



Tax Laws Amendment (2011 Measures No. 8) Bill 2011 [and] Pay As You Go Withholding Non-compliance Tax Bill 2011

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Tax Laws Amendment (2011 Measures No. 8) Bill 2011 [and] Pay As You Go Withholding Non-compliance Tax Bill 2011

Date introduced: 13 October 2011

House: House of Representatives

Portfolio: Treasury

Commencement: Tax Laws Amendment (2011 Measures No. 8) Bill 2011: Schedule 1 and 2—the day of Royal Assent; Schedule 3— various dates as set out in clause 2 of the Bill; Schedule 4— immediately after the commencement of Schedule 1 to the *Taxation of Alternative Fuels Legislation Amendment Act 2011* (1 December 2011).

Pay As You Go Withholding Non-compliance Tax Bill 2011: sections 3 and 4 commence at the same time as Part 2 of Schedule 3 to the *Tax Laws Amendment (2011 Measures No. 8) Act 2011*. The remainder commences upon Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bills' home pages for the [Tax Laws Amendment \(2011 Measures No. 8\) Bill 2011](#) and the [Pay As You Go Withholding Non-compliance Tax Bill 2011](#), or through <http://www.aph.gov.au/bills/>. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at <http://www.comlaw.gov.au/>.

Purpose

The Tax Laws Amendment (2011 Measures No. 8) Bill 2011 (TLA Bill) contains four schedules, each with a different purpose:

- to amend the *Income Tax Assessment Act 1997* (ITAA 1997) to provide the Commissioner for Taxation (Commissioner) with discretion to disregard certain events (for example, when a beneficiary becomes insolvent) in order to continue to defer tax liabilities on income from certain primary production activities that have been affected by certain diseases and natural disasters (**Schedule 1**)
- to amend the *Petroleum Resource Rent Tax Assessment Act 1987* to confirm that the taxing point for the Petroleum Resource Rent Tax is consistent with long-established practice recently confirmed by the Federal Court (**Schedule 2**)
- to amend the *Tax Administration Act 1953* to strengthen directors' obligations to cause their company to comply with existing 'pay as you go' (PAYG) withholding and superannuation guarantee requirements (**Schedule 3**) by imposing a tax on directors for the company's non-compliance (**Pay As You Go Withholding Non-Compliance Tax Bill 2011**), and
- to make minor consequential amendments to the *Excise Act 1901* and the *Fuel Tax Act 2006* to bring the gaseous fuels (liquefied petroleum gas (LPG), liquefied natural gas (LNG) and compressed natural gas (CNG)) into the fuel tax regime as intended and without imposing

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excessive compliance costs on gaseous fuel manufacturers, importers, distributors, or suppliers (Schedule 4).

Committee consideration

Both Bills were referred to the House of Representatives Standing Committee on Economics for inquiry. Details of the inquiry are at:

<http://www.aph.gov.au/house/committee/economics/Tax%20Laws/index.htm>.¹

The Committee's report, tabled in the House of Representatives on 3 November 2011, included a recommendation that the House of Representatives pass the TLA Bill after deleting Schedule 3 and associated provisions.² These recommendations were supported in a dissenting report by Coalition members.³ The Committee also recommended that the Pay As You Go Withholding Non-compliance Tax Bill 2011 (PAYG Bill) remain, pending the Government's investigation into whether it is possible to amend the Bills to better target phoenix activity, and whether to expand and strengthen the defences for company directors.⁴ The dissenting report also included a recommendation that Schedule 2 be removed from the Bill.⁵

The Bills were also referred to the Senate Standing Committee on Economics by resolution of the Senate on 3 November 2011 for inquiry and report by 8 February 2012.⁶ The Committee resolved to report by 21 November 2011. Details of the inquiry are at:

http://www.aph.gov.au/senate/committee/economics_ctte/TLAB8_2011_and_Pay_as_you_go/index.htm.⁷

