the passage of the Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, which makes important and beneficial taxation and superannuation changes. It also recommends that the Treasury undertake further consultation with industry groups on an aspect of Schedule 5 of the Bill.

There are eight schedules in the Bill: Schedule 1 (definition of a documentary), Schedule 2 (ex-gratia payments for natural disasters), Schedule 3 (GST instalment system), Schedule 4 (adding six groups to the deductible gift recipients list), Schedule 6 (Government superannuation co-contribution for low income earners), Schedule 7 (consolidating the dependency tax offsets) and Schedule 8 (Taxation of Financial Arrangements).

The committee did not receive any submissions on Schedules 2, 3, 4, 7 and 8. The report focuses on issues raised on Schedules 1, 5 and 6.

Schedule 1 defines a ‘documentary’ for the purpose of accessing film tax offsets, and makes explicit that game shows are not eligible programs. Currently, there is no definition of a documentary in the *Income Tax Assessment Act 1997.* The definition of a documentary to be inserted is based on the Australian Communications and Media Authority Guidelines, as was used by Screen Australia prior to the *Lush House* case. In the committee’s view it is a reasonable response by the Australian Government to reinstate the definition that Screen Australia had previously used in administering the Producer Offset.

The committee noted industry stakeholder concerns that the definition lacks flexibility. The committee believes there is a need for ongoing dialogue between Screen Australia and industry to ensure that the application of the definition in Schedule 1 remains responsive to the evolving documentary genre.

Schedule 2 exempts from income tax the ex-gratia payments made to people affected by natural disasters in Australia during 2011-12 and 2012-13. It is warranted to extend these disaster assistance payments— and their tax exempt status—to New Zealand citizens holding non-protected special category visas who were affected by these disasters.

Schedule 3 enables eligible businesses to continue to pay GST instalments if they subsequently move into a net refund position. It will allow businesses to continue to make their Business Activity Statements annually and retain the cost advantage of not having to submit a quarterly statement. Entities that are not paying GST by instalments and are already in a net refund position remain ineligible to use the instalment option.

Schedule 4 adds six entities to the list of deductible gift recipients, making donations to these organisations tax deductible.

Schedule 5 will provide a legislative basis for identifying and merging multiple superannuation accounts within the same fund. A number of super funds are already merging multiple accounts within the same fund.

In evidence to the committee, groups unanimously supported the intent of Schedule 5 to reduce the amount affected members pay in multiple sets of administration fees and insurance premiums, and consequently increase retirement savings.

Proposed subsection 108A(1) will require super trustees to merge multiple accounts within the same fund if they reasonably believe that it is 'in the best interests of the member to do so'. Some industry groups expressed concern that the wording of 108A(1)(c) could place undue liability on trustees by obligating them to examine each individual member's best interests, rather than on a general trust fiduciary law basis, which is understood as acting in the collective best interests of members.

The committee's view is that Schedule 5 is making an important change to help super members maximise their retirement savings, but recommends further Treasury consultation with industry groups to ensure that undue liability is not being inadvertently placed on trustees who are working in good faith for the benefit of their members.

The committee understands that given the breadth of the task proposed, automated processes for merges will need to be judiciously employed. Funds will need to develop procedures to assist them to identify members whose needs are best served by the individual consideration of their circumstances. To this end the committee urges the Australian Prudential Regulation Authority to provide funds with guidance on circumstances which should trigger individual consideration of what constitutes a member's 'best interests'. Where funds are dealing with complex cases, the committee believes trustees should seek input from the affected members.

Schedule 6 will make changes to the government superannuation co-contribution for low income earners, including reducing the rate of co-contribution from 100 to 50 per cent.

Schedule 6 scales down the operation of the government super co-contribution, as part of wider superannuation reforms to ensure that schemes are well targeted and effective. The scheme will remain, albeit at a reduced rate, for people that are in a position to make super contributions from their net pay. The 50 per cent contribution rate is still a generous matching rate of return for extra contributions made.

Further, the Government and industry groups agreed that the low income superannuation contribution measure is better targeted, as it helps build super balances and does not require the low income earner to make additional contributions.

Schedule 7 will consolidate eight existing dependency tax offsets into a single tax offset that is only available to taxpayers maintaining a dependant who is unable to work due to invalidity or carer obligations. Certain features of the current arrangements will remain. Taxpayers eligible for the zone, overseas forces or overseas civilian tax offset will retain their offset and concession entitlements. Taxpayers will also remain eligible to receive more than one amount of dependency tax offset, as long as it is in respect of a different dependant.

Schedule 8 makes amendments to clarify and refine the operation of certain aspects of the Taxation and Financial Arrangements regime; lowering compliance costs and proving additional certainty to affected taxpayers. It is anticipated that it will ‘protect a significant amount of revenue which would otherwise be at risk’.

On behalf of the committee, I thank the organisations that assisted the committee during the inquiry through their submissions and participating at the hearing in Canberra. I also thank my colleagues on the committee for their contribution to the report.

Julie Owens MP
Chair

Contents

ADDITIONAL COMMENT

APPENDICES

Membership of the Committee

Chair	Ms Julie Owens MP	
Deputy Chair	Mr Steven Ciobo MP	
Members	Hon Chris Bowen MP (from 22/04/13)	Hon Joel Fitzgibbon MP
	Mr Scott Buchholz MP	Dr Andrew Leigh MP (to 22/04/13)
	Mr Stephen Jones MP	Mr Craig Thomson MP
	Ms Kelly O'Dwyer MP	

Committee Secretariat

Secretary	Mr Stephen Boyd
Inquiry Secretary	Ms Samantha Mannette
Inquiry Staff	Ms Zoë Smith
	Dr Kilian Perrem
Administrative Officers	Ms Natasha Petrović
	Ms Carissa Skinner

Terms of reference

On 21 March 2013 the Selection Committee asked the Committee to inquire into and report on the Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013.

Under Standing Order 222(e), Selection Committee reports are treated as having been adopted by the House when they are presented.

List of abbreviations

AAT	Administrative Appeals Tribunal
ACMA	Australian Communication and Media Authority
ATO	Australian Taxation Office
DGR	Deductible gift recipient
GST	Goods and services tax
GST Act	*A New Tax System (Good and Services Tax) Act 1999*
ITAA 1936	*Income Tax Assessment Act 1936*
ITAA 1997	*Income Tax Assessment Act 1997*
LISC	low income superannuation contribution
MYEFO	Mid-Year Economic and Fiscal Outlook
QAPE	qualifying Australian production expenditure
SIS Act	*Superannuation Industry (Supervision) Act 1993*
TOFA	Taxation of financial arrangements
TOFA Act	*Tax Laws Amendment (Taxation of Financial Arrangements) Act 2009*
the Bill	Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013

Recommendation

2 Issues in the Bill

Recommendation 1

The House of Representatives pass Schedules 1, 2, 3, 4, 6, 7 and 8 of the Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013. In relation to Schedule 5, the Australian Government should consult with industry groups to ensure that undue liability is not being inadvertently placed on trustees who are working in good faith for the benefit of their members.

1

Introduction

Referral of the Bill

1.1 On 21 March 2013 the House of Representatives Selection Committee referred the Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013 (the Bill) to the House of Representatives Standing Committee on Economics (the committee) for inquiry and report.

1.2 The Bill amends various tax and superannuation laws. It contains eight schedules, which broadly:

- define a 'documentary' in the *Income Tax Assessment Act 1997* (ITAA 1997) for the purpose of accessing film tax offsets, and makes explicit that game shows are not eligible programs for film tax offsets (Schedule 1);
- exempt from income tax the ex-gratia payments made to people affected by natural disasters in Australia during 2011-12 and 2012-13 (Schedule 2);
- amend the goods and services tax (GST) law to enable eligible businesses to continue to pay their GST instalments if they subsequently move into a net refund position. This will enable businesses to continue to make their Business Activity Statements annually (Schedule 3);
- update the list of deductible gift recipients, adding six entities (Schedule 4);
- provide for procedures to consolidate accounts where a member of a superannuation fund may have multiple accounts within that fund (Schedule 5);

- make changes to the government superannuation co-contribution for low income earners (Schedule 6);
- consolidate eight existing dependency tax offsets into a single tax offset that is only available to taxpayers who maintain a dependant who is unable to work due to invalidity or carer obligations (Schedule 7); and
- clarify and refine the operation of certain aspects of the Taxation and Financial Arrangements (TOFA) regime, lowering compliance costs and proving additional certainty to affected taxpayers (Schedule 8).

1.3 In referring the Bill, the Selection Committee set out the following reasons for referral and principal issues for consideration:

> Further scrutiny and road-testing is required, particularly in relation to the following schedules:
>
> - Schedule 1 – after the two key changes proposed here, whether the film tax offset provisions remain properly targeted and consistent with policy intent;
> - Schedule 5 – whether the enforced consolidation of multiple member accounts with certain super funds will be done efficiently, effectively, and in the best interests of members, without unnecessary costs or unintended consequences;
> - Schedule 6 – proposed reductions in superannuation co-contributions for low income earners, including the freezing of the thresholds at which these co-contributions will begin phasing out (and end phasing out), are politically controversial, and where we have come from regarding co-contributions need ventilating;
> - Schedule 7 – consolidation of eight separate tax offsets for dependents into one new tax offset from 1 July 2012 is controversial and may have unintended consequences; and
> - Schedule 8 – complex matters regarding Taxation of Financial Arrangements (TOFA) regime, and changes apply retrospectively.
>
> Key concerns here generally involve:
>
> - Whether legislative changes are hitting the mark in terms of policy intent and efficacy;
> - Potential unintended consequences;
> - Many complex subject matters exist here;
> - Some parts apply retrospectively and may not be entirely beneficial to taxpayers; and
> - Some parts are quite controversial (for other reasons).[1]

1 House of Representatives Selection Committee, *Report No. 78: Private Members' business and referral of bills to committees*, 21 March 2013, p. 4.

Schedule 1—Definition of a documentary

Background

1.4 Schedule 1 amends the film tax offset provisions of the ITAA 1997. The schedule inserts the definition of a 'documentary' and includes 'game shows' on the list of formats that are ineligible for the film tax offset. Presently, the law does not provide a definition of what constitutes a 'documentary'.[2]

1.5 There are three tax offsets to encourage investment in Australian film production. Documentaries are generally not eligible for the 'location' or 'post, digital and visual' offsets. The Producer Offset is available for documentaries. This offset provides film makers who satisfy a number of criteria with a refundable tax offset of 40 per cent on feature films and 20 per cent on other films of their 'qualifying Australian production expenditure' (QAPE).[3]

1.6 The QAPE threshold for a documentary series is lower than for other program formats. A documentary has a QAPE threshold of $500,000, with a minimum of $250,000 per film hour, as compared to a drama series which requires a QAPE of at least $1 million, as well as a minimum of $500,000 per film hour. News and current affairs programs, films for exhibition as advertising and light entertainment programs are excluded formats for the purposes of the Producer Offset.[4]

1.7 Screen Australia is the film authority that administers the Producer Offset, which involves assessing whether a film satisfies the criteria set out in Division 376–65 of the ITAA 1997. This includes determining whether a film is a 'documentary' and calculating a film's level of QAPE. Since 2007 Screen Australia has used the definition from the Australian Communication and Media Authority's (ACMA) Guidelines. In its role as administrator of the Producer Offset, Screen Australia refused to certify a television program, *Lush House*, determining it to be an infotainment program, not a documentary. However, in 2011 the Administrative Appeals Tribunal (AAT) developed a different definition and ruled that the television program *Lush House* was a documentary that qualified for the Producer Offset.[5]

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2 Explanatory Memorandum (EM), Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 20.

