
Explanatory Memorandum

GST and representatives of incapacitated entities

Outline of chapter

1.1 Schedule X to this Bill amends the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) to ensure that a representative of an incapacitated entity is responsible for the GST consequences that arise during its appointment. This is the stated intention of the current law however, a recent Federal Court decision held that the current law does not achieve this intention. The proposed amendments will restore the intention of the GST Act relating to the GST consequences for representative of incapacitated entities.

1.2 The proposed amendments will also ensure that the GST consequences that arise from an action performed by the representative are the same as those that would have arisen had the action been performed by the incapacitated entity.

1.3 The main operative provisions will take effect from 1 July 2000, the introduction date of the GST. The consequential amendment to the *Fuel Tax Act 1996* will take effect from 1 July 2006 which is the commencement date for this Act. The remaining consequential and minor amendments will commence from the date of Royal Assent.

Context of amendments

1.4 Division 147 of the GST Act contains provisions relating to representatives of incapacitated entities. The explanatory memorandum to the GST bill, at paragraphs 6.272 and 6.273, provides that the intention of Division 147 is to ensure that:

The representative is personally liable for the GST payable and for the other requirements [of the GST legislation]. The representative is liable from the date on which he or she becomes entitled to act for you (the principal) until he or she ceases to be entitled. The representative is liable for GST, entitled to input tax credits and has any adjustments attributable to that period.

During that period the effect of Division 147 is that the representative rather than the principal is carrying on the enterprise. The representative is not personally liable for GST attributable before he or she becomes entitled to act for the principal.

1.5 However, Division 147 does not expressly deem the representative to be liable for the GST consequences that arise during its appointment. Rather, it:

- requires the representative to register for GST in its capacity as a representative, if the entity it represents is registered or required to be registered (current section 147-5);
- specifies when the Commissioner of Taxation (the Commissioner) is required to cancel the representative's GST registration (current section 147-10);
- requires the representative to notify the Commissioner if and when it ceases to represent the incapacitated entity (current section 147-15);
- specifies that increasing adjustments that arise in relation to pre-appointment transactions undertaken by the incapacitated entity are, if the representative provides written notice to the Commissioner, to be treated as adjustments that the incapacitated entity has (instead of the representative) (current section 147-20); and
- specifies that the tax periods applying to the representative, in that capacity, are the same as those applying to the incapacitated entity (current section 147-25).

1.6 The Federal Court decision *Deputy Commissioner of Taxation v PM Developments Ltd* [2008] FCA 1886 (PM Developments) handed down on 12 December 2008 found that a liquidator is not liable for the GST arising from a transaction occurring during the period of the liquidator's appointment. Instead the Court found that the GST liability is a liability of the company in liquidation.

1.7 The PM Developments decision is contrary to the stated policy intention (contained in the explanatory memorandum) that the representative of an incapacitated entity (for the purposes of Division 147 of the Act) is liable for GST on transactions within the scope of its appointment. It is also contrary to the Commissioner's administration of Division 147.

1.8 Following the Federal Court decision the Government decided to amend the GST law with effect from 1 July 2000 to ensure the law achieves the stated policy objective.

1.9 Retrospective amendment of the GST law is considered appropriate as the proposed amendments will give effect to the stated policy intention as at the commencement of the GST law on 1 July 2000. The proposed amendments are also generally consistent with the way the law has been administered by Commissioner.

1.10 Consequently, retrospective application of the law is not expected to adversely impact taxpayers with one exception. Supplies by representatives to associates of incapacitated entities for no consideration or inadequate consideration may have a different GST outcome as a result of the retrospective amendments. A transitional provision will apply to ensure that the amendments will not adversely impact those taxpayers affected.

Summary of new law

1.11 Schedule X inserts new Division 58 into the GST Act to provide that any supply, acquisition or importation by a representative of an incapacitated entity in his or her representative capacity will be treated as a supply, acquisition or importation of the incapacitated entity. This will ensure that the GST consequences that arise from a supply, acquisition or importation of the representative are the same as the consequences that would have arisen as if they were a supply, acquisition or importation of the incapacitated entity.

1.12 New Division 58 will also ensure that the representative is responsible for certain GST consequences which arise from a supply, acquisition or importation that falls within the scope of the representative's responsibility or authority for managing the incapacitated entity's affairs.