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1. House of Representatives Standing Committee on Economics, *Inquiry into the Tax Laws Amendment (2011 Measures No. 8) Bill 2011 and the Pay As You Go Withholding Non-compliance Tax Bill 2011*, House of Representatives, Canberra, 19 October 2011, viewed 3 November 2011, <http://www.aph.gov.au/house/committee/economics/Tax%20Laws/index.htm>
 2. House of Representatives Standing Committee on Economics, *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*, House of Representatives, Canberra, November 2011, p. 36, viewed 3 November 2011, <http://www.aph.gov.au/house/committee/economics/Tax%20Laws/report/Final%20report.pdf>
 3. Coalition Members, *Tax Laws Amendment (2011 Measures No. 8) Bill 2011 and the Pay As You Go Withholding Non-compliance Tax Bill 2011, Dissenting report*, House of Representatives Standing Committee on Economics, *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*, House of Representatives, Canberra, November 2011, pp. 3–4, viewed 3 November 2011, <http://www.aph.gov.au/house/committee/economics/Tax%20Laws/report/Final%20report.pdf>
 4. House of Representatives Standing Committee on Economics, *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*, op. cit., p. 36.
 5. Coalition Members, *Tax Laws Amendment (2011 Measures No. 8) Bill 2011 and the Pay As You Go Withholding Non-compliance Tax Bill 2011, Dissenting report*, op. cit., pp. 3–4.
 6. Australia, Senate, *Journals*, no. 63, 3 November 2011, p. 1735, viewed 15 November 2011, http://www.aph.gov.au/Senate/work/journals/jnlp_063.pdf
 7. Senate Economics Committee, *Inquiry into the Tax Laws Amendment (2011 Measures No. 8) Bill 2011 and Pay As You Go Withholding Non-compliance Tax Bill 2011*, Senate, Canberra, viewed 16 November 2011, http://www.aph.gov.au/Senate/committee/economics_ctte/TLAB8_2011_and_Pay_as_you_go/info.htm

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Schedule 1— Discretion for the Commissioner for Taxation to disregard certain events to continue to defer tax liabilities

Background

Under current arrangements, the ITAA 1997 allows taxpayers to defer taxation liabilities on income from certain primary production activities, which have been affected by certain diseases and natural disasters.⁸ Activities from which concessional tax treatment can be provided includes profits made from forced disposal or death of livestock, insurance payments for loss of livestock or trees, and profits on the sale of a second wool clip in a year, if natural disasters were the reason for the taxpayers having to shear twice in one income year.⁹

Concessional taxation treatment continues until such a time as a ‘disentitling event’ occurs, at which time any unassessed portion of profit is included in the assessable income of the same income year.¹⁰ Such an event is defined in the Act and covers separate situations for individuals, partnerships and trusts but generally includes events such as death, permanent departures from Australia, bankruptcy or the cessation of primary production by the taxpayer.¹¹

Prior to the introduction of the provisions in the ITAA 1997 there existed similar provisions within the *Income Tax Assessment Act 1936* (ITAA 1936).¹²

The proposal to re-instate the Tax Commissioner’s discretion to disregard certain events that would otherwise trigger the assessment of certain income for a primary production trust, in the year of the event, was noted by the Assistant Treasurer in the Parliament on 20 June 2011.¹³ This followed the issue being raised by the Coalition during debate of the Bills.¹⁴

The Coalition have indicated that they support this measure.¹⁵

8. *Income Tax Assessment Act 1997*, Division 385.

9. *Income Tax Assessment Act 1997*, Subdivisions 385-E, 286-F and 385-G.

10. *Income Tax Assessment Act 1997*, section 386-160.

11. *Income Tax Assessment Act 1997*, section 385-163.

12. *Income Tax Assessment Act 1936*, updated as at 15 July 1996, sections 26B, 26BA, 36AAA and 36AA, viewed 2 November 2011, <http://www.comlaw.gov.au/Details/C2004C04652>

13. B Shorten (Assistant Treasurer and Minister for Financial Services and Superannuation), ‘Second reading speech: Tax Laws Amendment (2011 Measures No. 5) Bill 2011’, House of Representatives, *Debates*, 20 June 2011, p. 6292, viewed 2 November 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F7b1b8b1-ac51-46c6-81bb-2c145051e8ce%2F0053%22>

14. T Smith, ‘Second reading speech: Tax Laws Amendment (2011 Measures No. 5) Bill 2011’, House of Representatives, *Debates*, 20 June 2011, p. 6482, viewed 2 November 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F7b1b8b1-ac51-46c6-81bb-2c145051e8ce%2F0049%22>

15. *Ibid.*

Financial implications

The Explanatory Memorandum notes that this measure is estimated to have a small unquantifiable cost to revenue over the forward estimates period but that it is expected that some of that cost is a timing impact and is likely to be recovered in future years.¹⁶

Main provisions

Amendments to the *Income Tax Assessment Act 1997*: TLA Bill

Item 1 repeals **paragraph 385-163(3)(a)** so that in the case of a trust, the death of a beneficiary is no longer considered to be a specific circumstance that qualifies as a disentitling event. The Explanatory Memorandum notes that in the death of a beneficiary 'it is difficult to contemplate circumstances where it would not be appropriate for the Commissioner to exercise a favourable discretion'.¹⁷

Item 2 inserts **proposed subsection 385-163(4)** to specify that in the case of a trust, a disentitling event does not happen if the Commissioner makes a determination to this effect and either of the following apply:

- a beneficiary becomes bankrupt or insolvent (including various stages of insolvency) or
- a beneficiary leaves Australia permanently, or it appears to the Commissioner that a beneficiary is about to do so.