3 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 11.

4 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, pp. 11-12.

5 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 20.

1.8 The changes in this schedule were announced in the 2012-13 Budget. In a joint media release on 5 July 2012, the Assistant Treasurer and the Minister for the Arts, issued further advice about the Government's intention to update the legislation governing the producer tax offset, indicating that 'recent court decisions have led to some uncertainty for screen producers about whether or not their production will qualify' for the Producer Offset. The then Minister for the Arts, the Hon Simon Crean MP, stated:

> Inserting a definition of the term 'documentary' will give producers greater confidence about the eligibility of their production and will support the success of the Producer Offset as a funding mechanism …
>
> It will also provide clear guidance for the program's administrator Screen Australia and the Government in the operation of the Offset.[6]

1.9 The Treasury released draft legislation and explanatory material on the changes in Schedule 1 on 14 December 2012, calling for submissions on the proposed changes. It received 10 submissions, including two confidential submissions. The public submissions are available on the Treasury's website.[7]

The new law

1.10 Schedule 1 will insert the ACMA's Guidelines definition of a documentary into the ITAA 1997 (Section 376-25):

Meaning of documentary

(1) A *film is a ***documentary*** if the film is a creative treatment of actuality, having regard to:
- (a) the extent and purpose of any contrived situation featured in the film; and
- (b) the extent to which the film explores an idea or a theme; and
- (c) the extent to which the film has an overall narrative structure; and
- (d) any other relevant matters.

Exclusion of infotainment or lifestyle programs and magazine programs

(2) However, a *film is not a ***documentary*** if it is:
- (a) an infotainment or lifestyle program (within the meaning of Schedule 6 to the *Broadcasting Services Act 1992*); or

6 The Hon David Bradbury MP, Assistant Treasurer, and the Hon Simon Crean MP, Minister for the Arts, *Clarity for Producer Offset documentaries*, Joint Media Release No. 63, 5 July 2012.

7 The Treasury, Consultations and Submissions, *Film tax offsets –Definition of a 'documentary'*, <http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/Film-tax-offsets--definition-of-a-documentary>, viewed 2 April 2013.

(b) a film that:

(i) presents factual information; and

(ii) has 2 or more discrete parts, each dealing with a different subject or a different aspect of the same subject; and

(iii) does not contain an over-arching narrative structure or thesis.

1.11 The amendments will apply retrospectively to films that commence principal photography on, or after, 1 July 2012.[8] From 1 July 2012 Screen Australia advised applicants for the Producer Offset of both the AAT and ACMA's definitions of what constituted a documentary.[9] Consequently, the EM stated:

> It follows that film makers would have embarked on making their films fully aware of the amendments that were proposed and of the consequences of those amendments for their film.[10]

1.12 The second change made in Schedule 1 is to add 'game shows' to the list of formats that are ineligible for the tax offsets.[11] These amendments are in line with the original policy intent to exclude 'light entertainment programs' from receiving tax offsets.[12] The amendments apply to films that start their principal photography on, or after, the Bill receives Royal Assent.[13]

1.13 The EM stated that there will be no revenue impact, and that the compliance cost impact will be low.[14]

Schedule 2—Ex-gratia payments for natural disasters

Background

1.14 Schedule 2 amends the ITAA 1997 to exempt from income tax the Disaster Income Recovery Subsidy (DIRS) and the ex-gratia Australian Government Disaster Recovery Payment made to New Zealand citizens holding non-protected special category visas.

8 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 19.

9 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 19.

10 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 19.

11 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 19.

12 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 18.

13 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 21.

14 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 3.

1.15 The Australian Government Disaster Recovery Payment is a one off payment of $1,000 for eligible adults and $400 for eligible children adversely affected by a major or widespread disaster. The payment is tax exempt. New Zealand citizens holding non-protected special category visas (subclass 444) who arrived in Australia after 2001 are not eligible for the payment. However, the Government deemed that the hardship caused by specific natural disasters occurring between 2012 and 2013, warrants extending the payment to New Zealand non-protected special category visa holders. Included were those affected by the 2012 floods in New South Wales, Queensland and Victoria; the 2013 floods in New South Wales and Queensland; and the 2013 bushfires in Tasmania.[15]

1.16 The DIRS provides financial assistance to employees, small business persons and farmers that have lost their income as a result of a natural disaster.[16] In February 2013 the Prime Minister announced that the DIRS would be made available to people who had lost income as a result of ex-Tropical Cyclone Oswald and associated flooding in specified government areas.[17] New Zealand non-protected special category visa holders are eligible to apply for this payment.

The new law

1.17 Schedule 2 of the Bill amends the ITAA 1997 to ensure that Australian Government Disaster Recovery Payments to New Zealand citizens holding non-protected special category visas are tax exempt. This is consistent with the tax treatment of the payment to other eligible recipients. It will also make amendments to ensure that the DIRS is tax exempt. In the second reading speech, the Assistant Treasurer commented:

> Exempting these payments from tax maximises the value of the payments for people affected by recent disasters. It also ensures that the payments are treated in the same way as previous disaster assistance payments, such as those made in the wake of cyclone Yasi in 2011.[18]

1.18 Item 1 of Schedule 2 updates the table in Section 11-15 of the ITAA, which provides for income tax exemptions for certain payments. Specific references to New Zealand non-protected special category visa holders for a disaster in the 2010-11 financial year, the floods in NSW and Queensland

15 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, pp. 23-24.

16 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 24.

17 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 24.

18 The Hon David Bradbury MP, Assistant Treasurer, *House of Representatives Hansard*, 20 March 2013, p. 17.

in 2012, and the 2010 floods and Cyclone Yasi, are replaced with a more general reference to disaster assistance for this category of visa holders, and a reference to the Disaster Income Recovery Subsidy.

1.19 Division 51 of the ITAA 1997 includes a list of welfare payments that are exempt from income tax. Item 2 amends table item 5.1C to exempt the ex-gratia payments to the New Zealand non-protected special category visa holders from income tax. The amendments also provide for the time period in which the payment must be claimed, generally six months after the disaster has been declared.

1.20 Item 3 inserts a definition for the 'Emergency Management Minister' in Subsection 995-1(1) of the Dictionary of definitions in the ITAA 1997. The Attorney-General who administers the *Social Security Act 1991* will be responsible for announcing a disaster, which will be covered by the Australian Government Disaster Recovery Payment.

1.21 Items 4 and 5 of Schedule 2 amend the *Tax Laws Amendment (2011 Measures No. 1) Act 2011* and the *Tax Laws Amendment (2012 Measures No. 1) Act 2012*, respectively, to repeal sections of those Acts that are no longer necessary, following the amendments in this schedule to the ITAA 1997.

1.22 The remaining items 6 to 9 provide for sunset clauses to repeal these changes in 2016 and 2017. The EM outlined that:

> These amendments will be repealed on 1 July 2016 in the case of the tax exemption for the 2011-12 financial year, and on 1 July 2017 in the case of the 2012-13 tax exemption, by which time the amendments would have become inoperative.[19]

1.23 No revenue and compliance cost impact is anticipated. This measure applies to payments relating to disasters occurring in the 2011-12 and 2012-13 income years.[20]

19 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 26.

20 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 3.

Schedule 3—GST instalment system

Background

1.24 Schedule 3 amends *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) to allow entities that pay their GST by instalments, but subsequently move into a net refund position, the option to continue to use the GST instalment system.

1.25 Businesses use an activity statement to report and pay a number of tax obligations, including GST. For GST purposes, the business will use the Business Activity Statement (BAS) to report and pay the GST collected, and to claim GST credits. BAS can be undertaken on a monthly, quarterly or annual basis.

1.26 The GST instalment option allows eligible businesses to pay GST by quarterly instalments and to lodge an annual GST return in which it accounts for any difference between the actual GST liability and the total GST instalments paid for the year. This instalment option, introduced in 2001, aims to reduce reporting compliance costs by allowing annual rather than quarterly BAS.[21]

1.27 The changes in Schedule 3 were announced in the 2011-12 Budget, as part of the reforms to the GST instalment system. The Treasury has also consulted on this change, with a discussion paper released in June 2011. The Treasury stated that the original policy intent of this measure was refined following this consultation, stating:

> The original measure aimed to extend access to the instalment system to small businesses in a net refund position. Concerns were identified during the development of the legislation that the measure may present a revenue risk and conflict with other initiatives designed to target non-compliance in particular sectors of the economy. Consequently, the scope of the measure was limited, applying only to those entities that are already participating in the GST instalment system and subsequently move into a net refund position.[22]

1.28 Subsequently, draft legislation was released on 5 November 2012. One submission from the Tax Institute was received. No changes were made to the draft legislation as a result of the exposure draft consultation.

21 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 29.

22 The Treasury, Summary of Consultation Process, *Allowing businesses in a net refund position to continue paying GST by instalments*, available at <http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/GST-instalment-system>, viewed 2 April 2013.

The new law

1.29 Currently, the GST Act prevents entities from paying GST by instalments if they move into a net refund position. The EM defined a 'net refund position' as:

> … one in which a business is entitled to receive more input tax credits on its acquisitions than it is required to pay GST on its sales and other supplies during the relevant tax period.[23]

1.30 Entities choosing to remain in the GST instalment system, that move to a net refund position, will have an instalment amount of zero, and not less.[24] This allows them to retain the compliance cost advantage of not having to complete a quarterly BAS. Entities that are not paying GST by instalments and are already in a net refund position remain ineligible to use the instalment option.[25]

1.31 The amendments made by Schedule 3 apply in relation to GST instalment quarters starting on, or after, the first 1 July that occurs on, or after, Royal Assent of this Bill.[26]

Schedule 4—Deductible gift receipts

Background

1.32 Division 30 of the ITAA 1997 contains a list of deductible gift recipients (DGRs). A DGR is an entity or fund that can receive tax deductible gifts of $2 or more. It can either be endorsed by the ATO or be listed in the tax law.[27] Having DGR status assists funds and entities to attract financial support for their activities, as donations will be tax deductible.

23 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, pp. 29-30.
24 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 31.
25 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 31.
26 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 32.
27 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 35.

