

2009

EXPOSURE DRAFT

TAX LAWS AMENDMENT (2009 GST
ADMINISTRATION MEASURES) BILL 2009

EXPLANATORY MATERIAL

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***T**able of contents*

Glossary.....	1
Chapter 1 Creating a consistent four-year period for claiming input tax credits and fuel tax credits	3
Chapter 2 Australian External Territory refund collection system	17
Chapter 3 Agency provisions	27
Chapter 4 Gambling supplies to entities outside Australia	33
Chapter 5 Recovering overpaid refunds.....	37
Chapter 6 Interaction of associate provisions.....	45

Glossary

The following abbreviations and acronyms are used throughout this explanatory material.

<i>Abbreviation</i>	<i>Definition</i>
ATO	Australian Taxation Office
Commissioner	Commissioner of Taxation
Fuel Tax Act	<i>Fuel Tax Act 2006</i>
GIC	general interest charge
GST	goods and services tax
GST Act	<i>A New Tax System (Goods and Services Tax) Act 1999</i>
LCT Act	<i>A New Tax System (Luxury Car Tax) Act 1999</i>
WET Act	<i>A New Tax System (Wine Equalisation Tax) Act 1999</i>
TAA	<i>Taxation Administration Act 1953</i>

Chapter 1

Creating a consistent four-year period for claiming input tax credits and fuel tax credits

Outline of chapter

1.1 Schedule 1 to this exposure draft amends the *A New Tax System (Goods and Services Tax) 1999* (GST Act), the *Fuel Tax Act 2006* (Fuel Tax Act), the *Income Tax Assessment Act 1997* and the *Taxation Administration Act 1953* (TAA) to require that input tax credits and fuel tax credits are claimed within a four-year period.

Context of amendments

1.2 This measure implements recommendation 20 of the Board of Taxation in its review of the legal framework for the administration of the GST.

1.3 Under the GST Act, input tax credits are attributable to the first tax period in which either any consideration is provided by the recipient, or an invoice is issued. If the taxpayer accounts on a cash basis, input tax credits will only be attributable when and to the extent that the recipient provides consideration.

1.4 Two exceptions exist to this basic rule. Firstly, input tax credits cannot be attributed to a tax period unless a relevant tax invoice is held by the taxpayer in that tax period. Such input tax credits will instead be attributable to the first tax period in which the taxpayer holds a tax invoice (see subsection 29-10(3) of the GST Act). Secondly, if the GST return for a tax period does not take into account an otherwise attributable input tax credit, the input tax credit is not attributable to that tax period. Such credits are attributable to the first period in which a return is provided taking the credit into account (see subsection 29-10(4) of the GST Act).

1.5 Similar provisions exist for fuel tax credits (see section 65-5 of the Fuel Tax Act).

1.6 The TAA establishes a four-year limitation period for indirect tax liabilities and entitlements, including input tax credits (subject to special rules in situations involving fraud and evasion or where notice of the liability or entitlement has been provided). The four-year period for claiming input tax credits and fuel tax credits starts from the end of the tax period to which the relevant credit is attributable (see section 105-55 of the TAA).

1.7 As outlined above, the four-year period is imposed by reference to the tax period or fuel tax return period to which the credit was attributable. However, the attribution rules permit taxpayers to defer the attribution of credits until a later tax period. As a consequence there is no effective limitation period for claiming input tax credits and fuel tax credits.

1.8 Flexibility in attributing input tax credits and fuel tax credits benefits taxpayers and the Commissioner by minimising the need for revisions to prior returns. Removing this flexibility would increase compliance costs. However, it is also important to balance certainty and consistency generally for GST and fuel tax credits by limiting the time for revising liabilities and entitlements. Flexibility in attributing credits should not result in input tax and fuel tax credit entitlements existing indefinitely, including where the entity's liabilities for the same period are no longer due and payable because of the limitation period.

Summary of new law

1.9 Schedule 1 amends the GST Act, Fuel Tax Act and TAA to provide that a taxpayer will cease to be entitled to an input tax credit or fuel tax credit if the credit has not been claimed within four years. The four-year period starts from the date to which it would be attributable under the basic attribution rules in subsections 29-10(1) and (2) of the GST Act for input tax credits and subsections 65-5(1) to (3) of the Fuel Tax Act for fuel tax credits.

1.10 However, entitlements will not cease where:

- the Commissioner has issued a notice under section 105-50 or 105-55 of Schedule 1 to the TAA concerning refunds or additional liability and a credit directly relates to the specific circumstances of the taxpayer's refund or liability;
- the Commissioner is satisfied that the payment or non-payment of amounts by the taxpayer to which the

entitlement directly relates was avoided as a result of fraud or evasion; or

- the taxpayer or the Commissioner has issued a notice under section 105-55 of Schedule 1 to the TAA.