Proposed subsections 385-163(5) to 385-163(7) specify how the Commissioner is to exercise discretion, including consideration of the nature of the disentitling event and the circumstances applying to the beneficiary and require the Commissioner to make the determination in writing and to give a copy to the trustee.

The provisions that previously existed under the ITAA 1936 in relation to the exercise of discretion by the Commissioner were general in nature and did not provide any guidance or requirements for the Commissioner to consider.¹⁸ The proposed amendments are modelled on similar provisions in the ITAA 1997 that give the Commissioner some discretion in applying the Act.¹⁹

Item 3 provides that the amendments proposed in Schedule 1 apply to income tax assessments for the 2005–06 income tax year and later income tax years.

16. Explanatory Memorandum, Tax Laws Amendment (2011 Measures No. 8) Bill 2011 and Pay As You Go Withholding Non-compliance Tax Bill 2011, p. 3.

17. Explanatory Memorandum, p. 9.

18. *Income Tax Assessment Act 1936*, sections 26B, 26BA and 36AA. These sections use the terms 'if the Commissioner so determines' or 'Notwithstanding anything in any other provision of this Act, the Commissioner may amend an assessment for the purpose of giving effect to this section' to provide for discretion by the Commissioner.

19. See *Income Tax Assessment Act 1997*, subsections 203-55(1) and 204-30(3).

Schedule 2—Clarifying the taxing point under the Petroleum Resource Rent Tax with retrospective application from 1 July 1990

Background

The *Petroleum Resource Rent Tax Act 1987* imposes a tax liability of 40 per cent on certain taxable profits derived from the extraction and processing of petroleum recovered in Commonwealth waters (but excluding the North West Shelf project area).²⁰ Assessment of the liability is subject to the *Petroleum Resource Rent Tax Assessment Act 1987* (PRRT Assessment Act), which sets out the range of factors that determine how liability is to be assessed, including deductible expenditure, applicable projects and compliance arrangements.

Calculating tax liability is complex. A key consideration is the point at which a ‘marketable petroleum commodity’ produced from project petroleum becomes an ‘excluded commodity’ (except in circumstances where petroleum is sold prior to a marketable petroleum commodity being produced).²¹ It is at this point—referred to as the taxing point—that the commodity becomes a saleable commodity and the relevant income and expenditure is calculated to determine the quantity of tax that applies.²²

The taxing point was recently considered by the Federal Court in *Esso Australia Resources Pty Ltd v Commissioner of Taxation*.²³ The key issue considered was whether the definition of marketable petroleum commodity was met before the product was produced into a final product for sale (as argued by Esso Australia Resource Pty Ltd), or at the point it was produced into a final product for sale (as argued by the Commissioner). The Federal Court (comprising Middleton J) held in favour of the Commissioner.²⁴ The TLA Bill seeks to reinforce the Federal Court ruling by amending the definition of ‘marketable petroleum commodity’ in the PRRT Assessment Act to clarify when the taxing point occurs.

20. *Petroleum Resource Rent Tax Act 1987*, section 5 and Explanatory Memorandum, p. 13.

21. ‘Marketable petroleum commodity’ is defined in section 2 of the *Petroleum Resource Rent Tax Assessment Act 1987* to be any of the following products produced from petroleum: (a) stabilised crude oil; (b) sales gas; (c) condensate; (d) liquefied petroleum gas; (e) ethane; (f) any other product declared by the regulations to be a marketable petroleum commodity; not being a product produced from another product of a kind referred to in paragraphs (a) to (f) (inclusive). ‘Excluded commodity’ is defined in section 2 of the Act to be a marketable petroleum commodity that: (a) has been sold; (b) after being produced, has been further processed or treated; (c) has been moved away from the place of its production other than to a storage site adjacent to that place; or (d) has been moved away from a storage site adjacent to the place of its production.

22. *Petroleum Resource Rent Tax Assessment Act 1987*, section 24 and Explanatory Memorandum, p. 15.