The new law

1.33 Schedule 4 amends the ITAA 1997 to update the list of DGRs by adding the following six entities:

- The Conversation Trust—a charity that publishes analysis and commentary on current affairs from the university and research sector, written by experts and delivered directly to the public through its website, Twitter and Facebook (applicable to gifts made after 21 November 2012);
- National Congress of Australia's First Peoples Limited—a national representative organisation of Aboriginal and Torres Strait Islander peoples. It works for the recognition of Aboriginal and Torres Strait Islander rights, and towards securing a better economic, social, cultural and environmental future for these peoples (applicable to gifts made after 30 June 2013);
- National Boer War Memorial Association Incorporated—seeking donations to commemorate Australian service in the Boer War (1899 to 1902) by constructing a memorial on Anzac Parade in Canberra (applicable to gifts made after 31 December 2012 and before 1 January 2015);
- Anzac Centenary Public Fund—collecting donations to fund a range of Anzac Centenary initiatives and projects as agreed by Government, for the commemoration of the Anzac Centenary and Australia's involvement in World War One (1914 to 1918) (applicable to gifts made after 30 November 2012 and before 1 May 2019);
- Australian Peacekeeping Memorial Project Incorporated—seeking donations to build a memorial on Anzac Parade in Canberra, ACT to recognise the service of Australians who have served in peacekeeping missions (applicable to gifts made after 31 December 2012 and before 1 January 2015); and
- Philanthropy Australia Inc—a national membership body for the philanthropic sector, primarily servicing Australia's philanthropic trusts and foundations, and providing directory and information products on philanthropy (applicable to gifts made after 27 February 2013).[28]

28 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, pp. 5, 35-37.

1.34 These amendments will commence from Royal Assent. The Government's revenue projections from the measure are outlined in the table below:

Table 1.1 Financial impact of changing the DGR status of the six entities ($m)

Organisation	2012-13	2013-14	2014-15	2015-16
The Conversation Trust	0	-0.3	-0.5	-0.5
National Congress of Australia's First Peoples Limited	0	0	0*	-0.01
National Boer War Memorial Association Incorporated	0	-0.02	-0.05	-0.02
Anzac Centenary Public Fund	0	-1.3	-3.5	-2.3
Australian Peacekeeping Memorial Project Incorporated	0	-0.02	-0.04	-0.02
Philanthropy Australia Inc.	0	0*	-0.01	-0.01
Total ($m)	**0**	**-1.64**	**-4.10**	**-2.86**

Source *Explanatory Memorandum, p. 6.*
** Denotes that the financial impact has been rounded to zero*

1.35 The schedule also provides for the repeal of the time limited DGRs. Entries for National Boer War Memorial Association Incorporated and Australian Peacekeeping Memorial Project Incorporated will be repealed on 1 July 2019. The entry for the Anzac Centenary Public Fund will be repealed on 1 July 2023.[29]

Schedule 5—Merging multiple superannuation accounts

Background

1.36 On 21 September 2011, the then Minister for Financial Services and Superannuation, the Hon Bill Shorten MP, announced that as part of the Gillard Government's *Stronger Super* reforms, the Government 'will help superannuation funds and their members locate and consolidate multiple member accounts'.[30] The aim of the reform is to reduce the amount of fees paid on multiple accounts and maximise benefits for retirees.

1.37 The Treasury has conducted two consultations on intra-fund consolidation of superannuation interests, in March and August 2012.[31]

29 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 37.

30 The Hon Bill Shorten MP, Minister for Financial Services and Superannuation, *A better deal for superfund members*, Media Release No. 131, 21 September 2011.

31 The Treasury, Consultations and Submissions, *Intra fund consolidation of superannuation interests,* <http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/Intra-

The new law

1.38 Schedule 5 amends the *Superannuation Industry (Supervision) Act 1993* (SIS Act) to task trustees of particular superannuation funds with identifying if a member has multiple accounts within a fund and considering whether it is in the member's best interest to merge accounts.[32] This schedule aims to reduce the number of unnecessary multiple accounts within the same superannuation fund by merging these accounts. This will reduce the amount affected members pay in multiple sets of administration fees and insurance premiums, and consequently increase retirement savings.[33] In the second reading speech, the Assistant Treasurer stated:

> At June 2012 there were almost 32 million superannuation accounts in Australia—almost three accounts for every worker. This measure will facilitate a steady reduction in the number of unnecessary accounts in the superannuation system.[34]

1.39 These amendments apply to trustees of Australian Prudential Regulation Authority regulated superannuation funds and approved deposit funds.[35] According to the EM, the amendments will require affected trustees to:

- establish rules setting out how they will find multiple accounts held by one member within their fund;
- search for multiple accounts at least once per financial year;
- merge the member's multiple accounts (except in the case of defined benefit and income stream accounts) where the trustee reasonably believes it would be in the member's best interest, regardless of the balances of the accounts; and
- ensure no fees are payable (other than buy/sell spreads) for any mergers of multiple accounts.[36]

1.40 Proposed Section 108A(3) provides for a way in which accounts may be merged by introducing a definition of a 'superannuation account', which is to be used only in the context of these amendments:

> (3) A superannuation account is a record of the member's benefits, in relation to a superannuation entity in which the member has an interest, which is recorded separately:

fund-consolidation-of-superannuation-interests> and <http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/Intra-fund-consolidation>, viewed 2 April 2013.

32 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, pp. 39, 41.

33 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 49.

34 The Hon David Bradbury MP, Assistant Treasurer, *House of Representatives Hansard*, 20 March 2013, pp. 17-18.

35 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, pp. 39, 48.

36 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 42.

(a) from other benefits of the member in relation to the entity (if any); and

(b) from other benefits of any other member in relation to the entity.

To avoid doubt, an FHSA (within the meaning of the *First Home Saver Accounts Act 2008*) is not a superannuation account.

1.41 When considering whether it is a member's 'best interest' to merge accounts, the EM stated:

> In general, multiple fees, charges and insurance may not be in the member's best interest, and one set of fees and charges may be more appropriate.[37]

1.42 The EM also specified that trustees will not be required to merge accounts 'where they consider it to be impracticable'.[38] Further, a number of accounts will be exempt from the consolidation measure, these include:

- benefit interest accounts;
- accounts supporting an income stream;
- First Home Saver Accounts;
- pooled superannuation trusts; and
- self-managed superannuation funds.[39]

1.43 Trustee will not require the consent of members prior to consolidating eligible accounts. However the EM outlined that:

- trustees can seek a member's view when dealing with large accounts;
- trustees must comply with the requirements of the Australian Securities and Investments Commission in relation to significant events; and
- trustees must consider their disclosure obligations in the *Corporations Act 2001* and the *Corporations Regulations 2001* when consolidating accounts.[40]

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37 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 43.

38 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 44.

39 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 40.

40 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 46.

1.44 On the matter of 'disclosure' the EM stated:

> Where a trustee makes a decision that fundamentally affects a member's investment, including a decision to transfer a member's benefits without notice or consent, the trustee must disclose this change or event to the member either before, or as soon as practicable (but not more than three months) after the decision.[41]

1.45 Trustees will be expected to undertake possible consolidation duties on a 'periodic basis', which the EM outlined is to happen at least annually.[42]

1.46 The EM indicated that there will be no revenue impact of the Schedule 5 amendments, but that a moderate compliance cost impact is expected.[43] A regulation impact statement on the *Stronger Super* reforms is available from the Department of Finance and Deregulation website, with the consolidation of superannuation accounts discussed in Section 3 of that report. The EM noted that this change has been developed in consultation with industry.[44]

1.47 The EM noted that Schedule 5 raises some human rights issues, as it engages the right to privacy in Article 17 of the International Covenant on Civil and Political Rights. Under the proposed amendments, trustees will not be required to obtain a member's consent to merge multiple accounts in the same fund. However, the EM concluded that the schedule 'limits the right to privacy in a reasonable and proportionate way and is therefore compatible with human rights'.[45]

1.48 These amendments will commence from 1 July 2013, with a first round of consolidation to be undertaken by 30 June 2014.[46]

Schedule 6—Superannuation co-contributions

Background

1.49 Schedule 6 changes the superannuation co-contributions made by government. The superannuation co-contribution initiative involves the Government making co-contributions to help eligible low and middle income earners boost their super savings.

41 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 46.

42 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, pp. 39-41.

43 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 41.

44 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 40.

45 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 50.

46 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, pp. 40, 47.

1.50 Under the scheme, the Government would match up to $1,000 for individuals who fall within certain income thresholds. There are two applicable income thresholds (from 1 July 2009 to 30 June 2012), the lower income threshold ($31, 920), and the higher income threshold ($61,920). The maximum entitlement is $1,000, which is then reduced by 3.333 cents for every dollar of total income—less any allowable business deductions—is over $31,920, up to $61,920.[47]

1.51 The lower income threshold is indexed, but has been frozen at $31,920 for the 2010-11 and 2011-12 income years. In the 2011-12 Budget, the Government announced a measure for an additional one year freeze on the indexation of the lower income threshold, extending the freeze to 2012-13. In the 2011-12 Mid-Year Economic and Fiscal Outlook the Government also announced further changes to superannuation government co-contribution arrangements.[48]

The new law

1.52 Schedule 6 amends the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* by:

- reducing the rate of payment for the superannuation co-contribution from 100 per cent to 50 per cent;
- decreasing the maximum amount payable from $1,000 to $500;
- extending the freeze on the indexation of the lower income threshold for the 2012-13 income year; and
- setting the higher income threshold at $15,000 above the lower income threshold (down from $30,000).[49]

1.53 In the second reading speech, the Assistant Treasurer explained that:

> Schedule 6 will reduce the matching rate and maximum payment of the voluntary superannuation co-contribution from 1 July 2012 … These changes mean that for the co-contribution, the government will contribute 50c for every dollar of eligible personal contributions an individual makes up to a maximum of $500.[50]

47 Australian Taxation Office, *Super co-contribution*, available at <http://www.ato.gov.au/individuals/content.aspx?menuid=0&doc=/content/42616.htm&page=3&H3>, viewed 2 April 2013.

48 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 8.

49 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 51.

50 The Hon David Bradbury MP, Assistant Treasurer, *House of Representatives Hansard*, 20 March 2013, p. 18.

1.54 The amendments in the schedule freeze the lower income threshold of $31,920 for the 2012-13 income year. However, the Assistant Treasurer outlined in his second reading speech that there will be a change to the higher income threshold:

> The income threshold above which no co-contribution is payable [currently $61,920] will be reduced to $15,000 above the lower income threshold, that is, $46,920 for the 2012-13 income year.[51]

1.55 The EM stated that only 20 per cent of eligible people currently take advantage of the scheme.[52] The low income superannuation contribution (LISC) is put forward as a more accessible scheme for low income earners:

> The LISC is a better targeted payment, covering over an estimated five times as many individuals as the superannuation co-contribution as a result of these amendments. It also does not require that low income individuals make eligible personal superannuation contributions to their superannuation fund, which increases the coverage of assistance available to low income earners.[53]

1.56 The EM outlined the implications for the underlying cash balance over the forward estimates as follows:

Table 1.2 Revenue impact of Schedule 6 ($m)

Year	2012-13	2013-14	2014-15	2015-16
Amount	0	325	335	327

Source Explanatory Memorandum, p. 8.

1.57 These amendments will commence from the date of Royal Assent and apply from the 2012-13 income year.[54]

51 The Hon David Bradbury MP, Assistant Treasurer, *House of Representatives Hansard*, 20 March 2013, p. 18.

52 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 52.

53 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 52.

54 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 8.

