

# client alert | explanatory memorandum

December 2011/January 2012

## CURRENCY:

This issue of **Client Alert** takes into account all developments up to and including 16 November 2011.

## Small business benchmarks under microscope

The Inspector-General of Taxation (IGT), Mr Ali Noroozi, in broad consultation with the community has developed the work program for 2011–2012. He said this new work program has a more flexible structure which provides for more urgent review action that may arise outside of the formal work program life cycle.

Mr Noroozi said he will review the Australian Tax Office's use of benchmarking to target the cash economy. The review is expected to commence in the second quarter of the financial year. The IGT said he will investigate whether benchmarks are an appropriate tool for identifying the potential underreporting of income and for the calculation of default assessments. Mr Noroozi said he will also consider whether the Australian Tax Office's expectations in relation to micro and small business record keeping are clearly communicated and reasonable.

Other topics in the work program include:

- **review into ATO use of Early and Alternative Dispute Resolution** – commenced 26 July 2011. As a part of this review, the IGT said he will aim to determine whether the Australian Tax Office (ATO) is currently making sufficient use of early and alternative dispute resolution and whether the ATO and taxpayers could benefit by making greater use of these methods. The IGT said the review will also examine the circumstances in which it is appropriate for the ATO to utilise early and alternative dispute resolution methods.
- **follow-up review into ATO implementation of IGT recommendations** – The IGT said the follow-up review is directed at assessing the ATO's progress with implementing agreed changes in a number of IGT's reviews released since November 2008.
- **continuation of reviews that are currently in progress.**

Source: *Inspector-General of Taxation Annual Report 2010–2011*,  
[www.igt.gov.au/content/reports/2010\\_11\\_annual\\_report/downloads/IGT\\_Annual\\_Report\\_2010\\_11.pdf](http://www.igt.gov.au/content/reports/2010_11_annual_report/downloads/IGT_Annual_Report_2010_11.pdf)

## Carbon tax scheme to commence on 1 July 2012

The Government's controversial carbon tax scheme has passed Parliament and will commence on 1 July 2012. From that date, the country's biggest polluters will be required to pay \$23 for each tonne of carbon pollution released into the atmosphere. To assist certain emissions-intensive, trade-exposed industries, the package establishes the Jobs and Competitiveness Program. In addition, as part of the scheme, tax cuts to assist households and support measures for businesses to assist them in adapting to the new carbon tax will also be implemented.

The Clean Energy legislation was introduced into Parliament on 13 September 2011 and had passed all stages with Government amendments in the House of Representatives. The Government amendments will, among other things, give small landfill operators a limited reprieve from the tax.

Further information is available on the Government's Clean Energy Future website at: [www.cleanenergyfuture.gov.au](http://www.cleanenergyfuture.gov.au).

Source: *Senate Hansard, 8 November 2011, p 26*, [www.aph.gov.au/hansard/senate/dailys/ds081111.pdf](http://www.aph.gov.au/hansard/senate/dailys/ds081111.pdf);  
*Senate Hansard, 9 November 2011 p 18*, [www.aph.gov.au/hansard/senate/dailys/ds091111.pdf](http://www.aph.gov.au/hansard/senate/dailys/ds091111.pdf)

## Uncertainty with private rulings system

The Full Federal Court has unanimously held that assessments issued by the Commissioner were not in breach of s 170BB of ITAA 1936 or s 357-60 of Sch 1 to the TAA even though the assessments were inconsistent with a Private Ruling issued to the taxpayer.

### Background

The taxpayer was incorporated with an object of promoting education, sport and culture. It leased and maintained five sporting fields and spent substantial amounts maintaining and operating a fitness centre and supported sub-clubs of 28 different sports. In 2004, the Commissioner ruled that the taxpayer would be exempt from income tax pursuant to s 50-45 of ITAA 1997 for the income years ended 30 June 2003 to 30 June 2010 inclusive.