23. AustLII, (2011) 194 FCR 32; (2011) 279 ALR 519; [2011] FCR 360 available at: <http://www.austlii.edu.au/au/cases/cth/FCA/2011/360.html>, viewed 3 November 2011. It should be noted that Esso Australia Resources Pty Ltd have appealed the decision to the Full Court of the Federal Court. At the time of publication of this Bills Digest, the hearing was yet to be completed.

24. See the following for a summary of the case: G Cathro (Partner: Allens Arthur Robinson), ‘Focus: taxing time for PRRT’, Allens Arthur Robinson website, viewed 3 November 2011, <http://www.aar.com.au/pubs/tax/fotaxapr11.htm>

The Government announced this measure in the 2011–12 Budget.²⁵ The Budget Papers note:

The amendments will provide further statutory support for the Court’s judgment, and will be consistent with the established application of the PRRT law. As such, this measure has no revenue impact.²⁶

Retrospectivity

A significant issue in relation to Schedule 2 of the TLA Bill is the retrospective application of the amendments to the year of tax commencing on 1 July 1990.

While the Parliament has the power to pass legislation retrospectively, it is usual practice for a government to justify the need for retrospective operation. Particularly in the case of taxation laws, ‘the fact that taxpayers will have organised their affairs to comply with existing legislation strengthens the argument that the legislative intention to remove existing rights should appear clearly’.²⁷ The Explanatory Memorandum rationalises the retrospective application of the amendment as follows:

The amendments apply retrospectively to remove any uncertainty regarding the long-established operation of the PRRT. This is particularly important in light of the extension of the PRRT to all Australian oil and gas projects, including onshore projects, from 1 July 2012.

The amendments do not impose any new tax burden, as they merely clarify and confirm the current application of the PRRT, consistent with the policy intent.²⁸

The Treasury, in providing evidence to the House of Representatives Standing Committee on Economics inquiry into the Bills stated the Australian Taxation Office (ATO) has administered the laws since 1 July 1990 in line with the proposed amendment and companies have paid the Petroleum Resource Rent Tax (PRRT) accordingly.²⁹

However, ExxonMobil Australia Pty Ltd (owner of ESSO) in giving evidence before the House of Representatives Standing Committee on Economics inquiry into the Bills, were opposed to the retrospective application of the amendment, stating that

It is clear that the proposed bill is designed to usurp the role of the judiciary by reinforcing a disputed decision in the government’s favour. Passage of the retrospective PRRT measures in these circumstances would constitute an interference by parliament in a dispute between the government and an individual taxpayer. It disregards consistent advice received by governments

25. Australian Government, *Budget measures: budget paper no. 2: 2011–12*, Commonwealth of Australia, Canberra, 2011, p. 40, viewed 2 November 2011, http://cache.treasury.gov.au/budget/2011-12/content/download/bp2_revenue.pdf

26. Ibid.

27. D Pearce and R Geddes, *Statutory Interpretation in Australia*, 7th edn., LexisNexis, 2010, p. 316.

28. Explanatory Memorandum, p. 26.

29. House of Representatives Standing Committee on Economics, op. cit., pp. 22–23.

past and present about retrospectivity in tax legislation and will damage Australia's international reputation and perceptions of sovereign risk in this country. It may well cause some investors to consider whether Australia is an appropriate destination for their mobile capital, especially at a time when international capital markets are extremely tight. The committee should recommend to parliament that it reject the retrospectivity of the proposed bill.³⁰

In addition, the Law Council of Australia made the following comments:

In the present case, it is suggested that the PRRT amendments merely confirm the long established application of the PRRT.

The surrounding circumstances do however suggest that the retrospective nature of this change is not without some controversy, may well be unnecessary, and indeed can only really be necessary if the change has the effect of taking away a taxpayer's rights, in litigation which is as yet incomplete.

It is apparent that at least one taxpayer, Esso Australia Resource Pty Ltd has been in dispute with the Commissioner for Taxation about the interpretation of the law for a period in excess of 20 years. It is understood that case is on appeal and that the courts have yet to make a final decision on the prior interpretation of the point. The existence of this legislation and the context of the proposed amendment suggests that it cannot be said that no taxpayer will necessarily be prejudiced by the amendment and nor can it accurately be suggested that the amendments confirm the long established application of the law.