Schedule 7—Consolidating dependency tax offsets

Background

1.58 The *Income Tax Assessment Act 1936* (ITAA 1936) provides for dependency tax offsets for taxpayers who maintain certain classes of dependants. The Government announced in the 2012-13 Budget that it would consolidate eight existing dependency tax offsets into a single offset that is only available to taxpayers who maintain a dependant who is unable to work due to invalidity or care obligations.[55] Treasury undertook a public consultation on the provisions of Schedule 7.[56]

The new law

1.59 Schedule 7 consolidates eight separate tax offsets for dependants into one new tax offset from 1 July 2012. The eight tax offsets to be consolidated are: the carer spouse, invalid spouse, invalid relative, parent/parent-in-law, child-housekeeper, child-housekeeper (with child), housekeeper and housekeeper (with child) tax offsets.[57]

1.60 Specifically, Schedule 7 of the Bill amends:

- the ITAA 1997 to create a new, consolidated dependency tax offset for taxpayers maintaining certain classes of dependants who are genuinely unable to work;
- the ITAA 1936 to preserve the existing dependency tax offsets for taxpayers eligible for the zone, overseas forces and overseas civilian tax offsets; and
- the ITAA 1936 to reflect the impact of the consolidation of the dependency tax offsets on the net medical expenses tax offset.[58]

55 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 57.

56 The Treasury, Consultations and Submissions, *The dependant (invalid and carer) tax offset,* <http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2013/Dependant-Invalid-and-Carer-Tax-Offset>, viewed 2 April 2013.

57 The Hon David Bradbury MP, Assistant Treasurer, *House of Representatives Hansard*, 20 March 2013, p. 18.

58 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 57.

1.61 In the second reading speech, the Assistant Treasurer commented in relation to Schedule 7 that 'this reform is consistent with the Australian Future Tax System Review and builds on the government's record of tax reform'. The Assistant Treasurer explained:

> The new tax offset will be called the dependant (invalid and carer) tax offset. It will be paid at the highest of the rates of the consolidated tax offsets. The offset will be limited to taxpayers who contribute to the maintenance of a dependant who is genuinely unable to work because of invalidity or carer obligations.[59]

1.62 The EM defined an eligible dependant as:

- a taxpayer's spouse, parent, child (aged 16 years or over), brother or sister (aged 16 years or over) who is genuinely unable to work due to invalidity;
- the taxpayer's spouse's parent, brother or sister (aged 16 years or over), who is genuinely unable to work due to invalidity; or
- a taxpayer's spouse or parent/parent in law, who is genuinely unable to work due to carer obligations.[60]

1.63 The EM further stipulated that under the amendments in Schedule 7:

> A dependant is considered to be genuinely unable to work due to invalidity where that person receives: a disability support pension or a special needs disability support pension under the *Social Security Act 1991*; or an invalidity service pension under the *Veterans' Entitlements Act 1986*.[61]

1.64 The amendments in Schedule 7 will make the following key changes to the dependency tax offset arrangements:

- A taxpayer will no longer be able to receive a tax offset in respect of a child-housekeeper, child-housekeeper (with child), housekeeper or housekeeper (with child), as those dependants do not meet the requirement of being genuinely unable to work;
- The current maximum offset amount varies depending on the dependency offset the taxpayer is entitled to, with the new maximum amount set at $2,423 for 2012-13;

59 The Hon David Bradbury MP, Assistant Treasurer, *House of Representatives Hansard*, 20 March 2013, p. 18.

60 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 64.

61 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 64.

- A taxpayer will only be entitled to include as part of their net medical expenses tax offset (NMETO) claim the net medical expenses of a dependant who is a relative, spouse's relative, parent or spouse's parent who is genuinely unable to work due to invalidity or care obligations. The housekeeper and related categories will no longer be covered; and
- A taxpayer may be entitled to a concession for accessing the family Medicare levy low income threshold if they have a spouse or child. They are no longer entitled to access it if they contribute to the maintenance of a child housekeeper, or if they engage a housekeeper.[62]

1.65 Certain features of the current arrangements will continue to apply, in particular:

- A taxpayer who maintains a dependant who is eligible for the zone, overseas forces or overseas civilian tax offset will experience no changes to any of their offset and concession entitlements or amounts; and
- A taxpayer can still receive more than one amount of dependency tax offset, as long as it is in respect of a different dependant.[63]

1.66 The EM outlined the implications for the underlying cash balance over the forward estimates as follows:

Table 1.3 Revenue impact of Schedule 7 ($m)

Year	2012-13	2013-14	2014-15	2015-16
Amount	–2.9	24.9	24.9	20.0

Source *Explanatory Memorandum, p. 9.*

Schedule 8—Taxation of financial arrangements

Background

1.67 Schedule 8 amends Division 230 of the ITAA 1997 and the *Tax Laws Amendment (Taxation of Financial Arrangements) Act 2009* (TOFA Act) to clarify and refine the operation of certain aspects of the Taxation of Financial Arrangements (TOFA) regime.

1.68 TOFA reforms were first announced in 1992 and have involved the implementation of various stages of arrangements in the ensuing years. The TOFA arrangements aim to reduce the influence of tax considerations

62 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, pp. 62-63.

63 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, pp. 62-63.

on how financial arrangements are structured, emphasising other factors, such as risk, when making financing decisions.

1.69 The TOFA rules provide for the tax treatment of gains and losses on financial arrangements. The rules are contained in Division 230 of the ITAA 1997 and apply to those with large tax payment obligations. Division 230, representing stages three and four of the TOFA reforms, was introduced by the TOFA Act. The rules include methods for calculating gains and losses from financial arrangements, and the time at which these gains and losses will be brought to account.

1.70 The TOFA rules generally apply to financial arrangements for financial years commencing on or after 1 July 2010, unless the taxpayer elected to apply the TOFA provisions from the previous financial year. When introduced, the Government foreshadowed that monitoring and further legislative refinements would be required.

1.71 On 29 June 2010, the then Assistant Treasurer, Senator the Hon Nick Sherry, announced further refinements to the income tax law relating to the TOFA rules, outlining a number of proposed amendments to the ITAA 1997 and the TOFA Act.[64]

1.72 The Treasury has consulted with the ATO and industry as part of the TOFA Working Group consultation process, and on 10 January 2013 released exposure draft legislation and explanatory material for public consultation. The Treasury received six submissions, including three confidential submissions. The Government amended the draft Bill to address certain concerns raised during the consultation.[65]

The new law

1.73 The amendments in Schedule 8 will cover the following aspects of the TOFA regime:

- **core rules** cover the tax treatment of gains and losses from financial arrangements;
  - ⇒ the amendments will provide that taxpayers must have regard to financial benefits that they are both certain and *uncertain* of providing and receiving; and

64 Senator the Hon Nick Sherry, Assistant Treasurer, *New reforms to the Taxation of Financial Arrangements*, Media Release No. 145, 29 June 2010.

65 The Treasury, Summary of Consultation Process, *Amendments to the taxation of financial arrangements (TOFA) stages 3 & 4 provisions,* <http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2013/TOFA-Stages-3-and-4>, viewed 2 April 2013

  - ⇒ financial benefits are generally not attributable to interest or interest-like amounts,[66] but can be in 'appropriate circumstances' (Part 1 of Schedule 8);

- **accruals and realisation tax timing methods**, which are the default methods of recognising gains and loses under the TOFA provisions;
  - ⇒ the amendments propose changes to how overall gains and losses interact with particular gains and losses (Part 2 of Schedule 8);
- **fair value tax timing method**, by which financial arrangements that are assets or liabilities are classified or designated as at fair value through profit or loss for accounting purposes;
  - ⇒ the amendments will clarify how TOFA deals with different types of fair value gains and losses recognised under accounting standards (Part 3 of Schedule 8);
- **hedging financial arrangements method**, under which taxpayers may use financial arrangements to hedge financial risks arising from the purchase, sale or production of commodities, and their financial assets or liabilities;
  - ⇒ the amendments will ensure that the hedging financial arrangements election is applied consistently, by removing the current possibility to ensure that an election does not apply to a particular hedge by failing to meet certain documentation requirements (Part 4 of Schedule 8);
- **transitional balancing adjustment provisions** provide for an adjustment to reconcile differences in tax treatments under other tax provisions when a taxpayer makes an election to bring their existing financial arrangements under the TOFA regime;
  - ⇒ the amendments will ensure that an alternative method can only be used if the amount of the balancing adjustment worked out under that method approximates the amount under the primary method (Part 5 of Schedule 8);
- taxpayers must meet eligibility requirements for making **certain elections** under the TOFA regime;
  - ⇒ the amendments will provide that to satisfy eligibility requirements foreign banks may use an audited Statement of Financial Position and Statement of Financial Performance to submit to the Australian Prudential Regulation Authority (Part 6 of Schedule 8); and

66 An amount is an interest-like amount if it represents a return paid or provided on a debt interest, is something in the nature of interest or is something that could reasonably be regarded as being a substitute for interest.

- miscellaneous amendments to ensure language is used consistently and to make minor drafting corrections (Part 7 of Schedule 8).

1.74 In the second reading speech, the Assistant Treasurer stated that the proposed amendments are 'the outcome of ongoing monitoring of the implementation of the taxation of financial arrangements regime, and were announced following extensive consultation with the Australian Taxation Office and industry'.[67]

1.75 The EM maintained that the amendments are 'generally beneficial to taxpayers'. The financial impact is described as 'unquantifiable but is not expected to be significant'. The EM stated that the amendments are expected to 'protect a significant amount of revenue which would otherwise be at risk'. It is anticipated that the compliance cost impact will be low.[68]

1.76 The Schedule 8 amendments will apply retrospectively from the commencement of the TOFA regime, to income years commencing on or after 1 July 2010, or from the previous income year, if taxpayers have elected to apply Division 230 earlier.

Objectives and scope of the inquiry

1.77 The objective of the inquiry is to investigate the adequacy of the Bill in achieving its policy objectives and, where possible, identify any unintended consequences.

Conduct of the inquiry

1.78 On 25 March 2013 the Chair issued a media release announcing the inquiry and calling for submissions, and details of the inquiry were placed on the committee's website.

1.79 The committee received 14 submissions, which are listed in Appendix A.

1.80 A public hearing was held in Canberra on Thursday, 18 April 2013. The list of the witnesses who appeared at the hearing is available in Appendix B. The submissions and transcript of evidence are available on the committee's website at http://www.aph.gov.au/economics.

67 The Hon David Bradbury MP, Assistant Treasurer, *House of Representatives Hansard*, 20 March 2013, p. 18.

68 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 9.

2

Issues in the Bill

2.1 The committee received evidence in relation to Schedule 1 (definition of a documentary), Schedule 5 (merging multiple superannuation accounts), and Schedule 6 (superannuation co-contributions), of the Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013 (the Bill). The key issues raised in relation to these schedules are discussed below.

Schedule 1—Definition of a documentary

Background

2.2 Schedule 1 amends the *Income Tax Assessment Act 1997* (ITAA 1997) to define a 'documentary', which will apply to determining programs' eligibility for the Producer Offset scheme. The amendments will also explicitly exclude games shows, as light entertainment programs, from eligibility for film tax offsets.

2.3 Screen Australia is the 'film authority' for the purposes of the Producer Offset in the ITAA 1997. It is responsible for certifying whether a program is eligible for certain tax concessions aimed at encouraging the production of Australian feature films, television and other projects. To be eligible for the Producer Offset, the program must satisfy certain criteria in Division 376–65 of the ITAA 1997.