1.13 The main operative provisions relating to a supply, acquisition or importation of a representative and the provisions ensuring the representative is responsible for certain GST consequences will take effect from the date of the introduction of the GST on 1 July 2000. The consequential amendment to the *Fuel Tax Act 1996* will take effect from 1 July 2006 which is the commencement date for this Act. The remaining consequential and minor amendments will commence from the date of Royal Assent of this Bill.

1.14 The proposed retrospective amendments may give rise to a different GST outcome for supplies by representatives for inadequate or no consideration to associates of incapacitated entities. Schedule X will insert a transitional provision to ensure that taxpayers affected will not be adversely impacted.

1.15 Schedule X will also amend section 105-50 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) which provides a 4 year time limit on the Commissioner's ability to recover unpaid indirect tax. The proposed amendments will provide the Commissioner with an extension to the 4 year time limit to ensure that the Commissioner has the ability to recover any liability imposed by the retrospective amendments in circumstances where refunds may have been provided between the PM Developments' decision and enactment of the proposed amendments.

Comparison of key features of new law and current law

| <i>New law</i> | <i>Current law</i> |
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| <p>A supply, acquisition or importation by a representative, in its capacity as a representative, is taken, for GST purposes, to be a supply, acquisition or importation of the incapacitated entity.</p> <p>Further, any act or omission of a representative in its capacity as a representative, is taken, for GST purposes, to be an act or omission of the incapacitated entity for the purposes of applying any provision in the GST law which determines or otherwise affects whether:</p> <ul style="list-style-type: none">• a supply or importation made by an incapacitated entity is a taxable supply or a taxable importation or the amount of GST payable on the supply or importation;• an acquisition or importation made by an incapacitated entity is a creditable acquisition or creditable importation, or the amount of the input tax credit for the acquisition or importation; or• an adjustment arises in relation to a supply, acquisition or | <p>No equivalent.</p> |

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| <p>importation made by an incapacitated entity or the amount of any such adjustment.</p> <p>However, the representative (and not the incapacitated entity) is liable for or entitled to certain GST consequences that arise from a supply, acquisition or importation or related acts or omissions during the representative's appointment.</p> | |
| <p>A representative of an incapacitated entity must give to the Commissioner a GST return for a tax period applying to the incapacitated entity if the incapacitated entity has failed to give such a return and the Commissioner direct the representative to give the Commissioner the return. In directing a representative to give such a return, the Commissioner must take into account a number of factors.</p> | <p>No equivalent.</p> |
| <p>If a representative becomes aware, or could reasonably be expected to have become aware of, any increasing adjustments, or that an incapacitated entity is liable for GST, and the amount of GST or increasing adjustment is attributable to a tax period applying to the incapacitated entity for which a GST return has not been given to the Commissioner, the representative must not declare a dividend to unsecured creditors unless the representative has notified the Commissioner of such amounts.</p> | <p>Increasing adjustments that arise in relation to pre-appointment transactions undertaken by an incapacitated entity are, if a representative provides written notice to the Commissioner, to be treated as adjustments that an incapacitated entity has (instead of a representative).</p> |
| <p>Tax periods applying to a representative, in that capacity, are the same as those applying to the incapacitated entity.</p> <p>The tax period applying to an incapacitated entity at the time it becomes incapacitated ends at the end of the day before the entity became incapacitated.</p> | <p>Tax periods applying to a representative, in that capacity, are the same as those applying to an incapacitated entity.</p> |
| <p>The Commissioner must revoke the approval of a member of a GST Group if the member becomes incapacitated and the representative</p> | <p>No equivalent.</p> |

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| of the incapacitated entity applies to the Commissioner for the member's approval to be revoked. | |
| If a member of a GST group becomes incapacitated, the representative member of that group may elect to have the tax periods that apply to group members cease at the same time as the incapacitated entity's tax period ceases. | No equivalent. |
| An individual that is appointed as a representative of two or more incapacitated entities may elect to lodge one consolidated GST return per tax period (rather than a separate return for each incapacitated entity) if the incapacitated entities are members of the same GST group. | No equivalent. |
| A representative is entitled to apply any money which the representative receives in his or her capacity as representative in order to pay liabilities that arise as a result of the operation of new Division 58. | No equivalent. |
| A representative is not liable to civil or criminal proceedings in relation to an act done, or omitted to be done, in good faith, in the performance or exercise of his or her duties or powers under, or in relation to, the GST Act. | No equivalent. |

Detailed explanation of new law

1.16 Division 147 of the GST Act contains provisions relating to representatives of incapacitated entities. The explanatory memorandum to the GST Bill provides that the intention of Division 147 is to ensure that the representative is personally liable for the GST payable and for the other requirements of the GST legislation.