If the law were clear, there would be no need for retrospective amendment.³¹

Concerns about the retrospectivity of the amendments were also expressed in submissions by the Australian Petroleum & Exploration Association, the Business Council of Australia, the Tax Institute, the Institute of Chartered Accountants Australia and the Corporate Tax Association.³²

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30. J Dashwood (ExxonMobil Australia Pty Ltd), House of Representatives Standing Committee on Economics, Pay As You Go Withholding Non-compliance Tax Bill 2011, Tax Laws Amendment (2011 Measures No. 8) Bill 2011, *Public hearing transcript*, 27 October 2011, p. 8, viewed 2 November 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommrep%2F3166f8df-71ff-4b8a-9abc-c23a15640e72%2F0002%22>
 31. Law Council of Australia, Submission to the House of Representatives Economics Committee, *Inquiry into Tax Laws Amendment (2011 Measures No. 8) Bill 2011 [and] the Pay As You Go Withholding Non-compliance Tax Bill 2011*, p. 2, viewed 2 November 2011, <http://www.aph.gov.au/house/committee/economics/Tax%20Laws/subs/Sub03-Law%20Council%20of%20Australia.pdf>
 32. Australian Petroleum Production & Exploration Association, Submission to the House of Representatives Economics Committee, *Inquiry into Tax Laws Amendment (2011 Measures No. 8) Bill 2011 [and] the Pay As You Go Withholding Non-compliance Tax Bill 2011*, p. 3, viewed 2 November 2011, <http://www.aph.gov.au/house/committee/economics/Tax%20Laws/subs/Sub01-APPEA%20Submission%20-%20TLAB%20No.8%202011.pdf>; Business Council of Australia, Submission to the House of Representatives Economics Committee, *Inquiry into Tax Laws Amendment (2011 Measures No. 8) Bill 2011 [and] the Pay As You Go Withholding Non-compliance Tax Bill 2011*, pp. 1–2, viewed 2 November 2011, <http://www.aph.gov.au/house/committee/economics/Tax%20Laws/subs/Sub02-Business%20Council%20of%20Australia.pdf>; Law Council of Australia, Submission to the House of Representatives

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The Committee concluded that the amendment affirmed the original legislative intent of the PRRT and 'do not generate the type of uncertainty and unfairness that is the underlying concern behind the retrospective legislation'.³³

Financial implications

The Explanatory Memorandum notes that this measure is estimated to have no financial impact as these amendments affirm the established application of the PRRT law.³⁴ According to evidence provided to the House of Representatives Standing Committee on Economics, the value of tax revenue that is contested by ExxonMobil Australia Pty Ltd and its partner is in the order of \$650 million.³⁵

Main provisions

Amendments to the *Petroleum Resource Rent Tax Assessment Act 1987*: TLA Bill

Item 1 repeals the existing definition of 'marketable petroleum commodity' in **section 2**.

Item 2 inserts **proposed section 2D** defines 'marketable petroleum commodity'. The key difference between the proposed definition and the existing definition is that the proposed definition clarifies that a marketable petroleum commodity must be in its final form for sale, use of a feedstock for conversion to another product, or direct consumption as energy.³⁶

Item 3 provides that the amendments proposed by Schedule 2 apply in relation to the year of tax commencing on 1 July 1990 and each later year of tax.

Economics Committee, *Inquiry into Tax Laws Amendment (2011 Measures No. 8) Bill 2011 [and] the Pay As You Go Withholding Non-compliance Tax Bill 2011*, pp. 1–2, viewed 2 November 2011, <http://www.aph.gov.au/house/committee/economics/Tax%20Laws/subs/Sub03-Law%20Council%20of%20Australia.pdf>; Tax Institute, Submission to the House of Representatives Economics Committee, *Inquiry into Tax Laws Amendment (2011 Measures No. 8) Bill 2011 [and] the Pay As You Go Withholding Non-compliance Tax Bill 2011*, pp. 1–5, viewed 2 November 2011, <http://www.aph.gov.au/house/committee/economics/Tax%20Laws/subs/Sub04-Tax%20Institute.pdf>; Institute of Chartered Accountants Australia, Submission to the House of Representatives Economics Committee, *Inquiry into Tax Laws Amendment (2011 Measures No. 8) Bill 2011 [and] the Pay As You Go Withholding Non-compliance Tax Bill 2011*, pp. 1–3, viewed 2 November 2011, <http://www.aph.gov.au/house/committee/economics/Tax%20Laws/subs/Sub10-Chartered%20Account.pdf>; Corporate Tax Association, Submission to the House of Representatives Economics Committee, *Inquiry into Tax Laws Amendment (2011 Measures No. 8) Bill 2011 [and] the Pay As You Go Withholding Non-compliance Tax Bill 2011*, pp. 1–2, viewed 2 November 2011, <http://www.aph.gov.au/house/committee/economics/Tax%20Laws/subs/Sub11-CTA.pdf>

33. House of Representatives Standing Committee on Economics, op. cit., p. 23.
34. Explanatory Memorandum, p. 4.
35. House of Representatives Standing Committee on Economics, op. cit., p. 8.
36. Explanatory Memorandum, p. 18.