2.4 The ITAA 1997 does not include a definition of the term 'documentary'. Prior to the *Lush House* case,[1] in making its decisions Screen Australia referred to the Explanatory Memorandum (EM) on the introduction of the offsets legislation, and the Australia Communications and Media Authority's (ACMA) Guidelines that define a documentary as 'a creative treatment of actuality other than a news, current affairs, sports coverage, magazine, infotainment or light entertainment program'.[2]

2.5 As of April 2013, Screen Australia had issued 350 provisional certificates to documentary projects and 335 final certificates.[3] On receipt of an application for provisional or final certification of a program that the applicant claims is a documentary, Screen Australia undertakes 'an initial and preliminary assessment to determine whether the project is *clearly* a documentary or not'. Screen Australia maintained that while the vast majority of applications are usually straightforward, in a small minority of cases it may need to seek further information from the applicant.[4]

Lush House case

2.6 One of the programs refused certification as a documentary was *Lush House*, which follows a household management expert, Shannon Lush, who works with a different family or household, in each of the ten episodes, to improve their household management. The program satisfied the other conditions in Division 376-65 of the ITAA for the offset, but failed in respect to the documentary requirement.[5] Screen Australia decided that *Lush House* was an infotainment program and not a documentary, and so was ineligible for the Producer Offset.

2.7 Essential Media and Entertainment (EME) Productions, the makers of *Lush House*, sought an Administrative Appeals Tribunal (AAT) review of Screen Australia's decision. The AAT set aside Screen Australia's decision and found that *Lush House* is entitled to a Producer Offset certificate under Division 376-65(1) pursuant to Section 376-65(6) item 6. The AAT judgment stated:

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1 *EME Productions No. 1 Pty Ltd v Screen Australia* [2011] AATA 439.

2 Explanatory Memorandum (EM), Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 12.

3 Ms Fiona Cameron, Screen Australia, *Committee Hansard*, Canberra, 18 April 2013, p. 1.

4 Screen Australia, Submission to the Treasury consultation on *Film tax offsets - definition of a 'documentary'*, p. [5], available at <http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/Film-tax-offsets--definition-of-a-documentary>, viewed 11 April 2013.

5 See *EME Productions No. 1 Pty Ltd v Screen Australia* [2011] AATA 439, paragraphs 6-7.

> In the result, we accept that *Lush House* does not present the clearest of cases of a documentary. It is close to the line. Nevertheless, we conclude, for the reasons we have given, that it does represent sufficient of the elements of a documentary to warrant it having that overall description.[6]

2.8 Screen Australia appealed the AAT's decision on *Lush House*, stating that it was 'the first case concerning the definition of documentary and we believe it is important to differentiate between documentary and lifestyle/infotainment programming'.[7] The Full Federal Court dismissed Screen Australia's appeal. Screen Australia noted in a media release on the case that both the Tribunal and the Court 'have found that the term "documentary" as used in the Producer Offset legislation is uncertain, ambiguous and obscure'.[8]

2.9 Since the *Lush House* proceedings the AAT's definition applies when determining whether a program is a documentary.

Analysis

Defining a documentary

2.10 Screen Australia supported the changes proposed in Schedule 1 of the Bill. However, a number of industry stakeholders objected to the amendments, arguing that the Government should not proceed with the changes.[9]

2.11 Screen Australia argued that the AAT's finding in the *Lush House* case extends the definition of documentary beyond the original policy intent, and may have financial implications. Screen Australia explained that the category of documentary 'provides the privilege of a lower threshold not extended to other programs':

6 *EME Productions No. 1 Pty Ltd v Screen Australia* [2011] AATA 439, paragraph 41.

7 Screen Australia, *Lush House appealed*, 22 July 2011, available at <http://www.screenaustralia.gov.au/news_and_events/2011/mr_110722_lushhouse.aspx>, viewed 11 April 2013.

8 Screen Australia, *Public Statement: Lush House Decision*, 8 March 2012, available at <http://www.screenaustralia.gov.au/news_and_events/2012/ps_120308_lushhouse.aspx>, viewed 11 April 2013.

9 Screen Producers Association of Australia (SPAA), *Submission 3*, pp. 1-2. See also Australian Subscription Television and Radio Association, *Submission 7*; Essential Media and Entertainment, *Submission 8;* Beyond International Limited*, Submission 9*; Prospero Productions, *Submission 10*; Electric Pictures, *Submission 11*; and Cordell Jigsaw Zapruder, *Submission 12*.

> By virtue of their special conditions documentaries do not have to meet [the] half a million dollar per hour threshold that most other programs have to meet. In fact, the threshold to documentary is 250,000 per hour. Regardless of format, if a program meets the half a million dollar threshold, it may be eligible for the offset. So, in fact, infotainment and magazine programs can be eligible if they meet that threshold.[10]

2.12 Screen Australia claims that the AAT definition of a documentary allows the industry 'to receive an unintended benefit', with infotainment and magazines programs previously ineligible now able to come under the documentary category. In expressing its support for Schedule 1, Screen Australia maintained that:

> Schedule 1 of the bill seeks to remedy that situation and uphold the original intention of the act to provide support for projects which the market by itself could not otherwise support. The offset was not designed to replace industry or marketplace funds but to supplement such funding. The offset is a hugely valuable resource for the industry and has enabled producers to retain more equity in their projects and develop more viable production companies. Screen Australia is keen to preserve the offset to continue to fulfil these objectives.[11]

2.13 As the administrator of the Producer Offset, Screen Australia advocated for clarity in determining what programs are documentaries. It observed that it had used the EM of the original offset legislation and the ACMA Guidelines in its determinations. However, in the *Lush House* proceedings, Screen Australia commented that the AAT found: 'It is not legislated for; we will make up our own definition of documentary'.[12] Screen Australia takes the view that including a definition of a documentary in the ITAA 1997 will provide greater certainty moving forward.

2.14 Industry participants at the hearing supported the AAT's definition, and did not see the need for further changes. Arguments made to the committee were twofold:

- The proposed definition in Schedule 1 of the Bill is too restrictive and will hamper industry flexibility as documentaries are an evolving genre; and

10 Ms Fiona Cameron, Screen Australia, *Committee Hansard*, Canberra, 18 April 2013, p. 1.
11 Ms Fiona Cameron, Screen Australia, *Committee Hansard*, Canberra, 18 April 2013, p. 2.
12 Ms Fiona Cameron, Screen Australia, *Committee Hansard*, Canberra, 18 April 2013, p. 11.

- *Lush House* should have been found to be a documentary under the previous guidelines.

2.15 The Screen Producers Association of Australia (SPAA) argued that documentaries are 'the most dynamic, and financially vulnerable, genre in screen production', and as such, any definition used must have the flexibility to allow the genre to evolve. It is concerned that 'calcifying definitions in legislation' will be damaging to the sector as it does not allow for the documentary genre to adapt to new approaches and in line with the tastes of contemporary audiences.[13] SPAA asserted that:

> It is the industry's view that documentary is an evolving craft and its supporting mechanisms must be able to respond to change and adapt accordingly or run the risk of being ineffectual and retarding growth.[14]

2.16 Similarly, Electric Pictures, one of the producers directly affected by the changes, submitted that the amendments in Schedule 1 would 'lock down' the definition of a documentary, and stated:

> There must be flexibility in guidelines to reasonably reflect changes in audience demand. If not, the policy intent of the Producer Offset to build stable and sustainable production companies will be undermined and will potentially be rendered inefficient as a market-driven financing mechanism.[15]

2.17 The Australian Subscription Television and Radio Association suggested that the ACMA definition, on which the proposed definition is based, may be out of date, and commented that:

> The proposed definition is derived from a definition in the Australian Content Standard, which was developed over 15 years ago specifically for the purposes of regulating content on one particular platform (commercial free-to-air (FTA) television)—there has been little subsequent examination of its continued appropriateness or relevance.[16]

2.18 In discussing the aims of the Producer Offset, SPAA noted that while there is targeted government support for certain projects through grants and investments of Screen Australia, the Producer Offset 'lessens the need for direct subsidy by offering leverage to finance documentaries via the

13 SPAA, *Submission 3*, p. 2.

14 Mr Matthew Deaner, SPAA, *Committee Hansard*, Canberra, 18 April 2013, p. 2.

15 Electric Pictures, *Submisson 11*, p. 1.

16 Australian Subscription Television and Radio Association, *Submission 7*, p. 1.

market'. SPAA argued that the amendment will hamper the industry by restricting which programs are regarded as a documentary.[17]

2.19 SPAA sought legal advice on the Exposure Draft of Schedule 1 from Maurice Byers Chambers, who were counsel to EME Productions in the *Lush House* litigation.[18] SPAA claimed that the advice indicated that the changes in Schedule 1 'will not rule out similar challenges in the future'.[19]

2.20 In its advice, Maurice Byers Chambers contended that ACMA Guidelines are 'imprecise and ambiguous', and that the proposed definition of a documentary is 'a formula used for an administrative decision'.[20] It stated:

> A properly drafted definitional clause should state with clarity the meaning of the word. The proposed definition, however, requires a court to 'have regard to' the factors set out. It provides no assistance as to what weight is to be given to each matter by the court … The task proposed has the effect of not providing a common definition but rather inviting a different definition depending on the film concerned. One may expect that the proposed definition will confuse the application of the term not clarify it.[21]

2.21 Screen Australia stated that the proposed definition in Schedule 1:

> … defines 'documentary' consistently with the Broadcasting Services Act and the Australian communications and media guidelines. Those guidelines have very recently been endorsed by the industry as fit and appropriate. The definition is in fact very flexible. It is nimble. It allows us to accept that documentaries evolve. I wanted to make the point, responding to your point, that documentaries do evolve and the definition gives us that flexibility.[22]

17 SPAA, *Submission 3*, p. 2.

18 EME Productions is the group that brought the *Lush House* case to the Administrative Appeals Tribunal when Screen Australia determined that the show was not a documentary.

19 SPAA, *Submission 3*, pp. 1-2.

20 SPAA, *Submission 3*, pp. 7, 5.

21 SPAA, *Submission 3*, p. 5, Attachment A.

22 Ms Fiona Cameron, Screen Australia, *Committee Hansard*, Canberra, 18 April 2013, p. 5.

2.22 The proposed definition of a documentary in Schedule 1 excludes infotainment and lifestyle programs, as provided for in the *Broadcasting Services Act 1992*, which sets out the following definition:

> ***infotainment or lifestyle program*** means a program the sole or dominant purpose of which is to present factual information in an entertaining way, where there is a heavy emphasis on entertainment value.[23]

2.23 At the hearing participants discussed whether a focus on the excluded categories might address industry concerns about the definition. However, industry representatives also expressed concern about the definition of the infotainment category in the Broadcasting Services Act, and suggested that this definition needs updating.[24]

2.24 Industry participants maintained that the AAT decision has not opened the floodgates to every program, and that the Government should take time to ensure that it is delivering a workable solution for Screen Australia and the industry. SPAA called for further consultation on the definition of a documentary in the ITAA 1997. It stated:

> We acknowledge that finding a line between one form and another is an ongoing challenge, yet to stop the possibility of change by calcifying what we see as a very flawed definition in legislation is deeply concerning. There can be no doubt that the producer offset has been a great success—it has assisted the growth of many production companies over the last few years— … [However] in order to achieve the policy intent of the legislation, [producers] must be able to react to changing trends and shifts in market demands. Pragmatically, to ensure that we have reasonable parameters to provide certainty to both production companies and government processes, we are urging you to set aside these amendments pending further consultation with industry.[25]

Retrospectivity

2.25 SPAA raised industry concerns about the retrospective application of the definition, which will apply to films that commence principal photography on, or after, 1 July 2012. It stated:

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23 *Broadcasting Services Act 1992*, Schedule 6: Definitions.