On or about 22 June 2005, the Commissioner wrote to the taxpayer purporting to withdraw the Ruling on the basis that “the arrangement” ruled upon had not commenced in relation to the financial year ended 30 June 2006 and later years, and stating that the Commissioner was authorised to withdraw the Ruling in respect of those years under s 14ZAU of the TAA. In 2006, the Commissioner issued a second Private Ruling to the taxpayer stating that it was not exempt from tax in relation to the income years ended 30 June 2006 to 30 June 2010 due to what the Commissioner said was a change in the arrangement ruled upon. The Commissioner also issued assessments relating to the 2006 year (which assessed a taxable income of just over \$1.4m) and the 2007 year (which assessed a taxable income of just over \$493,000).

The Court said that, after referring to certain matters which came about as a result of a so-called “amalgamation” of the taxpayer with another club in 2005–2006, the ATO said it viewed these changes as representing “a material change to the arrangement ruled upon in the 2004 ruling”. Accordingly, the ATO said it considered that the 2004 ruling was not binding on the Commissioner for the year ended 30 June 2006 and future years.

The taxpayer objected to the assessments issued and, in addition to the current proceedings, lodged an application with the AAT pursuant to Pt IVC of the TAA in relation to the 2006 assessment which is still pending (at the time of writing). In the current proceedings, the taxpayer contended that s 170BB of ITAA 1936 and s 357-60 of Sch 1 to the TAA were not merely part of the process of assessment, but, were rather substantive rules which place a duty upon the Commissioner not to raise assessments in a manner contrary to a Ruling. Therefore, the taxpayer argued “that the sections imposed upon the Commissioner an ‘imperative duty’ or ‘inviolable limitation or restraint’ such that, if the Commissioner purports to make an assessment in a manner inconsistent with a current ruling, there is no ‘assessment’ at all”.

The taxpayer also argued that the failure of the Commissioner to observe the provisions of s 170BB of ITAA 1936 and s 357-60 of Sch 1 to the TAA in raising the assessments in a manner contrary to the Ruling was inconsistent with the proposition that protection should be afforded to such a breach by ss 175 and 177(1) of ITAA 1936.

### Decision

The Court held that “no provision of the private ruling regime expressly imposes a duty, limitation or restraint on the ability of the Commissioner to issue an assessment”. Further, the Court held there was no “inconsistency with the private ruling regime and the general power and duty of the Commissioner to make an assessment”.

In relation to the taxpayer’s second argument, the Court said the factual issue was whether the activities of the taxpayer had materially changed from 2006 from those that existed at the time the Ruling was issued. It held that without a factual investigation, it could not be said that “when the assessment is viewed alongside the Ruling, the assessment is inconsistent with it and is made in breach of s 170BB of the ITAA 1936 and s 357-60 of Sch 1 to the TAA”.

The Court also noted that the arguments regarding the factual evidence and proper construction of the private ruling regime provisions will be determined in the Pt IVC proceedings before the AAT. The Court observed that if the taxpayer is successful in arguing before the AAT that the Ruling should be applied, this “will demonstrate that the 2006 Assessment is excessive”.

In conclusion, the Court dismissed the taxpayer’s application for declaratory relief.

*Source: Mount Pritchard District Community Club Ltd v FCT [2011] FCAFC 129, Full Federal Court, Edmonds, Middleton, and Jagot JJ, 17 October 2011*

## Taxpayer entitled to prompt GST refund, says Court

The Federal Court has ordered that a writ of mandamus issue directing the Commissioner to comply with s 35-5 of the GST Act and s 8AAZLF of the TAA by immediately paying to the taxpayer the net amount notified in its GST return for each of the tax periods January, February, March, April and May 2011. The

Court held that s 35-5 implicitly contemplates that the refund payment to the taxpayer should be made within a reasonable period.

## **Background**

The taxpayer was in the business of purchasing mobile phones and similar goods from suppliers in Australia (creditable acquisitions) and making GST-free exports of the goods to customers overseas, resulting in an excess of input tax credits. The taxpayer lodged monthly BASs for the periods January to May 2011, and claimed it was entitled to an immediate payment of refunds under Div 35 of the GST Act.

The ATO contended that input tax credits claimed by the taxpayer were unsubstantiated and allegedly fraudulent. It presented evidence that it was currently conducting an investigation into the taxpayer's compliance with the GST Act. The Court was told that "in the period leading up to 2009, [three companies in the same group as the taxpayer had] been involved in 'sham transactions through a supply chain' ". The ATO therefore refused to pay the refunds in this case until an audit had concluded.