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Schedule 3—Companies' non-compliance with PAYG withholding and superannuation obligations

Background

Under the ITAA 1997, the *Superannuation Guarantee (Administration) Act 1993* and the *Taxation Administration Act 1953* (Taxation Administration Act), employers have specific obligations to regularly make tax payments under PAYG withholding requirements to the ATO and superannuation payments on behalf of their employees to the relevant superannuation funds. Schedule 3 of the TLA Bill amends the Taxation Administration Act and other related Acts to:

- extend the director penalty regime to directors of companies that have not complied with their superannuation payment obligations³⁷
- where a company's debt remains unpaid or unreported for three months from the due date, the Commissioner may take steps to recover director penalties without first issuing a director penalty notice, and
- establish a PAYG withholding non-compliance tax making directors and their associates (in some limited cases) liable for the company's unpaid PAYG withholding amounts to the Commissioner (the tax is established by the PAYG Bill).

The aims of the amendments are to 'better protect workers' entitlements to superannuation, strengthen the obligations of company directors and enhance the deterrence of fraudulent phoenix activity'.³⁸ The amendments do not impose any additional obligations on companies, but rather they toughen the penalty regime for non-compliance. While the legislation provides defences for directors who may otherwise find themselves personally liable for a penalty, to date, the Courts have interpreted these defences rather narrowly.

A 2010 report by the Inspector-General of Taxation recommended that the director penalty regime be extended to a company's unpaid superannuation obligations.³⁹ This option was also included in a 2009 Treasury consultation paper on addressing fraudulent phoenix activity.⁴⁰

The House of Representatives Standing Committee on Economics inquiry into the Bills raised a number of issues in relation to Schedule 3 of TLA Bill, primarily in how effective it will be in deterring fraudulent phoenix activity.⁴¹ The Committee highlighted the broad range of directors that the

37. Whereby directors are held personally liable for the company's unpaid superannuation obligations.

38. Second Reading Speech, p. 6491.

39. Inspector-General of Taxation, *Review into the ATO's administration of the Superannuation Guarantee Charge*, Sydney, March 2010, p. 15, http://www.igt.gov.au/content/reports/super_guarantee/superannuation_guarantee.pdf

40. Department of the Treasury, 'Options to address fraudulent phoenix activity', Canberra, November 2009, p. vi, <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1647>

41. The Committee provides a summary of phoenix activities in its advisory report: House of Representatives Standing Committee on Economics, op. cit., p. 9.

amendments would apply to, including those not involved in phoenix activity. In particular, the Australian Chamber of Commerce and Industry noted:

... many businesses would still view the mandatory role of business in collecting and remitting superannuation to be highly burdensome, complex, where mistakes can easily be made. Many businesses who, in good faith, are attempting to comply with their legal obligations, may be captured by these provisions due to manner by which the bills are drafted to encompass any director of a company involved (whether deliberate, negligent or not) in noncompliance with a company's [superannuation] obligations.⁴²

The Committee recommended that the 'Government investigate whether it is possible to amend the Bills to better target phoenix activity' and to 'expand and strengthen the defences for company directors available in the Bills'.⁴³ In addition, the Committee recommended the TLA Bill be passed only after deleting Schedule 3.⁴⁴

Financial implications

The Explanatory Memorandum indicates that the amendments will increase the departmental expenses of the ATO by \$22.1 million over the forward estimates period. In terms of financial implications for businesses, the amendments will not cause any direct increase in expenses, but rather, will increase the potential liability of directors of companies that fail to meet their PAYG and superannuation payment obligations.⁴⁵

Main provisions

Amendments to the *Taxation Administration Act 1953*: TLA Bill

Item 5 repeals existing subsection 269-25(1) of Schedule 1 and inserts **proposed subsection 269-25(1) of Schedule 1** to allow the Commissioner to commence proceedings to recover director penalties when a company's debt remains unpaid or unreported for three months from the due date. This relates to outstanding debts under Subdivision 16-B (PAYG withholding payable to the Commissioner) and Division 268 (estimates of PAYG withholding and superannuation guarantee charge).