1.17 The GST law concerning representatives of incapacitated entities has been administered in a manner consistent with the intent expressed in the explanatory memorandum. However, the PM Developments decision found that a liquidator is not liable for GST arising from a transaction occurring during the period of the liquidator's appointment. Instead, the Court found that the GST liability is a liability of the company in liquidation.

1.18 The Federal Court judgement is contrary to the stated policy intention of Division 147. As a result, the Government has decided to amend the GST law to ensure it achieves the stated policy objective.

1.19 The operative provisions that will ensure that representatives are responsible for certain GST consequences will take effect from the commencement of the GST law on 1 July 2000. The consequential amendment to the *Fuel Tax Act 1996* will take effect from 1 July 2006 which is the commencement date for this Act. The remaining consequential or minor provisions will commence from the date of Royal Assent of the Bill.

1.20 Schedule X will replace Division 147 of the GST Act with new Division 58 to ensure that a representative of an incapacitated entity is responsible for certain GST consequences that arise during its appointment. It is intended that a supply, acquisition or importation of the representative will be treated as a supply, acquisition or importation of the incapacitated entity for the purposes of determining the GST consequences for the representative.

Supplies, acquisitions or importations by representatives of incapacitated entities

1.21 New section 58-5 will ensure that a supply, acquisition or importation by a representative, in its capacity as representative, is taken, for GST purposes, to be a supply, acquisition or importation by the incapacitated entity and not the representative. [subsection 58-5(1)]

1.22 Further, under new subsection 58-5(2), any act or omission of a representative is taken, for GST purposes, to be an act or omission of the incapacitated entity for the purposes of applying any provision in the GST law which determines or otherwise affects whether:

- a supply or importation is a taxable supply or a taxable importation or the amount of GST payable on the supply or importation;
- an acquisition or importation is a creditable acquisition or a creditable importation, or the amount of the input tax credit for the acquisition or importation; or
- an adjustment arises in relation to a supply, acquisition or importation made by an incapacitated entity or the amount of any such adjustment.

1.23 The intention of these two subsections is to ensure that the GST consequences that arise for the representative are the same as the

consequences that would have arisen if they were supplies, acquisitions or importations or related acts or omissions of the incapacitated entity. For example, these provisions will ensure that:

- any method that the incapacitated entity would have been eligible to use to work out the amount of GST payable on a supply (such as the margin scheme under Division 75) can be used;
- a supply the representative makes for no consideration to an associate of the incapacitated entity is subject to GST if it would have been subject to GST had it been made by the incapacitated entity; and
- supplies made by the representative in that capacity are taken into account in determining whether the incapacitated entity is required to be registered (which, in turn, will determine whether the representative is required to be registered).

1.24 New subsection 58-5(3) ensures that a seamless transition occurs in cases where the incapacitated entity continues to operate after the representative's appointment has ended. For example, an entity that was previously incapacitated will not be prevented from claiming an input tax credit in relation to a supply of second-hand goods it makes on the technicality that the goods were acquired by the representative while the entity was an incapacitated entity.

1.25 Finally, subsection 58-5(4) will ensure that for the purposes of the provisions relating to bad debts in Division 21 of the GST law, the act of a representative to account on a cash basis will not be taken to be an act of the incapacitated entity. In this regard, it is noted that the accounting basis of a representative need not be the same as the accounting basis of the incapacitated entity.

1.26 Subsection 58-5(4) ensures that the action by a representative to account for GST on a cash basis does not prevent an adjustment that would otherwise have arisen under Division 21 from arising due to subsections 21-5(2) and 21-15(2).