24 Mr Peter Tehan, Beyond International, *Committee Hansard*, Canberra, 18 April 2013, p. 10.

25 Mr Matthew Deaner, SPAA, *Committee Hansard*, Canberra, 18 April 2013, p. 2.

> Because this is retrospective to 1 July 2012, it means that, depending on where this legislation goes, there may or may not be a number of documentaries which if the legislation is amended may or may not sit within the reading of the producer offset view as to whether it may or may not be eligible.[26]

2.26 Screen Australia advised the committee that because the application of the proposed definition will be retrospective to 1 July 2012, when it provides provisional certificates for applications, it includes advice on eligibility in relation to the AAT definition and if the proposed amendments are enacted.[27] It indicated that there are no preliminary letters advising that any projects would become ineligible once the amendments are enacted. Screen Australia stated:

> It might provide the committee with comfort to know that every letter we have provided subsequent to that date has not had any issue with reference to this legislation. In other words, there is no letter out there that says, 'Your provisional certificate would be overturned if this legislation were to be passed, in our opinion.' That should provide the certainty that the industry is looking for.[28]

2.27 Screen Australia argued that the retrospective application of the definition was appropriate, because in addition to providing the legislative basis for it to make decisions on what constitutes a documentary, the Schedule 1 changes also aim to uphold the original policy intent; that the Producer Offset was not intended to 'stand in the shoes of the market' and to subsidise programs that would have been produced without assistance.[29] The EM stated that as the planned change was announced in the 2012-13 Budget:

> It follows that film makers would have embarked on making their films fully aware of the amendments that were proposed and of the consequences of those amendments for their film.[30]

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26 Mr Matthew Deaner, SPAA, *Committee Hansard*, Canberra, 18 April 2013, p. 4.

27 Mr Alex Sangston, Screen Australia, *Committee Hansard*, Canberra, 18 April 2013, p. 4.

28 Ms Fiona Cameron, Screen Australia, *Committee Hansard*, Canberra, 18 April 2013, p. 4.

29 Ms Fiona Cameron, Screen Australia, *Committee Hansard*, Canberra, 18 April 2013, p. 9.

30 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 19.

Conclusion

2.28 Prior to the *Lush House* case in 2011, Screen Australia referred to the ACMA Guidelines and the Explanatory Memorandum of the legislation that introduced the relevant tax offsets to determine whether a program is a documentary for the purposes of the Producer Offset. When Screen Australia's determination about the program *Lush House* was challenged—in the absence of a definition of a documentary in the *Income Tax Assessment Act 1997* (ITAA 1997)—the Administrative Appeals Tribunal created a new definition that seems to expand the types of programs that can be regarded as documentaries.

2.29 Schedule 1 aims to introduce a definition of a documentary into the ITAA 1997. It inserts a definition of a documentary based on the ACMA Guidelines, as was used by Screen Australia prior to the *Lush House* case. In the committee's view this is a reasonable response by the Australian Government to reinstate the definition that Screen Australia had previously used in administering the Producer Offset.

2.30 Screen Australia supports the definition of a documentary in Schedule 1, as it will provide greater clarity in determining whether a program is a documentary. However, the Screen Producers Association of Australia and some industry representatives prefer the AAT definition, and argued that the proposed definition lacked flexibility for the evolving documentary genre.

2.31 The committee noted industry stakeholder concerns about flexibility and suggests there is a need for ongoing dialogue between Screen Australia and industry to ensure that the application of the definition in Schedule 1 remains responsive to the evolving documentary genre.

Schedule 5—Merging multiple superannuation accounts

Background

2.32 Schedule 5 amends the *Superannuation Industry (Supervision) Act 1993* to task trustees of particular superannuation funds with identifying if a member has multiple accounts within a fund and considering whether it is in the member's best interest to merge accounts.[31] This schedule aims to reduce the number of unnecessary multiple accounts within the same

31 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, pp. 39, 41.

superannuation fund by merging these accounts. This will reduce the amount affected members pay in multiple sets of administration fees and insurance premiums.[32]

2.33 The Treasury advised that many funds are currently undertaking measures to consolidate multiple funds and that the schedule aims to make this process an industry wide initiative.[33]

Analysis

2.34 Submitters to the inquiry supported the intent of the schedule to identify, with a view to consolidating, multiple super accounts within a fund. The Australian Institute of Superannuation Trustees (AIST) told the committee that the schedule provided a flexible legislative framework for processes that are already in operation 'within the overwhelming majority of superannuation funds'.[34]

2.35 During the hearing the Treasury provided justification for the schedule and the process that lead to its current form:

> In our mind, this is more than just removing unnecessary fees. A lot of people lose their super, a lot of money gets lost … It is part of helping people to be engaged with their super and making sure they ultimately get their super when they retire, so it is a broader issue than just fees, otherwise I guess we would have just done a provision legislating on fees. We originally started off with something very detailed, saying, 'These are the accounts you should only legislate,' and the strong message back from industry was that that would be undesirable and would actually not adequately address the 15 million or so accounts out there that potentially could be picked up.[35]

32 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 49.

33 Ms Ruth Gabbitas, Department of the Treasury, *Committee Hansard*, Canberra, 18 April 2013, p. 20.

34 Mr David Haynes, Australian Institute of Superannuation Trustees (AIST), *Committee Hansard*, Canberra, 18 April 2013, p. 15.

35 Ms Ruth Gabbitas, Department of the Treasury, *Committee Hansard*, Canberra, 18 April 2013, pp. 20-21.

2.36 In the submissions a number of individual amendments were suggested.[36] During the hearing witnesses focused on proposed Section 108A of Schedule 5, which outlines a trustee's duty in relation to multiple superannuation accounts of their members. Proposed subsection 108A(1) provides:

> 108A **Trustee's duty to identify etc. multiple superannuation accounts of members**
>
> (1) Each trustee of a superannuation entity (other than the trustee of a pooled superannuation trust or a self managed superannuation fund) must ensure that rules are established, which:
>
> (a) set out a procedure for identifying when a member of the superannuation entity has more than one superannuation account in the superannuation entity; and
>
> (b) require the trustee to carry out the procedure to identify such members at least once each financial year; and
>
> (c) if the member has 2 or more superannuation accounts in the superannuation entity—require the trustee to merge the accounts so that the member has only one account balance in respect of those accounts, if the trustee reasonably believes that it is in the best interests of the member to do so; and
>
> (d) provide that fees are not payable (other than a buy sell spread) for any merger of superannuation accounts that occurs as a result of paragraphs (a) to (c).

2.37 Discussion at the hearing covered the fiduciary relationship between trustees and members, the liability of trustees, cases where merges would not be in a member's best interest and the exclusion of an explicit directive to merge accounts.

2.38 As a general principle, some witnesses were concerned that the schedule misconstrued the role of trustees and their fiduciary obligations. According to the Association of Superannuation Funds of Australia (ASFA):

36 Law Council of Australia, *Submission 1*, pp. [2]-[3]; AIST, *Submission 2*, pp. [2]-[3].

> … our major concern is the test in the legislation about applying the best interest test at an individual member level as opposed to the general trust fiduciary law basis, which is acting in the collective best interest of members. It has both legal implications and very much practical implications. This is an exercise that would be done en masse and it really is not feasible for a trustee to apply that test against each and every individual member ...[37]

2.39 UniSuper and the Law Council of Australia supported ASFA's concern and explained:

> Trustees have long been obliged to act in the best interests of their members … that is a duty to act in the best interests of members on the whole. It is a duty which is concerned with the manner and the way in which trustees go about making their decisions. It has never been construed as a duty to ensure that the consequences of those decisions are positive or favourable or to the liking of the member. To the extent to which the bill requires a decision about what is in the best interests of individual members it involves a departure from that well-understood principle.[38]

2.40 Specifically UniSuper, the Law Council of Australia and ASFA were concerned that the wording of subsection 108A(c) suggests that trustees should work on a case-by-case basis when merging funds. According to UniSuper and the Law Council of Australia:

> The concern arises from that proviso at the end: 'if the trustee reasonably believes that it is in the best interests of the member to do so'. That lies at the heart of the issue. It requires the trustee to form an opinion that it is in the best interests of members. Trustees cannot go about forming ill-informed opinions. They are just guesses.[39]

2.41 AIST responded to this concern, and argued that what was proposed in the Schedule 5 replicated current fiduciary transactions undertaken by trustees.[40] Later in the hearing, AIST reiterated this sentiment:

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37 Ms Fiona Galbraith, Association of Superannuation Funds of Australia (ASFA), *Committee Hansard,* Canberra, 18 April 2013, p. 13.

38 Mr Luke Barrett, UniSuper and Law Council of Australia, *Committee Hansard,* Canberra, 18 April 2013, p. 13.

39 Mr Luke Barrett, UniSuper and Law Council of Australia, *Committee Hansard,* Canberra, 18 April 2013, p. 18.

40 Mr Richard Webb, AIST, *Committee Hansard,* Canberra, 18 April 2013, p. 18.

> Every day in every way a trustee puts themselves in the shoes of a member and makes decisions which impact on the superannuation benefit of the member, and they need to do that on a reasonable basis, having regard to all of the facts that they need to consider, and to gather further information. We do not see this as being qualitatively different from those other circumstances.[41]

2.42 UniSuper and the Law Council of Australia countered by stating:

> It is simply a case of paragraph (c) positively requiring the formulation of a reasonable belief. Ninety per cent of mergers happen automatically, at the press of a button. No-one is formulating a reasonable belief. No-one is making any inquiries to form the belief.[42]

2.43 UniSuper and the Law Council of Australia contented that in practice the current wording of subsection 108A(c) would dictate how the schedule was implemented:

> The choice to make is: is this intended to be done in an automated fashion in the vast majority of cases or is it intended to be an entirely manual process in every case? Once we accept that there is an efficiency in doing it substantially on an automated basis, paragraph (c) needs to yield.[43]

2.44 UniSuper and the Law Council of Australia provided an alternative formulation of subsection 108A(c) which would contain the requirement to 'merge accounts in all cases, unless there were reasonable grounds to suspect that it were not be in their interests'.[44]

2.45 Under questioning by the committee, the Treasury indicated that they would be willing to review the wording of subsection 108A(c):

> We are happy to consider it because we are trying to find ways to balance what ultimately is a shared policy intent. We would need to work through whether there are any unintended consequences.[45]

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41 Mr David Haynes, AIST, *Committee Hansard*, Canberra, 18 April 2013, p. 22.