1.11 The amendments also allow credits to be taken into account where taxpayers are contractually required to make extra payments (by what is often termed a ‘gross-up clause’) after the expiry of four years, due to the supplier being liable for GST. Such taxpayers may have no opportunity to claim these input tax credits (or parts of input tax credits where the acquisition has previously been treated as partly creditable).

1.12 Making a payment as a result of a gross-up clause may now result in an adjustment for GST. Such adjustments will reduce a taxpayer’s net amount to the same extent as the relevant input tax credit (or part of an input tax credit) if it had been available.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Limits on claims	
Taxpayers will cease to be entitled to input tax credits and fuel tax credits that have not been taken into account in a return for a tax period or fuel tax return period after four years have passed from the date the credit would have been attributable under the basic attribution rules.	No effective limitation period applies to taxpayers’ claims for input tax credits or fuel tax credits.
Notice to extend limits on claims	
<p>Taxpayers remain entitled to input tax credits and fuel tax credits after the four-year period has passed if they or the Commissioner have provided notice allowing more time in relation to the credit.</p> <p>Taxpayers’ entitlements will also be preserved where the Commissioner has provided notice extending the claim for an amount and the input tax credit or fuel tax credit arises directly from the same circumstances.</p>	<p>Taxpayers and the Commissioner may issue notices allowing more time to claim indirect tax amounts, including input tax and fuel tax credits.</p> <p>However, this is generally of limited relevance to input tax credits and fuel tax credits as no effective limitation period applies.</p>

<i>New law</i>	<i>Current law</i>
Limits on claims related to fraud or evasion	
<p>Taxpayers can claim input tax credits and fuel tax credits after the four-year period has expired if the credits directly relate to an amount of tax not paid or a claim for a refund that the Commissioner is satisfied resulted from fraud or evasion.</p> <p>However, such credits cannot be taken into account to the extent they reduce a net amount to less than zero.</p>	<p>The Commissioner must take into account input tax credits and fuel tax credits attributable to a period in which the Commissioner is satisfied payment or non-payment of an amount results from fraud or evasion.</p> <p>However, such credits cannot be taken into account to the extent they reduce a net amount to less than zero.</p> <p>However, this is generally of limited relevance to input tax credits and fuel tax credits as no effective limitation period applies.</p>
Adjustments for 'gross-up clauses'	
<p>An adjustment for GST will occur where a taxpayer is contractually obliged to provide an additional payment because their supplier is liable for GST or additional GST and the four-year period has expired.</p> <p>The adjustment will reduce the taxpayer's liability by the amount of the input tax credit to which they would otherwise have been entitled.</p>	<p>An adjustment for GST may not arise where additional payment is contractually required as a result of the supplier's GST liability.</p> <p>However, this is generally of limited relevance to input tax credits and fuel tax credits as no effective limitation period applies.</p>

Detailed explanation of new law

Time limit on entitlements to credits

1.13 Following the amendments, input tax credits and fuel tax credits must be taken into account in the calculation of a net amount or net fuel amount within four years of the period to which the credit would have been attributable under the subsections 29-10(1) and (2) of the GST Act and subsections 65-5(1) to (3) of the Fuel Tax Act. Where an input tax credit or fuel tax credit is not taken into account in the calculation of a net amount in this time, the taxpayer ceases to be entitled to the credit. *[Schedule 1, item 7, sections 93-1 and 93-5 (GST) item 14, section 47-5 (Fuel tax credits)]*

1.14 Under subsection 29-10(1) of the GST Act, taxpayers who account on a non-cash basis attribute input tax credits to the first tax period in which they hold an invoice or provide any part of the consideration for the acquisition. As a result, following the introduction of this measure, these taxpayers will generally cease to be entitled to input tax credits if they do not take account of the credit within four years of the end of a tax period in which the taxpayer provided payment or an invoice was issued for the acquisition.

1.15 Under subsection 29-10(2) of the GST Act, taxpayers who account on a cash basis attribute input tax credits when and to the extent that consideration is provided for the related acquisitions. As a result, these taxpayers will generally cease to be entitled to an input tax credit or part of an input tax credit four years after the end of the tax period in which the taxpayer provided the relevant portion of the consideration.

1.16 Equivalent rules apply to entities that account for fuel tax credits under Division 65 of the Fuel Tax Act.

1.17 These changes will not affect the entitlement of taxpayers to input tax credits or fuel tax credits where these amounts have been taken into account in earlier returns or assessments but the relevant amount has not been paid (whether by the Commissioner or by taxpayers).