1.27 Generally, under section 58-5 the decision of a representative to account on a cash basis would not be an act of the representative that would be taken to be an act of the incapacitated entity. However, under Division 21, this action by a representative may be relevant in determining whether an adjustment arises. The operation of new subsection 58-5(2) may mean this action could be taken to be the action of the incapacitated entity.

1.28 The overall effect of section 58-5 will be to ensure that the incapacitated entity will always be liable for, or entitled to, the GST consequences that arise from supplies, acquisitions and importations made during the period of the representative's appointment regardless of whether it was the incapacitated entity or the representative that undertook these transactions. This places all types of representation on common footing and provides a consistent base from which the relevant liabilities and entitlements can be transferred to the representative.

Representative liable for GST, entitled to input tax credits or has adjustments in some circumstances

1.29 New section 58-10 sets out the circumstances in which a representative of an incapacitated entity will be liable for GST on a taxable supply or a taxable importation, entitled to an input tax credit for a creditable acquisition or creditable importation and will have any adjustments.

1.30 New subsection 58-10(1) provides that a representative of an incapacitated entity is liable for any amount of GST, is entitled to any input tax credit, and has any adjustment that would, in the absence of this section, be an amount that the incapacitated entity is liable for, or entitled to. However, this only applies if the making of the supply, acquisition or importation to which the amount of GST, input tax credit, or adjustment relates is within the scope of the representative's responsibility or authority for managing the incapacitated entity's affairs.

1.31 The references to sections 48-40, 40-45 and 48-50 in paragraphs 58-10(1)(a), (b) and (c) respectively, provide for circumstances where the liability or entitlement would not be with the incapacitated entity because the incapacitated entity is a member of a GST group.

1.32 Subsections 58-10(2) and (3) provide a number of exemptions from the general rule in subsection (1). In particular, the representative of an incapacitated entity is not liable for or entitled to any GST related amounts to the extent that consideration for a taxable supply or creditable acquisition was received or provided before the representative became a representative of the incapacitated entity. [58-10(2)(a) and 58-10(3)(a)].

1.33 Further, the representative of an incapacitated entity is not liable for or entitled to any GST related amounts to the extent that the GST payable or input tax credit is attributable to a tax period applying to the representative that ends after the representative ceases to be a representative. [58-10(2)(d) and 58-10(3)(b)].

1.34 There are two further exceptions to the requirement that the representative is liable for GST on taxable supplies or importations within the scope of its authority. These relate to reverse-charged GST and vouchers. The representative is not liable for GST if under Divisions 83 or 84 the GST is payable by the recipient of the supply and the incapacitated entity provided any of the consideration for this supply before the representative became a representative. [58-10(2)(b)]

1.35 The representative is also not liable for any GST payable on a supply a representative makes to honour a voucher issued by the incapacitated entity, to which Division 100 applies,. This applies to the extent that the consideration provided for the representative's supply does not exceed the consideration provided for the incapacitated entity's supply of the voucher.

1.36 The intention of this provision is to ensure that a representative who honours a voucher issued by the incapacitated entity is not liable to remit GST on their supply as, effectively, the payment for the supply was provided to the incapacitated entity. The representative will only be liable to pay GST on the supply made on redemption of the voucher to the extent that it is entitled to receive additional consideration (that is, consideration in addition to the voucher itself). [paragraph 58-10(2)(c)]

1.37 New subsection 58-10(4) provides that the representative does not have adjustments in certain circumstances. The representative does not have an adjustment to the extent that the incapacitated entity received consideration for the supply or provided consideration for the acquisition to which the adjustment related before the representative's appointment. [paragraphs 58-10(4)(a) and (b)]

1.38 Further, the representative does not have an adjustment to the extent that the adjustment would not be attributable to a tax period applying to the representative. [paragraph 58-10(4)(c)]

1.39 Finally, new subsection 58-10(5) provides that an incapacitated entity, (or a representative member of an incapacitated entity if the incapacitated entity is a member of a GST group), is not liable for GST, entitled to input tax credits or has any adjustment if a representative is liable or entitled to such amounts.

Adjustments for bad debts

1.40 Division 21 of the GST Act provides for adjustments to arise where debts of an entity are written off. The adjustments are intended to ensure that any GST paid or input tax credits claimed where consideration is not received or provided is refunded or repaid. This is only necessary

in circumstances where an entity accounts on a non-cash basis where liability and entitlement can be attributed before consideration is received or provided.