Broadly, the ATO argued that the removal of the categorical 14-day requirement in s 35-5 of the GST Act by the *A New Tax System (Tax Administration) Act 1999* and the insertion of the generic refund rules as per s 8AAZLF(1) of the TAA, "necessarily left reasonableness as the defining criterion for the period within which a refund under that section had to be made".

Therefore, by relying on the 1999 amendment to the GST Act and also upon various provisions of the TAA, the ATO contended that where the statute imposes a positive duty to act upon an identified office holder, but provides no stated period within which that duty is to be performed, a reasonable period for performance will be implied, and withholding of a payment is allowed.

## **Decision**

In relation to the Commissioner's submission relating to the amendment to s 35-5 of the GST Act, the Court said it was "not disposed to view the 1999 amendment as necessarily, in all cases, allowing the Commissioner a longer period within which to make the required refund than had been specified under s 35-5 as originally enacted".

The Court also rejected the Commissioner's contention that the "proper construction" of the relevant provisions of the GST Act and TAA would allow withholding of a payment under s 35-5 of the GST Act pending an investigation by the Commissioner. Therefore, the Court held that once a net amount has been calculated under s 17-15 of the GST Act, a negative sum must be refunded by the Commissioner regardless of the underlying correctness of the calculation. Further, it held a reasonable period would only include a period which "may be required to enable the necessary administrative steps to be taken within the [ATO] to process the taxpayer's GST return".

The Court did however note that "[i]n the present case, the Commissioner could have put on a defence which placed the accuracy of the [taxpayer's] GST returns directly in issue, and could have proved that those returns were incorrect, fraudulent or the like. But the Commissioner had not conducted the present case on that footing".

In conclusion, the Court ordered that a writ of mandamus issue directing the Commissioner to comply with s 35-5 of the GST Act and s 8AAZLF of the TAA by immediately paying to the taxpayer the net amount notified in its GST return for each of the relevant GST periods.

## **Postscript**

On 11 November 2011, the Full Federal Court unanimously dismissed the Commissioner's appeal against the decision. It is understood the Commissioner intends to seek special leave to appeal to the High Court from the Full Federal Court's decision.

*Source: Multiflex Pty Ltd v FCT [2011] FCA 1112, Federal Court, Jessup J, 30 September 2011; FCT v Multiflex Pty Ltd [2011] FCAFC 142, Full Federal Court, Stone, Edmonds and Logan JJ, 11 November 2011*

## **CGT test includes commission liability after CGT event**

The Full Federal Court has, by majority, confirmed that for the purposes of accessing the CGT small business concessions, a real estate agent commission incurred on the sale of a hotel business could be included as a "liability" for the purposes of the "maximum net asset value test" (which requires the test to be satisfied "just before the CGT event"). This was the case even though the taxpayer was invoiced for commission after CGT event A1 (ie after entering the contract of disposal) and even though it was, in effect, contingent on the sale of the business being completed.

## **Background**

The taxpayer family company sold its hotel business and the accompanying lease (which was held by a related entity) for a capital gain of some \$4.1m. It claimed the relevant CGT small business concessions to

reduce its assessable gain to nil on the basis that it satisfied the (then) \$5m maximum net asset value test. In doing so, the taxpayer took into account as “liabilities” a real estate agent commission of some \$300,000 both it and the related entity were required to pay under an exclusive agency agreement, as well as legal and accounting fees of some \$100,000.

In the case of the real estate agent commission, its payment was dependant on the sale of the business being completed – with the result that the taxpayer was invoiced for the amount at the time of settlement of the sale contracts, being some several months after the contracts were originally entered into. Likewise, the taxpayer was invoiced for legal fees after the contract was entered into, albeit the fees were broken down for work done before and after the contracts were entered into.

The Commissioner issued an amended assessment to deny the taxpayer the benefit of the concessions on the basis that it had not satisfied the \$5m maximum net asset value threshold test. In particular, the Commissioner claimed that the liabilities for the real estate commission and the legal and accountancy fees could not be taken into account as they were not incurred “just before the CGT event” as required (ie just before CGT event A1 which occurs on the making of the contract).