Exceptions to the time limit for credits

1.18 The amendments also provide for three exceptions to the general rule that entitlements cease after the four-year period has elapsed. [*Schedule 1, item 7, subsection 93-5(2) (GST), item 14, paragraph 47-5(2) (Fuel tax credits)*]

Notices removing the time limit for liabilities

1.19 The first exception applies where the Commissioner notifies the taxpayer of an amount for which the taxpayer is liable.

1.20 The Commissioner can prevent the limitation period applying to an amount by providing notice to the taxpayer requiring payment of the amount within the relevant four-year period (section 105-50).

1.21 This ability to pursue liabilities in circumstances where the taxpayer may have ceased to be entitled to related input tax credits or fuel tax credits could result in inequities. The exception addresses this concern by preserving the entitlement of taxpayers to credits where they arise as an immediate consequence of the circumstances for which the Commissioner has issued the notice. [*Schedule 1, item 7, paragraph 93-5(2)(a) (GST), item 14, paragraph 47-5(2)(a) (fuel tax credits)*]

1.22 For an input tax credit or fuel tax credit to meet these requirements, it is not sufficient that the credit arise from the same business activity or the same tax period. For the credit to be sufficiently related, it must arise from the same basis on which the additional payment is sought by the Commissioner from that taxpayer. This would include an input tax credit for an acquisition related to a taxable supply that was wrongly treated as a financial supply for which the Commissioner has provided notice requiring payment.

1.23 Input tax credits and fuel tax credits may fall within this exception even where they arise in different periods from the liability for which the Commissioner provides notice. However, where the notice is provided after entitlement to a credit has already ceased, the entitlement will not be restored.

Example 1.1

Sophie operates a business that is registered for GST, reporting monthly. In October 2006, she changed accountants and due to a mix up failed to provide a GST return or remit tax for that tax period. In May 2010, this omission was identified during an ATO audit of Sophie's business. The Commissioner then provided Sophie with a notice requiring payment for the October 2006 tax period, meeting the requirements of section 105-50 of Schedule 1 to the TAA.

Following further discussions with the ATO, Sophie determines her net amount for the relevant tax period and lodges a return for the October 2006 tax period in November 2010. Sophie holds a tax invoice to establish her entitlement to input tax credits and is able to include the input tax credits that were attributable to this tax period in this net amount, despite entitlement typically ceasing after four years. This reflects that these input tax credits arise directly from the same circumstances as the notice – the failure to lodge. As Sophie had made significant acquisitions in this period, the relevant input tax credits exceeded her GST liabilities, making her net amount negative. Following lodgment, Sophie receives a refund from the Commissioner.

Example 1.2

LLE P/L is a property investment company that is registered for GST, reporting on a monthly basis. In January 2006, it sold a motel complex, treating the sale as an input taxed supply of residential premises. LLE P/L made a number of acquisitions related to this sale, including legal services attributable to the month of sale and valuation services in August 2005. LLE P/L also made a creditable acquisition related to a sale of commercial residential premises for which it did not claim any input tax credits.

In September 2009, LLE P/L is audited by the ATO. The auditors identify that the motel complex was a taxable supply of commercial residential premises. The Commissioner provides LLE P/L with a notice meeting the requirements of section 105-50 of Schedule 1 to the TAA in relation to the underpayment in January 2006 due to the treatment of the sale as input taxed.

In November 2009, the Commissioner makes an assessment of LLE P/L's net amount for the November 2006 tax period. In working out the new net amount for this period, the input tax credits related to the legal costs may be taken into account. LLE P/L, however, may not claim the credit for the valuation, as, while it did arise directly from the relevant circumstances, more than four years had passed since the credit was attributable when the notice was issued. LLE P/L is also not entitled to the unrelated credit. This credit does not arise directly out of the matter for which the notice was issued.

Fraud and evasion

1.24 The second exception applies to credits that relate to liabilities avoided as a result of fraud or evasion.

1.25 Under paragraph 105-50(3)(b) of Schedule 1 to the TAA, the limitation period established by section 105-50 does not apply to amounts or amounts of excess where the Commissioner is satisfied that payment was avoided or brought about by fraud or evasion.

1.26 The ability of the Commissioner to pursue such liabilities in circumstances where taxpayers would have ceased to be entitled to input tax credits that have gone unclaimed on the same basis would be inequitable. This exception addresses this concern by preserving the entitlements to input tax credits where the input tax credit arises as an immediate consequence of the fraudulent or evasive behaviour of the taxpayer. [*Schedule 1, item 7, paragraph 93-5(2)(b) (GST), item 14, paragraph 47-5(2)(b) (fuel tax credits)*]

1.27 The relationship required between such credits and the fraudulent or evasive activity is the same as outlined above for notices issued by the Commissioner.