Item 6 repeals existing subsection 269-35(1) to (4) of Schedule 1 and inserts **proposed subsections 269-35(1) to (4) of Schedule 1** amending the defences to the director penalty regime. The key difference being more detail on when 'all reasonable steps' were taken to pay the company's debt.

42. Australian Chamber of Commerce and Industry, Submission to the House of Representatives Economics Committee, *Inquiry into Tax Laws Amendment (2011 Measures No. 8) Bill 2011 [and] the Pay As You Go Withholding Non-compliance Tax Bill 2011*, pp. 4–5, viewed 15 November 2011, <http://www.aph.gov.au/house/committee/economics/Tax%20Laws/subs/Sub13-%20ACCI%20.pdf>

43. House of Representatives Standing Committee on Economics, op. cit., pp. 27 and 30.

44. Ibid., p. 36.

45. Explanatory Memorandum, pp. 79–81.

The **PAYG Bill** establishes a tax on directors for non-compliance with PAYG withholding obligations. Amendments to the Taxation Administration Act implements the administrative regime for collection of the tax (**Item 16**). **Proposed sections 18-125 and 18-135 of Schedule 1** impose the tax on directors (both current and past directors) and the associates of directors. The tax applies to associates when the Commissioner is satisfied the because of the individual's relationship with the director or the company, 'the individual knew, or could reasonably have been expected to know, of the company's failure to pay the' amounts outstanding.⁴⁶ The amount of the tax will be the total outstanding amount of PAYG withholding owed by the company. Any credits a director is entitled to individually will be applied to the tax (**proposed subsections 18-125(3) and 18-135(7)**).

Item 52 repeals existing paragraph 269-5(a) and inserts **proposed paragraph 269-5(a) of Schedule 1** to extend the director penalty regime to a failure to pay superannuation guarantee charges under the *Superannuation Guarantee (Administration) Act 1992*. **Item 43** repeals existing subsection 268-10(1) of Schedule 1 and inserts **proposed subsection 268-10(1) of Schedule 1** to allow the Commissioner to estimate the unpaid and overdue amount of superannuation guarantee charge owing by a company and therefore recover that amount.

Schedule 4—Consequential amendments for taxation of gaseous fuels

Background

Schedule 4 of the TLA Bill proposes to make minor consequential amendments to the taxation arrangements for gaseous fuels including:

- ensuring that the content of Liquefied Petroleum Gas (LPG) notices may be prescribed in regulations only and that the content of these notices is not also set out in primary legislation
- confirming that excise duty does not apply where Compressed Natural Gas (CNG) for transport use is manufactured in a home refuelling unit or units that collectively do not have commercial scale capacity, and
- confirming that entitlements to fuel tax credits are available to distributors of LPG in a wider range of circumstances.

These measures have not been previously announced by the Government and the intention is to minimise industry compliance costs.⁴⁷

46. **Proposed subsection 18-135(3)** of Schedule 1 to the *Taxation Administration Act 1953*.

47. Explanatory Memorandum, p. 6.

Changing the prescription of the contents of a required notice about the non-transport use of LPG from legislation to regulation

Under the *Excise Act 1901* (as enacted in the *Taxation of Alternative Fuels Legislation Amendment Act 2011*), an obligation is imposed on a person who holds a manufacturing or storage licence to give notice when LPG is supplied for non-transport use.⁴⁸ Paragraph 77L(3) sets out the requirements for such a notice, including that it set out that excise duty has not been paid on the LPG that is being sold or supplied, the effect of penalty provisions included in the Act and that the notice must be given in the manner and form prescribed by the regulations.

While the requirement to provide a notice when LPG is supplied for non-transport use is maintained in the Act, the amendment proposed by the TLA Bill provides that the content of a notice may only be prescribed in regulations.⁴⁹ The Explanatory Memorandum notes that this allows 'maximum flexibility to develop, in consultation with industry, the text of notices that inform purchasers of LPG for non-transport use of their obligations'. This approach minimises the compliance cost impact for entities that supply these notices'.⁵⁰

Confirming that excise duty does not apply where CNG for transport use is manufactured in units that collectively do not have commercial scale capacity

Under the *Excise Act 1901*, CNG is exempt from excise duty in certain circumstances including that the gas was compressed for use other than as a fuel for a motor vehicle and the gas was compressed for use as a fuel for a motor vehicle that is designed merely to move goods with a forklift and is for use primarily off public roads.⁵¹

The TLA Bill proposes to amend the Act so that CNG compressed at residential premises at a rate that is below a prescribed threshold (10 kilograms of CNG per hour) for private purposes is exempt from excise duty.