The Commissioner also claimed that the net value of the assets of the husband and wife controllers of the taxpayer company should be taken into account (being debts due to them as directors on their loan accounts with the taxpayer), as well as the net value of the assets of their son as a (then) “small business CGT affiliate” of the taxpayer. The husband and wife argued that their assets should be disregarded by the operation of s 152-40(4) of ITAA 1997 on the basis that the assets were not assets used in carrying on a business by the taxpayer or a connected entity.

At first instance in *AAT Case [2010] AATA 455*, the AAT ruled that the real estate agent commission could be taken into account as a liability on the basis that it would make no sense to exclude liabilities that were “inextricably” related to the disposal of the asset that triggered the CGT event. It also found that the legal fees could be apportioned for work done before and after the CGT event and that the son was not a “small business CGT affiliate” – with the result that the taxpayer satisfied the maximum net asset test. In view of this conclusion, the AAT found it unnecessary to decide whether the debts owed to the husband and wife should be considered.

## **Decision**

On appeal, the Full Federal Court by majority found that the real estate agent commission could be taken into account as a liability. The majority did so essentially on the basis of finding that, in the circumstances, the legal obligation to pay the commission was in the nature of a “primary obligation” (as opposed to being a “purely contingent” obligation) that had arisen before the execution of the contract. As Greenwood J stated (at para 117): “the agent had a presently identifiable contractual entitlement to be paid, in the future, an amount calculated as a commission fee under the formula in the contract for the performance of the single exclusive service to the client, notwithstanding that the effective cause of the sale of the land and business was subject to, one of four completion events occurring”.

In addition, the majority found that the obligations arising under the exclusive agency agreement with the real estate agent, although a contingent burden, fell within the notion of a “liability” in determining “net” value. In other words, the majority held that, properly construed, a liability (albeit contingent in the particular circumstances of this case) had arisen in the taxpayer “just before the CGT event” and that that liability was to be brought to account in the calculation of the net value of the CGT asset of the taxpayer entity for the purpose of the maximum net asset value test.

On the other hand, Bennett J in dissent found that the fees were not incurred just before the execution of the contract as specifically required by the provisions. In particular, Bennett J held that as at the “just before” time, the taxpayer was not, by virtue of its contractual arrangement with the real estate agent, subject to an obligation that could be classified as a liability for the purposes of the maximum net asset value test.

At the same time, the majority found (like the AAT at first instance) that the legal fees billed after the making of the contract could be apportioned for work done before and after the CGT event. However, after taking into account these and other adjustments, the majority still found that the taxpayer still exceeded the \$5m threshold by several thousand dollars. The majority then decided to remit the matter to the AAT for reconsideration to determine if the net value of the assets of the husband and wife should be taken into account to determine if the taxpayer would have satisfied the maximum net asset value test (which the AAT had originally found unnecessary to decide).

*Source: FCT v Byrne Hotels Qld Pty Ltd [2011] FCAFC 127, Full Federal Court, Dowsett, Bennett and Greenwood JJ, 11 October 2011*

## **Personal services income rules apply, finds Tribunal**

The AAT has held that the PSI rules applied to a taxpayer to include in his assessable income amounts derived by his company through the provision of his IT expertise to a small number of clients from the same

company group. The AAT also affirmed that a penalty was payable as the taxpayer had not taken reasonable care.

## **Background**

The taxpayer provided IT services through his company. For the 2004 and 2005 income years, the company earned its income from a small number of contracts to provide services to entities forming part of a substantial ASX-listed group (the T group) or joint venture entities or arrangements in which T group entities had control or significant influence. The Court noted that the taxpayer's company did not have a personal service business determination.

In the 2004 year, the company earned income through two independent labour hire agencies, and more than 95% of the company's income was derived from T group contracts. The taxpayer argued that the company satisfied the results test or passed the unrelated clients test or the business premises test and was a personal services business.

Similarly for the 2005 year, the company earned income through two independent labour hire agencies. However, the company now obtained a majority of its income (more than 80%) through contracts with another group (S group) which was wholly owned by T group. The taxpayer similarly argued that the company satisfied the results test for the year. The taxpayer also contended that the company was entitled to rely on the Commissioner's discretion under para 48 of the Taxation Ruling TR 2001/8.