1.41 Where a representative is appointed to an incapacitated entity, depending on the accounting basis of the representative and the incapacitated entity, Division 21 may not operate effectively.

1.42 New section 58-15 ensures that the bad debt provisions in Division 21 operate to ensure that bad debt adjustments cannot arise where GST has not been paid or an input tax credit has not been claimed.

1.43 For example, without this provision, if a representative that accounts for GST on a cash basis “makes” a taxable supply but does not receive the consideration for the supply within 12 months of the due date for payment, a bad debt adjustment may arise if the incapacitated entity accounts on a non-cash basis. This is because under proposed 58-5 it is the incapacitated entity and not the representative that would be taken to have made the supply.

Attribution rules

1.44 The interaction of the attribution rules and new Division 58 should not result in entitlements or liabilities not being attributable to any entity or conversely being attributed to more than one entity. In addition, liability for a supply should not be attributed to an entity that did not receive consideration in respect of the supply. These circumstances may arise where either an incapacitated entity or the representative account for GST on a non-cash basis.

1.45 New subsection 58-40(1) ensures that any amount of GST or input tax credit that a representative is liable for or entitled to (under section 58-10) is, to the extent the amount would have been attributable to a tax period that ended prior to the time the representative became a representative of the incapacitated entity, instead attributable to the first tax period applying to the representative that begins on or after this time. This will only apply to a representative that does not account for GST on a cash basis.

1.46 New subsection 58-40(2) provides that, if a representative is liable for any amount of GST payable on a supply or entitled to an input tax credit for an acquisition, the incapacitated entity is, to the extent that the incapacitated entity is also liable for an amount of GST on the supply or entitled to an input credit for the acquisition, required to attribute the amount as though it were accounting for GST on a cash basis. This rule

will only apply if the incapacitated entity does not account for GST on a cash basis.

Registration

1.47 New sections 58-20, 58-25 and 58-30 are consistent with sections 147-5, 147-10 and 147-15 of the current law. These provisions ensure that a representative of an incapacitated entity is required to be registered in that capacity if the incapacitated entity is registered or required to be registered. When the appointment of a representative ends, the representative must notify the Commissioner within 21 days of the end of the appointment. The Commissioner must cancel a representative's registration if the Commissioner is satisfied that the representative is not required to be registered in that capacity.

GST returns and notifications

1.48 New section 58-50 allows a representative that is appointed to 2 or more incapacitated entities that are members of a GST group to give the Commissioner one return for a tax period in respect of the entities.

1.49 New section 58-55 provides that a representative of an incapacitated entity must give to the Commissioner a GST return for a tax period applying to the incapacitated entity if the incapacitated entity has failed to give such a return and the Commissioner direct the representative to give the Commissioner the return. In directing a representative to give such a return, the Commissioner must take into account a number of factors such as:

- the prospect for, and likely size of a dividend being paid to unsecured creditors;
- the likelihood that the return would, if lodged, reveal an increase in tax liabilities owed to the Commissioner;
- the availability of books and records which would make it possible to prepare the returns;
- the likelihood that the representative's cost of preparing those returns would be covered by the assets of the incapacitated entity without resulting in an inordinate adverse impact on other creditors; and
- any other factors the Commissioner considers relevant.

1.50 New section 58-60 provides that a representative must notify the Commissioner of certain liabilities of the incapacitated entity that it becomes aware of or could reasonably be expected to become aware of for which a GST return has not been given to the Commissioner. In these circumstances the representative must not declare a dividend to unsecured creditors unless the representative has notified the Commissioner of such amounts.

Tax periods

1.51 New subsection 27-39 specifies what happens in relation to an entity's tax periods if it becomes incapacitated. In particular, the tax period applying to an incapacitated entity at the time it becomes incapacitated ends at the end of the day before the entity became incapacitated. The next tax period starts on the day after the tax period ends and ends when the first tax period would have ended.
[section 27-39]

1.52 Item 7 of the schedule amends existing subsection 27-40(1) which provides for an entity's concluding tax period in certain circumstances. This amendment ensures that all incapacitated entities have concluding tax periods. Currently, an incapacitated entity may or may not have a concluding tax period depending on the type of representation to which it is subject.