42 Mr Luke Barrett, UniSuper and Law Council of Australia, *Committee Hansard,* Canberra, 18 April 2013, p. 16.

43 Mr Luke Barrett, UniSuper and Law Council of Australia, *Committee Hansard,* Canberra, 18 April 2013, p. 22.

44 Mr Luke Barrett, UniSuper and Law Council of Australia, *Committee Hansard,* Canberra, 18 April 2013, p. 18.

45 Ms Ruth Gabbitas, Department of the Treasury, *Committee Hansard*, Canberra, 18 April 2013, p. 23.

2.46 The Treasury did note that the schedule should have some reference to the individual's 'best interests':

> … ultimately the accounts are held by the individual, so deciding something collectively without some reference to the individual would seem a bit arbitrary without having considered it at least at a broad level.[46]

2.47 The issue of trustee liability becomes salient because merging accounts could result in a material disadvantage for a member and there is a level of discretion implied in the legislation. Unisuper and the Law Council of Australia outlined a number of circumstances in which merging accounts would not benefit a member.[47] In its submission UniSuper argued that the schedule 'unnecessarily and sub-optimally increases the burden on superannuation trustees and their administrators':

> … by requiring trustees to merge accounts which, although within the same superannuation fund, may be markedly different and pertain to quite different financial products with distinct characteristics.[48]

2.48 In its submission, AIST highlighted a number of situations where the merger of accounts might not be beneficial. For example, AIST was concerned that the focus on insurance was one-sided, as it considered the cost or insurance premiums, but not the level of insurance coverage. AIST noted that under-insurance is a well-documented problem, and argued that 'additional consideration be explicitly given to this part of insurance, as well as any other benefits that may be affected in the event of the merging of accounts'.[49]

2.49 In relation to tax considerations, AIST noted that changes in 2007 removed the right of superannuation members to choose the tax component from which that they could draw benefits. Prior to that change, some superannuation members moved tax-free, or significantly tax-free, amounts into separate accounts to preserve these monies tax-free status. AIST proposed that this example be added to paragraph 5.27 of the EM to provide members who would be affected in this way with an 'opt-out'.[50]

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46 Ms Ruth Gabbitas, Department of the Treasury, *Committee Hansard*, Canberra, 18 April 2013, p. 22.

47 Mr Luke Barrett, UniSuper and Law Council of Australia, *Committee Hansard,* Canberra, 18 April 2013, pp. 18-19.

48 UniSuper, *Submission 4*, p. 1.

49 AIST, *Submission 2*, p. [2].

50 AIST, *Submission 2*, p. [2].

2.50 It was generally accepted that automated processes should be established by funds to identify multiple accounts and subsequently merge them.[51] During the hearing ASFA stated that funds 'will develop their own procedures about how they identify which accounts they should merge automatically and which accounts they should advise the member that they intend to merge the accounts and ask the member to respond'.[52] ASFA went on to acknowledge that additional guidance for industry on a criteria for merging may be of assistance:

> When I was listening to Mr Barrett going through all of his issues and the things which might cause you to not merge, it appeared to me that each one of those items, whether it be insurance or size of cash balance, are all pieces of information which the trustee knows about the member and would more than likely trigger, in the case of the funds I am talking to, the decision that that would fall into the class of cases which should be referred out to the member. At the same time I support what my colleague Fiona was saying that it would probably assist in the clarity of how this should be implemented if there were a provision that, in addition to having procedures as to how to identify multiple accounts, funds should also establish procedures for how they would go through the process of merging multiple accounts.[53]

2.51 UniSuper and the Law Council of Australia commented that the legislation does not oblige trustees to merge accounts rather it relies on their discretion:

> The trustee carries the can, so to speak. The risk for trustees is that some members may complain if their accounts are merged; others may complain if their accounts are not merged.[54]

2.52 ASFA reframed the issue of trustee liability in relation to mergers and proposed a solution. It suggested that an additional subsection be inserted into the legislation which would explicitly give trustees direction on mergers:

> I think what is missing here is a link between paragraphs (b) and (c) and that is probably where the test needs to be at a collective level … the policy would be at a fund-wide level and in forming

51 Mr David Haynes, AIST, *Committee Hansard,* Canberra, 18 April 2013, p. 14; Mr Luke Barrett, UniSuper and Law Council of Australia, *Committee Hansard,* Canberra, 18 April 2013, p. 16.

52 Mr Robert Hodge, ASFA, *Committee Hansard*, Canberra, 18 April 2013, p. 20.

53 Mr Robert Hodge, ASFA, *Committee Hansard*, Canberra, 18 April 2013, p. 20.

54 Mr Luke Barrett, UniSuper and Law Council of Australia, *Committee Hansard,* Canberra, 18 April 2013, p. 13.

> that policy the trustees would have regard to what is likely to be in the best interests of members collectively by setting criteria about when they will merge and when they will not merge. I think that is probably the missing link in this, which is why we have a concern, because that is not there, and it kicks straight down virtually at a member-by-member level. Legally that is problematic, and particularly practically that is problematic.[55]

2.53 While the Treasury did not rule out amending the legislation to address witnesses concerns, it did state that the Australian Prudential Regulation Authority would be able to issue prudential rules which would provide guidance on the operation of the legislation.[56] AIST supported the Treasury's decision to provide funds with a flexible, rather than prescriptive, approach to implementation.[57] Furthermore, AIST argued that the schedule in fact provided trustees with additional legal protection:

> If there is an issue with funds being exposed to litigation as a result of this legislation, how much more are they currently being exposed when there is not the sort of legislative requirement that is required by this bill?[58]

2.54 Finally witnesses appeared to have been satisfied with the way the Treasury had consulted with industry and refined the schedule.[59] At the hearing ASFA acknowledged the 'very consultative approach' adopted by the Treasury:

> We started in a position that was totally untenable from the industry perspective and we have moved to a piece of legislation which, with the small exception of maybe a rewording of paragraph (c), the industry is more than comfortable with. We thank Treasury for their consultative approach in getting to that position.[60]

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55 Ms Fiona Galbraith, ASFA, *Committee Hansard,* Canberra, 18 April 2013, pp. 17-18.

56 Ms Ruth Gabbitas, Department of the Treasury, *Committee Hansard*, Canberra, 18 April 2013, p. 20.

57 Mr David Haynes, AIST, *Committee Hansard,* Canberra, 18 April 2013, p. 15.

58 Mr David Haynes, AIST, *Committee Hansard,* Canberra, 18 April 2013, p. 22.

59 Financial Services Council, *Submission 6*, p. 1; Association of Superannuation Funds of Australia (ASFA), *Submission 5*, p. 2.

60 Mr Robert Hodge, ASFA, *Committee Hansard,* Canberra, 18 April 2013, p. 23.

Conclusion

2.55 Witnesses to the committee unanimously supported the intent of Schedule 5, to improve fund members' superannuation position at retirement by facilitating within fund consolidation measures. After examination of the schedule and consideration of the evidence received, the committee recommends that the Treasury consult with industry groups to ensure that undue liability is not being inadvertently placed on trustees who are working in good faith for the benefit of their members.

2.56 The committee understands that given the breadth of the task proposed, automated processes will need to be judiciously employed by funds. Funds will need to develop procedures to assist them to identify members whose needs are best served by the individual consideration of their circumstances. To this end the committee urges the Australian Prudential Regulation Authority to provide funds with guidance on circumstances which should trigger individual consideration of what constitutes a member's 'best interest'. Where funds are dealing with complex cases, the committee believes trustees should seek input from the affected members.

Schedule 6—Superannuation co-contributions

Background

2.57 The superannuation co-contribution initiative involves the Government making co-contributions to help eligible low and middle income earners boost their super savings. Schedule 6 amends the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* by:

- reducing the rate of payment for the superannuation co-contribution from 100 per cent to 50 per cent;
- decreasing the maximum amount payable from $1,000 to $500;
- extending the freeze on the indexation of the lower income threshold for the 2012-13 income year; and
- setting the higher income threshold at $15,000 above the lower income threshold (down from $30,000).[61]

61 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 51.

Analysis

2.58 While groups expressed regret at the reduction of government super co-contributions, they acknowledged that the decision was made in the context of overall budgetary considerations and is part of wider superannuation reforms.[62]

2.59 Only 20 per cent of eligible people currently take advantage of the scheme.[63] The low income superannuation contribution (LISC) was put forward as a more accessible scheme for low income earners. The EM stated that:

> The LISC is a better targeted payment, covering over an estimated five times as many individuals as the superannuation co-contribution as a result of these amendments. It also does not require that low income individuals make eligible personal superannuation contributions to their superannuation fund, which increases the coverage of assistance available to low income earners.[64]

2.60 The LISC was announced in the 2010-11 Budget and applies from the 2012-13 income year, with the first payments to be made in 2013-14. The scheme—provided for by the *Tax Laws Amendment (Stronger, Fairer, Simpler and Other Measures) Act 2012*—involves a new super contribution payment of up to $500 (not-indexed) annually from low income earners.

2.61 The payment amount will be 15 per cent of concessional contributions (including employer contributions) made by, or for, individuals with an adjustable taxable income that does not exceed $37,000. The Government describes the rationale for the scheme as follows:

> Currently, as a result of the flat tax rate for all superannuation concessional contributions, low-income earners receive little or no concession.
>
> This measure will improve the equity of superannuation taxation arrangements by effectively returning the tax payable on superannuation guarantee contributions made for low-income earners.[65]

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62 Ms Fiona Galbraith, ASFA, *Committee Hansard*, Canberra, 18 April 2013, p. 24.

63 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 52.

64 EM, Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013, p. 52.

65 Australian Government, *Fact Sheet: Superannuation — Low Income Earners Government Contribution*, 26 July 2011, available at <http://www.futuretax.gov.au/content/Content.aspx?doc=FactSheets/low_income_earners_govt_contribution.htm>, viewed 10 April 2013.

2.62 In its submission, ASFA proposed that the changes in Schedule 6 should 'not be considered in isolation but in conjunction with the low income superannuation (LISC) measure'.[66] AIST expressed concern at the hearing about the Opposition's announced intention to abolish the LISC benefit.[67] ASFA argued that the LISC should be retained in its current form, as the scheme:

> … compensates low income earners for the fact that the contribution tax paid from their superannuation account is levied at a rate higher than their effective marginal tax rate, which has the effect that, for these members, superannuation is not concessionally taxed but is actually taxed punitively.[68]

2.63 AIST agreed with the Government and ASFA that the LISC is a better targeted program and 'will benefit more Australians and does not require discretionary income, which many Australians do not have'.[69]

Conclusion

2.64 Providing assistance to low income earners to build their superannuation balances is important. The government co-contribution scheme will remain, albeit at a reduced rate, for people that are in a position to make super contributions from their net pay. The 50 per cent contribution rate is still a generous matching rate of return for extra contributions made.

2.65 Evidence indicated that many low income earners are not in a position to make that additional contribution, with only 20 per cent of eligible people taking up the scheme. Further, the program statistics show that it is generally those earners that have a spouse with greater earning capacity that access the scheme.

2.66 The Government and industry groups agree that the low income superannuation contribution (LISC) measure is better targeted, as it helps build super balances and does not require the low income earner to make additional contributions.