The Commissioner's discretion under para 48 of the Taxation Ruling TR 2001/8 refers to associates as defined in s 318 of ITAA 1936. It states that if an independent contractor does not, or could not reasonably be expected to know that the service acquirers are associates, then the fact that the clients are associates of each other will not itself be regarded as causing the unrelated clients test to be failed. The taxpayer contended that he did not know that S group was wholly owned by T group until he started working at S group.

## **Decision**

In relation to the 2004 year, the Tribunal held that the payments made under the contract were not for producing a result, rather the contract was for the company to make the taxpayer's services available to T group entities. Further, the Tribunal held that the company failed to meet the 80% test as it obtained "all of its personal services income directly from [the labour hire firm] or indirectly from T group associates". Therefore, it held that the company was not a personal services business under s 87-15 of ITAA 1997.

Similarly, the Tribunal held that for the 2005 income year, "neither the results test nor the unrelated clients test are met". Further it held that as soon as the taxpayer began working for the S group, it would have become reasonably apparent that the two groups were related based on the links between the well known products and services. It said that "this is not a case where the strict terms of the legislation are altered by the ruling". The AAT therefore concluded that the taxpayer had failed in his challenge to the Commissioner's objection decision that the company did not carry on a personal services business for the relevant years.

In relation to penalties, even though the taxpayer presented evidence that he had engaged a tax agent and was not aware of the personal services business rules, the AAT held that in the circumstances, the taxpayer had not demonstrated reasonable care. It further held that there was insufficient, if any, evidence of disclosures being made to the Commissioner which would warrant a remission of penalty payable.

*Source: AAT Case [2011] AATA 682, AAT, Ref No 2009/0062-63, O'Loughlin SM, 30 September 2011*

## **Tax changes for small businesses introduced**

The *Tax Laws Amendment (Stronger, Fairer, Simpler and Other Measures) Bill 2011* has been introduced in the House of Representatives. It contains amendments concerning:

- (i) small business instant asset write-off and simplified depreciation;
- (ii) small business accelerated deductions for motor vehicles;
- (iii) abolition of the entrepreneurs' tax offset; and
- (iv) low income superannuation contributions.

The Bill has been referred to the House of Representatives Standing Committee on Economics for report by 21 November 2011.

### **Instant asset write-off and simplified depreciation**

The Bill proposes to amend ITAA 1997 by:

- (i) increasing the small business instant asset write-off threshold from \$1,000 to \$6,500; and
- (ii) consolidating the long life small business pool and the general small business pool into a single pool to be written-off at one rate of 30%.

Under the changes, from 2012–2013, small businesses would be able to choose to use the capital allowance provisions in Subdiv 328-D of ITAA 1997 to write off depreciating assets costing less than \$6,500 in the income year in which they start to use the asset or have it installed ready for use for a taxable purpose during or before that income year. The amendments are proposed to apply to small business entities as defined in s 328-110 that have an aggregated turnover of less than \$2m for an income year. Other important points include:

- the existing capital allowance rules about the taxable purpose proportion of the depreciating asset would still apply, and would affect the amount of the deduction that can be claimed;
- small businesses that choose to use the capital allowance provisions in Subdiv 328-D may also claim an immediate deduction for the taxable purpose proportion of additions to existing assets (that cost less than \$6,500) if the addition also costs less than \$6,500; and
- existing rules for the disposal of assets that have been totally written-off would continue to apply.

For depreciating assets that cost \$6,500 or more, small businesses will be able to allocate these to a single general small business pool and depreciated at a rate of 15% in the year of allocation and 30% in following years. Other important points include:

- to simplify and streamline depreciation arrangements for small business, the long life small business pool will cease to exist after the 2011–2012 income year;
- the closing balance of a small business' long life pool and general small business pool for the 2011–2012 income year will be added together to calculate the opening balance of the general small business pool for the 2012–2013 income year; and
- the total balance of the pool will be able to be written-off when it falls below \$6,500. However, if the pool balance becomes less than nil, the amount by which the balance is less than zero will be added to the taxpayer's assessable income for that income year.