Equipment for households to convert natural gas to CNG and refuel at home is likely to become more widely available in Australia in the next few years.⁵² The 10 kilogram per hour conversion threshold equates to the equivalent of producing around 11 litres of petrol.⁵³

48. *Taxation of Alternative Fuels Legislation Amendment Act 2011*, section 10.

49. Explanatory Memorandum, p. 91.

50. *Ibid*, p. 91.

51. *Taxation of Alternative Fuels Legislation Amendment Act 2011*, clause 10 (section 77HA).

52. R Hammerton, 'Aussie company set to launch home CNG filler', Goauto website, 28 July 2010, viewed 13 November 2011, <http://www.goauto.com.au/mellor/mellor.nsf/story2/157B60B34C6D84B5CA25776E00215AAC>

53. Gas Today Australia, 'A home-grown home refueller', 28 April 2011, viewed 13 November 2011, http://gastoday.com.au/news/a_home-grown_home_refueller/054925/

Extension of eligibility for fuel tax credits to unlicensed distributors

Under amendments to the *Fuel Tax Act 2006* that come into effect on 1 December 2011 as a result of changes made by the *Taxation of Alternative Fuels Legislation Amendment Act 2011*, LPG supplied into certain kinds of tanks attracts a fuel tax credit.⁵⁴

The TLA Bill proposes to amend the Act so that unlicensed distributors of LPG who supply customers with LPG in storage tanks or supply LPG into customers' storage tanks that have a capacity of 210 kilograms or less.⁵⁵

Financial implications

The Explanatory Memorandum notes that the revenue impact of this measure is negligible and while not zero, has been rounded to zero in the forward estimates.⁵⁶

Main provisions

Amendments to the *Excise Act 1901*: TLA Bill

Items 1 and 2 amend **existing section 77HA** so that CNG is exempt from excise duty if it satisfies three conditions:

- the gas was compressed at 'residential premises'⁵⁷
- the rate at which natural gas can be compressed at those premises is not more than a threshold prescribed by the regulations or, if no rate is prescribed, 10 kilograms of CNG per hour, and
- the gas is not sold or otherwise supplied in the course of carrying on an 'enterprise'.⁵⁸

Item 3 repeals **existing subsection 77L(3)** and inserts **proposed subsection 77L(3)** so that the requirements covering the issue of a notice given to a customer who is supplied LPG for non-transport use by a person licensed as a manufacturer or supplier of LPG are to be set out in Regulations only, rather than the existing arrangements that prescribe some requirements relating to the contents of such a notice in the Act.

Item 4 provides a transitional provision so that Regulations made under the existing regulation-making power in paragraph 77L(3)(b) are treated as having been made under the **proposed subsection 77L(3)**.

54. *Taxation of Alternative Fuels Legislation Amendment Act 2011*, clause 21 (section 41-10(3)).

55. Explanatory Memorandum, p. 92.

56. Explanatory Memorandum, p. 6.

57. Residential premises is defined to have the same meaning of the *A New Tax System (Goods and Services Tax) Act 1999*—a land or a building that: (a) is occupied as a residence or for residential accommodation; or (b) is intended to be occupied, and is capable of being occupied, as a residence or for residential accommodation.

58. Enterprise is defined to have the same meaning of the *A New Tax System (Goods and Services Tax) Act 1999*—this covers a range of business activities and specifically excludes certain activities such as private recreational pursuits or hobbies.

Item 5 amends **subparagraph 41-10(3)(d)(i)** by removing the condition that the supply of LPG into a tank with a capacity of not more than 210 kilograms is for use in carrying on an enterprise.⁵⁹ The effect of removing this provision is that there is no discrimination for an entitlement to a fuel tax credit based on whether the customer carries on an enterprise.

Item 6 is a largely technical amendment that amends **subparagraph 41-10(3)(d)(ii)** by identifying that the terms ‘carrying on an enterprise’ are correctly identified as terms that are defined under section 110-5 of the Act.

Item 7 provides that the amendments proposed by **items 5 and 6** above apply to taxable fuel imported on or after 1 December 2011.

59. The term ‘carrying on an enterprise’ is defined to have the same meaning of the *A New Tax System (Goods and Services Tax) Act 1999*—defined to ‘includes doing anything in the course of the commencement or termination of the enterprise’ (section 195-1).

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