66 ASFA, *Submission 5*, p. 3.

67 Mr David Haynes, AIST, *Committee Hansard*, Canberra, 18 April 2013, p. 24.

68 ASFA, *Submission 5*, p. 3.

69 Mr David Haynes, AIST, *Committee Hansard*, Canberra, 18 April 2013, p. 24.

2.67 The committee supports the changes in Schedule 6 which scale down the operation of the government super co-contribution, as part of wider superannuation reforms to ensure that schemes are well targeted and effective. The LISC will reach more low income earners and help to build their super balances.

Recommendation 1

2.68 **The House of Representatives pass Schedules 1, 2, 3, 4, 6, 7 and 8 of the Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013. In relation to Schedule 5, the Australian Government should consult with industry groups to ensure that undue liability is not being inadvertently placed on trustees who are working in good faith for the benefit of their members.**

Julie Owens MP
Chair
7 May 2013

Additional comment from Liberal Members of the Committee

Introduction

Schedule 1 – Definition of a documentary

Industry evidence presented to the Committee, made it clear there was widespread angst throughout the film and television industry as a consequence of this proposed change. The principle source of concern stems from the industry's surprise at this change, especially given evidence provided made it clear there had been next to no industry consultation previously regarding this proposal.

Schedule 6 – Superannuation Co-contributions

With this legislation, the Gillard government again seeks to cut government super co-contribution benefits for low income earners.

Having promised to make no changes to superannuation in the lead-up to the 2007 election, the Rudd and Gillard governments have made a plethora of changes to superannuation, invariably designed to undermine incentives for people to save more towards their retirement voluntarily.

As well as reducing the concessional contribution caps the government has cut super co-contribution benefits for low income earners, imposing additional taxes of more than $8 billion on people's retirement saving so far.

Labor reduced concessional contribution caps from $50,000 and $100,000 per year (depending on age) under the previous Coalition government down to $25,000 per year across the board, which means anyone saving, and wanting to save more super per year than that low threshold, has to pay the top marginal tax rate.

Targeting low income earners saving for their retirement, Labor has also already reduced super co-contribution benefits for low income earners from a maximum of $1,500 down to $1,000 – while also reducing the matching rate (from 1.5:1 to 1:1).

This legislation proposes to cut the maximum super co-contribution benefit for low income earners again, this time in half down to just $500, with a similarly reduced matching rate (halved from 1:1 to 0.5:1).

Overall, the Labor government has cut super co-contribution benefits for low income earners by more than $3.3 billion so far.

Labor's assault on super co-contribution benefits for low income earners

Reduction in Co-Contribution

The rate at which government superannuation co-contribution is paid reduced temporarily between 1 July 2009 and 30 June 2014. The matching rate is to be 100 per cent for 2009-10, 2010-11 and 2011-12 (with a maximum of $1000), 125 per cent for 2012-13 and 2013-14 (with a maximum of $1250). Matching rate returns to $1.50 for every $1 contribution (subject to income test threshold) on 1 July 2014 (with a maximum of $1500).

Fiscal impact[1]

2009-10 - +$385 million

2010-11 - +$395 million

2011-12 - +$410 million

2012-13 - +$205 million

Co-Contribution count towards Reportable Super Contributions

Income for government superannuation co-contribution purposes was extended to include a person's reportable employer superannuation contributions. That is the amount that the employer puts into superannuation on the employee's behalf that exceeds the superannuation guarantee requirements.

Fiscal impact[2]

2008-09 - -$15.1 million

2009-10 - +$164 million

[1] Explanatory Memorandum, Tax Laws Amendment (2009 Budget Measures No 1) Bill 2009, p. 8

[2] Explanatory Memorandum, Tax Laws Amendment (2009 Budget Measures No 1) Bill 2009, p. 6

2010-11 - +$192.5 million

2011-12 - +$203.8 million

Permanent reduction in Co-Contribution

Government proposed changes to the co-contributions scheme. Income thresholds applying for 2009–10 are to continue for a further two years and the government co-contribution rate to be set permanently at $1 for every $1 of personal contributions made by those receiving an adjusted annual income less than $31,920 pa.

Fiscal impact[3]

2012-13 - +$175 million

2013-14 - +$175 million

Extending indexation pause for co-contribution

This announcement saw the extension of the pause to the indexation of the income threshold for the superannuation co-contribution.

Fiscal impact[4]

2012-13 - +$25 million

2013-14 - +$25 million

2014-15 - +$25 million

Reducing matching rate of co-contribution

The matching rate for the Government superannuation co-contribution reduced from $1 to $0.50, with the maximum benefit also to be reduced from $1000 to $500. The maximum income threshold is also proposed to fall from $61,920 to $46,920.

Fiscal impact[5]

2012-13 - +$352 million

2013-14 - +$342 million

2014-15 - +$329 million

Grand total

The grand total of these budget measures is $3.388 billion.

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[3] 2010–11 Budget Paper No 2, p. 298

[4] 2011–12 Budget Paper No 2, p. 326

[5] 2011-12 MYEFO, p. 291

Conclusion

Contrary to Government assertions, Labor is clearly no friend of low income earners saving for their retirement through superannuation.

It is also clear that Labor's promises in relation to superannuation cannot be trusted.

In 2007, Labor promised no change to superannuation – a promise which was emphatically broken again and again.

In 2010, Labor promised to re-increase super concessional contribution caps back up to $50,000 for at least some Australians saving for their retirement.

It hasn't happened.

Now Labor is promising that it will not scrap the low income super tax offset. If Labor was successful at the next election, there is no doubt that this would be the next broken Labor promise in relation to superannuation.

There is no doubt that Labor, if re-elected, would scrap the low income super tax offset, because having linked that measure to the failed mining tax, which hasn't raised any meaningful revenue, the government cannot afford it.

In contrast, the Coalition has made a firm commitment that in government we would not make any unexpected detrimental changes to superannuation over the next term of Parliament.

Steven Ciobo MP
Deputy Chair

Kelly O'Dwyer MP

Scott Buchholz MP

A

Appendix A – Submissions

Submissions

1. Law Council of Australia, Superannuation Committee
2. Australian Institute of Superannuation Trustees
3. Screen Producers Association of Australia

   + Attachments A and B
4. UniSuper
5. Association of Superannuation Funds of Australia
6. Financial Services Council
7. Australian Subscription Television and Radio Association
8. Essential Media and Entertainment
9. Beyond International Limited
10. Prospero Productions
11. Electric Pictures
12. Cordell Jigsaw Zapruder
13. Department of the Treasury
14. Screen Australia

B

Appendix B – Hearing and witnesses

Thursday, 18 April 2013—Canberra

Schedule 1 – Definition of documentary

Department of the Treasury

Mr Paul McMahon, Manager, Small Business Tax General Unit

Mr Gregory Pinder, Senior Advisor

Screen Australia

Mr Alex Sangston, Senior Manager, Producer Offset and Co-Production

Ms Fiona Cameron, Chief Operating Officer

Screen Producers Association of Australia

Mr Matthew Deaner, Executive Director

Mr Matthew Hancock, Manager, Strategy and Insights

Ms Sonja Armstrong, Producer (Essential Media and Entertainment)

Mr Peter Tehan, General Manager, Legal and Business Affairs
(Beyond International Limited)

Schedule 5 – Merging multiple superannuation accounts

Department of the Treasury

Ms Ruth Gabbitas, Manager, Contributions and Accumulation Unit, Personal and Retirement Income Division

Association of Superannuation Funds of Australia

Ms Fiona Galbraith, Director Policy

Mr Robert Hodge, Principal Policy Advisor

Australian Institute of Superannuation Trustees (via teleconference)

Mr David Haynes, Executive Manager, Policy and Research

Mr Richard Webb, Policy and Regulatory Analyst

UniSuper and Law Council of Australia

Mr Luke Barrett, Head of Investment Law and Compliance, UniSuper, and Chair of the Legislation and Policy Sub-Committee of the Law Council of Australia's Superannuation Committee

Schedule 6 – Government superannuation co-contributions

Department of the Treasury

Ms Ruth Gabbitas, Manager, Contributions and Accumulation Unit, Personal and Retirement Income Division

Association of Superannuation Funds of Australia

Ms Fiona Galbraith, Director Policy

Mr Robert Hodge, Principal Policy Advisor

Australian Institute of Superannuation Trustees (via teleconference)

Mr David Haynes, Executive Manager, Policy and Research

Mr Richard Webb, Policy and Regulatory Analyst

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Appendix C – List of reports

Below is a list of reports tabled by the House of Representatives Standing Committee on Economics in the 43rd Parliament.

No.

1. Inquiry into the Income Tax Rates Amendment (Temporary Flood Reconstruction Levy) Bill 2011, and the Tax Laws Amendment (Temporary Flood Reconstruction Levy) Bill 2011
2. Inquiry into Indigenous economic development in Queensland and advisory report on the Wild Rivers (Environmental Management) Bill 2010
3. Advisory report on the Taxation of Alternative Fuels Bills 2011
4. Advisory report on the National Consumer Credit Protection Amendment (Home Loans and Credit Cards) Bill 2011
5. Advisory report on the Competition and Consumer (Price Signalling) Amendment Bill 2010, and the Competition and Consumer Amendment Bill (No. 1) 2011
6. Advisory report on the Food Standards Amendment (Truth in Labelling - Palm Oil) Bill 2011
7. Advisory report on the Corporations (Fees) Amendment Bill 2011
8. Advisory report on the Tax Laws Amendment (2011 Measures No. 8) Bill 2011, and the Pay As You Go Withholding Non-compliance Tax Bill 2011
9. Advisory report on the Minerals Resource Rent Tax Bill 2011 and related bills
10. Review of the Tax Laws Amendment (2011 No. 9 Measures) Bill 2011

11. Review of the Insurance Contracts Amendment Bill 2011
12. Advisory report on the Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012
13. Advisory report on the Clean Energy Finance Corporation, Clean Energy Legislation Amendment Bill 2012, Clean Energy (Customs Tariff Amendment) Bill 2012, and Clean Energy (Excise Tariff Legislation Amendment) Bill 2012
14. Advisory Report on the Tax Laws Amendment (2012 Measures No. 2) Bill 2012, Pay As You Go Withholding Non-compliance Tax Bill 2012, Income Tax (Managed Investment Trust Withholding Tax) Amendment Bill 2012, and Passenger Movement Charge Amendment Bill 2012
15. Advisory Report on the Tax Laws Amendment (Managed Investment Trust Withholding Tax) Bill 2012
16. Advisory Report on the Tax Laws Amendment (2012 Measures No. 4) Bill 2012
17. Report on the Exposure Draft of the Australian Charities and Not-for-profits Commission Bills 2012
18. Advisory Report on the Clean Energy Amendment (International Emissions Trading and Other Measures) Bill 2012, Clean Energy (Charges—Excise) Amendment Bill 2012, Clean Energy (Charges—Customs) Amendment Bill 2012, Excise Tariff Amendment (Per-Tonne Carbon Price Equivalent) Bill 2012, Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Amendment (Per-Tonne Carbon Price Equivalent) Bill 2012, Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Amendment (Per-Tonne Carbon Price Equivalent) Bill 2012, and Clean Energy (Unit Issue Charge—Auctions) Amendment Bill 2012
19. Report on Australia's Oil Refinery Industry
20. Advisory Report on the Tax Laws Amendment (2012 Measures No. 6) Bill 2012
21. Advisory Report on the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013