#### **Date of effect**

The increase in the instant asset write-off threshold from \$1,000 to \$5,000 and the simplified pooling arrangements (both contained in Pt 1 of Sch 2 of the Bill) will commence on the later day of Royal Assent of the Bills giving effect to the Minerals Resource Rent Tax and of Royal Assent of the *Tax Laws Amendment (Stronger, Fairer, Simpler and Other Measures) Bill 2011*. The increase in the instant asset write-off threshold from \$5,000 to \$6,500 will commence after the commencement of Pt 1 of Sch 2 to the *Tax Laws Amendment (Stronger, Fairer, Simpler and Other Measures) Bill 2011* and Royal Assent of the *Clean Energy Bill 2011*.

#### **Small business entities' deductions for motor vehicles**

The Bill proposes to amend ITAA 1997 to allow small business entities (annual turnover less than \$2m) to claim an accelerated initial deduction for motor vehicles acquired in the 2012–2013 and subsequent income years.

Under the proposed changes, from the 2012–2013 income year, small business entities that choose to use the capital allowance provisions in Subdiv 328-D will be able to claim up to \$5,000 as an immediate deduction for a motor vehicle in the year they start to use the motor vehicle, or have it installed ready for use, for a taxable purpose. Taking into account the amount already written-off, the remainder of the purchase cost will be depreciated as part of the general small business pool, at 15% in the first year and 30% in later years. It should also be noted that, once in the pool, the deduction available in the start year will depend on the amount of the taxable purpose proportion of the adjustable value of the motor vehicle.

The proposed rules will apply to any motor powered road vehicle, but will not apply to road vehicles if the main function of the road vehicle is not related to public road use or if the vehicle's ability to travel on a public road is secondary to its main function. Examples of motor vehicles that will be able to be written-off include: cars, trucks, vans, utilities, motorbikes and scooters. However, road rollers, graders, tractors, combine harvesters, earthmoving vehicles, and trailers, will not be able to be written-off.

**Entrepreneurs' tax offset abolished:** The Government had previously announced in the 2011 Federal Budget that the proposed deduction for motor vehicles will effectively replace the entrepreneurs' tax offset (ETO). Accordingly, the Bill also proposes to repeal Subdiv 61-J (25% entrepreneurs' tax offset) of ITAA 1997 for the 2012–2013 income year and later income years. The change would implement the Henry Tax Review's recommendation to abolish the ETO because of its poor targeting and high compliance cost.

#### **Date of effect**

The amendments are proposed to commence on the day the Bill receives Royal Assent.

## Low income superannuation contribution

The Bill will amend the *Superannuation (Government Co-Contribution for Low Income Earners) Act 2003* to implement the Government's proposal to make a "low income superannuation contribution" of up to \$500 for individuals with an adjusted taxable income that does not exceed \$37,000 (not indexed).

**Eligibility:** A person (regardless of age) will be entitled to the low income superannuation contribution if:

- the person has "concessional contributions" for the year;
- the individual's "adjusted taxable income" does not exceed \$37,000;
- the individual is not a holder of a temporary resident visa. Note that New Zealand citizens in Australia do not hold a temporary resident visa and are as such eligible for the payment;
- the individual satisfies an income test in which 10% or more of their total income is derived from employment activities or carrying on a business;
- the amount payable for the individual is \$20 or more.

Note that the low income superannuation contribution in respect of concessional contributions is different to the Government co-contribution (which applies in relation to certain non-concessional contributions by low-income earners).

**Amount of contribution:** The amount payable by the Government will be calculated by applying a 15% rate to the total eligible "concessional contributions" made by or for eligible individuals during 2012–2013 and later income years. The maximum amount payable will be \$500. This will effectively offset the 15% contributions tax payable by a superannuation funds on superannuation guarantee contributions up to that amount (ie  $\$37,000 \times 9\% \times 15\% = \$500$ ).

**Eligible concessional contributions:** Eligible contributions must be concessional contributions (as defined in ITAA 1997) made to a complying superannuation plan. These include:

- superannuation guarantee contributions;
- contributions an employer makes under a salary sacrifice arrangement;
- personal contributions which are allowed as a tax deduction;
- "notional taxed contributions" in respect of a defined benefit interest; or
- allocations from reserves that are concessional contributions (ie an amount that is not an actual contribution but is still included in a fund's assessable income).