1.53 Consistent with existing section 147-25, new section 58-35 provides that if a representative of an incapacitated entity is required to be registered, the tax periods applying to the representative are the same tax periods that apply to the incapacitated entity.

1.54 These amendments relating to tax periods will assist in separating pre-appointment and post-appointment liabilities. It will also ensure that all incapacitated entities will be required to pay any net GST liability for their concluding tax period on or before the 21st day of the month following the end of the concluding tax period under section 33-5.

GST groups and incapacitated entities

1.55 Division 48 of the GST Act provides that two or more closely-related entities may form a GST group if they satisfy certain requirements. In particular, all group members must have the same tax periods and the group must nominate one member as the representative member of the GST group. The representative member of a group is the only member of the group required to lodge a GST return. It is liable for the GST payable on supplies made by group members and is entitled to

any input tax credits arising from acquisitions group members make. Intra-group transactions are effectively ignored.

1.56 A member of a GST group that becomes incapacitated will generally be required to exit the GST group. Such an entity would normally have a concluding tax period under section 27-40 of the GST Act and, as this tax period would differ from those applying to other members, the entity would no longer satisfy the membership requirements of the group.

1.57 In these circumstances, the incapacitated entity will be required to exit the GST group from the start of a tax period applying to group members. Thus, the incapacitated entity will be required to exit the group 'retrospectively' (that is, from the start of the tax period that applied to group members at the time it became incapacitated). This creates difficulties for the group as a whole as, during the first part of that tax period, they would have accounted for GST as though they were a group.

1.58 New section 48-72 provides that if a member of a GST group becomes incapacitated, the representative member of that group may elect to have the tax periods that apply to group members cease at the same time as the incapacitated entity's tax period ceases. [item 14 section 48-72]

1.59 If the representative member elects to have the group members' tax periods cease, it must lodge a GST return (for the group, including the incapacitated entity) on or before the 21st day of the month following the end of the tax period. The representative will also be required to pay any net GST liability for the tax period on or before this day. As a result of this election, the tax periods applying to all group members will be the same and the incapacitated entity will not be required to exit the group on the basis that it has different tax period to other members of the GST group.

1.60 If the representative member does not make an election under section 48-72 when a member of the GST group becomes an incapacitated entity, it is likely that the incapacitated member will no longer satisfy the grouping eligibility requirements and will be required to exit the group.

1.61 The intention of new section 48-72 is to provide the opportunity for an incapacitated entity to remain part of a GST group. This may reduce compliance costs especially where an incapacitated entity continues to trade in its own right during the period of the representative's appointment.

1.62 Further, item 13A amends section 48-70 to provide that the Commissioner must revoke the approval of a member of a GST Group if

the member becomes incapacitated and the representative of the incapacitated entity applies to the Commissioner for the member's approval to be revoked.

1.63 A representative may be appointed as a representative of two or more incapacitated entities that are part of the same GST group. In accordance with subsection 184-1(3) of the GST Act, the representative is taken to be a different entity in relation to each incapacitated entity that it represents. Thus, it will be required to account for GST separately in relation to each of these entities.

1.64 However, new section 58-45 provides that where a representative is appointed as a representative of two or more incapacitated entities, the representative may elect to lodge one consolidated GST return per tax period (rather than a separate return for each incapacitated entity) if the incapacitated entities are members of the same GST group.

1.65 The intention of the amendments in relation to GST groups is to provide flexibility and reduce compliance costs in circumstances where one or more members of a GST group becomes incapacitated.

Indemnity

1.66 Under new section 58-65 a representative will be indemnified for any payment it makes to meet its GST obligations.

1.67 Even though a representative may be appointed to an incapacitated entity, in most but not all cases (such as where the assets are vested in the representative), the incapacitated entity retains both the legal and beneficial ownership of any property even though it can no longer deal with that property. As the funds received by the representative in such cases will still belong to the incapacitated entity, an indemnification clause is required to ensure that the legal representative can use the incapacitated entity's assets to make GST payments to meet its GST obligations.

1.68 Further, new section 58-70 provides protection against civil or criminal proceedings in relation to an act done or omitted to be done in good faith in the performance of the representative's duties under the GST law.