Note also that amounts that are not concessional contributions will not be matched by the Government. For example, non-concessional contributions (which instead may qualify for a Government co-contribution), amounts transferred from foreign superannuation funds, rollover amounts, employer contributions made to non-complying funds and employer contributions to an untaxed element in the fund will not be matched.

**Tax consequences:** The low income superannuation contribution will not be included in the assessable income of any superannuation fund to which it is paid: s 295-170(1) of ITAA 1997. The low income superannuation contribution will form part of the contributions segment, and therefore, form part of the tax-free component of any superannuation benefit eventually paid to the person.

**ATO administration:** Where an individual does not lodge an income tax return (eg an individual is under the proposed tax-free threshold), the Commissioner will determine eligibility for the low income superannuation contribution based on information available to the ATO.

Consistent with the rules for the existing Government co-contribution, the ATO will be able to make the payment to a superannuation fund, an RSA, an individual or an individual's legal personal representative.

The ATO may be liable to pay interest on late payments and underpayments. The Commissioner may also recover overpayments directly from individuals or funds that the payment was made into. If a superannuation fund is returning monies that cannot be credited to an account, the ATO may issue an infringement notice if the superannuation fund fails to provide the prescribed information with the returned monies.

### Date of effect

The amendments will apply to eligible concessional contributions of an individual for the 2012–2013 income year and later income years. However, the amendments are dependent on the enactment of the Minerals Resource Rent Tax package of Bills.

Source: *Tax Laws Amendment (Stronger, Fairer, Simpler and Other Measures) Bill 2011*, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4709%22>

## Superannuation guarantee to be increased to 12%

The *Superannuation Guarantee (Administration) Amendment Bill 2011* has been introduced in the House of Representatives to give effect to the Government's proposal to increase the superannuation guarantee (SG) rate from 9% to 12%, phasing in from 1 July 2013. The Bill also proposes to increase the age of an employee at which the superannuation guarantee no longer needs to be provided from 70 to 75 (but see below the subsequent proposal to abolish SG age limit altogether).

The Bill has been referred to the House of Representatives Standing Committee on Economics for report by 21 November 2011.

### Superannuation guarantee rate

The Bill will amend s 19(2) of the *Superannuation Guarantee (Administration) Act 1992* (SGAA) to increase the SG "charge percentage" (rate) for a quarter from 9% to 12%, phasing in from 1 July 2013. There will be increments of 0.25% in the first 2 years and 0.5% thereafter, as follows:

Year starting	Super Guarantee charge percentage (%)
Current SG rate (ie until 30 June 2013)	9
1 July 2013	9.25
1 July 2014	9.5
1 July 2015	10
1 July 2016	10.5
1 July 2017	11
1 July 2018	11.5
1 July 2019 and thereafter	12

### Superannuation guarantee age limit

The Bill also proposes to amend s 27(1)(a) of the SGAA to increase the SG age limit from 70 to 75.

The increase in the SG age limit from 70 to 75 will bring the SGAA in line with the provisions of ITAA 1997, which allow employers to claim a deduction for contributions made on behalf of their employees up to age 75 (and allow self-employed people to make deductible personal contributions until they turn 75).

### Proposed abolition of SG age limit

Furthermore, the Assistant Treasurer subsequently announced on 2 November 2011 that the Government has "decided there will be no age limit for superannuation guarantee contributions from 1 July 2013". It is expected that the Government will seek to give effect to this additional measure by moving amendments to the Bill when it comes up for debate in House of Representatives. Accordingly, from 1 July 2013, employers will be required to make SG contributions for employees regardless of age.

### Date of effect

The amendments will commence on 1 July 2013 but are dependent on the passing of the Minerals Resource Rent Tax package of Bills.

Source: *Superannuation Guarantee (Administration) Amendment Bill 2011*, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=ld%3A%22legislation%2Fbillhome%2F4698%22; Assistant Treasurer's media release No 146, 2 November 2011](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=ld%3A%22legislation%2Fbillhome%2F4698%22;Assistant%20Treasurer%27s%20media%20release%20No%20146%2C%202%20November%202011), <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2011/146.htm&pageID=003&min=brs&Year=&DocType=>

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