Application and transitional provisions

1.69 New provisions 58-1 to 58-15, 58-40 and minor related consequential amendments will commence from 1 July 2000. The consequential amendment to the *Fuel Tax Act 1996* will take effect from 1 July 2006 which is the commencement date for this Act. The remainder of the amendments will take effect from the date of Royal Assent.

Supplies to associates of incapacitated entities

1.70 The proposed retrospective amendments may give rise to an anomalous outcome in relation to supplies by a representative of an incapacitated entity to an associate of the incapacitated entity for no consideration.

1.71 Division 72 of the GST Act provides that a supply between ‘associates’ may be a taxable supply even though there is no consideration. In most cases an associate of an incapacitated entity will not be an ‘associate’ of the representative. Accordingly a supply made by a representative to an associate of the incapacitated entity would not be treated as a taxable supply if there was no consideration provided by the associate.

1.72 In contrast, under section 58-5, a supply by a representative to an associate of the incapacitated entity for no consideration will be covered by Division 72 as the supply will be taken to be a supply of the incapacitated entity.

1.73 Item 15A provides a transitional rule that will prevent Division 72 from applying to past supplies by representatives to associates of incapacitated entities for no consideration or inadequate consideration. The new provisions will apply in respect of any such supplies made after the date of Royal Assent.

Repeal of Division 147 – transitional provisions

1.74 The repeal of Division 147 will take effect from the date of Royal Assent. The provisions in new Division 58 requiring notifications and returns by representatives will also take effect from the date of Royal Assent of the bill. In light of this a number of transitional provisions are required.

1.75 Section 147-20 is amended to ensure it only applies to increasing adjustments for the period between 1 July 2000 and the date of Royal Assent of the bill.

1.76 Items 20AA and 20A ensure that cancellations of registration under section 147-10 and notices under section 147-15 still have effect under the new relevant provisions in Division 58 that is, sections 58-25 and 58-30 respectively.

Time limit on recovery by the Commissioner

1.77 Section 105-50 of Schedule 1 to the TAA 1953 provides for a 4 year time limit on the Commissioner's ability to recover unpaid indirect tax. That is, an unpaid amount ceases to be payable if 4 years have passed after the date it was due for payment. Similarly, section 105-55 provides that entitlements to refunds and credits will expire 4 years after the end of the tax period to which they relate.

1.78 The proposed amendments in Schedule X will have the effect of 'reimposing' liability for GST payable on a representative of an incapacitated entity in accordance with the proposed provisions.

1.79 However, if a refund of GST previously paid is made in accordance with the law between the date of the Federal Court decision (12 December 2008) and the commencement of Schedule X, the proposed amendments will have the effect of reimposing that liability upon the representative unless the liability falls outside the 4 year limit.

1.80 Item 33 inserts a transitional provision to provide the Commissioner with an extension to 4 year time limit to ensure that the Commissioner has the ability to recover the liability imposed by the retrospective amendments in circumstances where refunds may have been paid between the Federal Court decision and commencement of the proposed amendments.

1.81 In particular, the 4 year period within which the Commissioner may recover unpaid tax will be extended to 4 years from the date on which the refund was claimed.

Refunds of amounts wrongly paid by incapacitated entities

1.82 Item 34 provides that if an amount is payable by a representative of an incapacitated entity to the Commissioner, but was paid by the incapacitated entity after the appointment of the representative, the incapacitated entity is not entitled to a refund of the amount unless the representative has paid the amount to the Commissioner.

Consequential amendments

1.83 The proposed amendments insert a new Division 58 dealing with representatives of incapacitated entities. As a result existing Division 147 is repealed. A number of transitional provisions ensure there are no anomalous outcomes as a result of the retrospective commencement of new Division 58 and repeal of Division 147.

1.84 There are also a number of amendments reorganising headings, notes and other things that need to be removed or changed because of the introduction of the new provisions.

1.85 A consequential amendment will be made to subsection 110-50(2) of the TAA 1953 to replace the reference to Division 147 with Division 58.

1.86 A consequential amendment will be made to section 70-25 of the *Fuel Tax Act 2006* to replace the reference to 'Division 147' with a reference to 'Divisions 58 and 147' from 1 July 2006 until the date of Royal Assent of this Bill. From the date of Royal Assent the reference in section 70-25 will be to 'Division 58' only.