1.28 This exception applies to all credits arising directly from circumstances in which the Commissioner is satisfied involve fraud or evasion. Unlike the exception that applies where the Commissioner issues a notice, this exception can result in input tax credits and fuel tax credits being available after the taxpayer has ceased to be entitled to the credit.

Example 1.3

Fiona operates a plumbing business that has been registered for GST since January 2003. In the course of her business, Fiona will occasionally take special jobs out of hours. Payment for these special jobs must be in cash and, despite advice from her accountant, Fiona does not pay GST on these sales or claim input tax credits for parts and other supplies she obtains for these special jobs.

In November 2010, the ATO uncovers these unreported transactions. The Commissioner forms the view that Fiona's behaviour in not declaring or paying tax on the special jobs constitutes evasion and assesses Fiona on the unpaid tax on these sales dating back to January 2003, relying on paragraph 105-50(3)(b) of Schedule 1 to the TAA. As the acquisition of the parts and other supplies relates directly to the evasion, Fiona may still claim the relevant input tax credits despite the elapsed time.

Notices removing the time limits for refunds and credits

1.29 The third and final exception applies where the taxpayer notifies the Commissioner of their entitlement to a credit.

1.30 Under subsection 105-55(1) of Schedule 1 to the TAA, taxpayers may notify the Commissioner of their entitlement to a refund, other payment or credit. Providing such a notification allows the taxpayer more time to claim the relevant amount.

1.31 This exception ensures that taxpayers will remain entitled to credits after the expiry of four years where the required notice of the credit has been provided. [*Schedule 1, item 7, paragraph 93-5(2)(c)(GST), item 14 paragraph 47-5(2)(c) (fuel tax credits)*]

1.32 However, the notice only preserves the entitlement to the credit. Where a taxpayer has already ceased to be entitled to an input tax credit or fuel tax credit, the issue of a notice will not restore this entitlement. [*Schedule 1, item 7, subparagraph 93-5(2)(c)(ii) (GST), item 14, paragraph 47-5(2)(c)(ii) (fuel tax credits)*]

1.33 Taxpayers will not be able to preserve their entitlement by issuing notices where section 105-55 does not apply, such as input tax credits that are not attributable as no tax invoice is held. However, if the taxpayer makes a request to the Commissioner to treat another document as a tax invoice within the four-year period and the Commissioner agrees to the request, the request will be a notice for the purposes of section 105-55 and entitlement to the credit will not cease. This may be the case even where the Commissioner's agreement to the request occurs after the four-year period. [*Schedule 1, item 13, subsection 105-55(2A)*]

1.34 Where an entitlement to an input tax credit or fuel tax credit is preserved as a result of this exception, the credit may be attributed and claimed in a tax period under the normal rules in the GST Act or Fuel Tax Act. Typically, taxpayers may include the input tax credit or fuel tax credit in the net amount or net fuel amount for either the current tax period or fuel tax return period, or the period to which it was attributable under the general attribution rules in the relevant act (subsections 29-10(1) and (2) of the GST Act and subsections 65-5(1)-(3) of the *Fuel Tax Act 2006*).

Example 1.4

Matthew operates a toy store and is registered for GST, reporting on a quarterly basis. In June 2006 he purchases and pays for a stock of dolls and action figures. This was a creditable acquisition. However, Matthew does not receive a tax invoice.

In May 2010 Matthew realises he has not obtained the relevant input tax credit. He applies to the Commissioner to treat the invoice he holds as a tax invoice and lodges a notice with the Commissioner relating to the input tax credit that meets the requirements of section 105-55 of Schedule 1 to the TAA. In July 2010, the Commissioner agrees to this request. At this point, Matthew's request becomes a valid notification for the purposes of section 105-55. Had Matthew not made this request or not made it within the four-year period he would not have been entitled to this credit. However, as he is treated as having notified the Commissioner at the time he made the request, Matthew is still entitled to the credit and can include it in the net amount for the original period or the current period (due to the notice).

Adjustments for payments resulting from gross-up clauses

1.35 The exposure draft also amends the GST Act to create an adjustment rule. Taxpayers that have made an acquisition must adjust their GST liability or entitlement where they are contractually required to provide payment as a result of a supplier being liable to pay GST after the taxpayer has ceased to be entitled to the relevant input tax credit.
[Schedule 1, item 7, section 133-5]

1.36 It is the responsibility of suppliers to determine what, if any, GST liabilities they may incur as a result of their commercial activities. However, it is common for clauses to be included in commercial agreements entitling the supplier to additional amounts should supplies made under the contract prove to be subject to GST. Such clauses, termed GST gross-up clauses, are standard practice in many contracts. Depending on the drafting of the clause, they may require an extra amount to be paid in the event the supply is subject to GST or provide that the consideration under the contract includes the stated amount plus any applicable GST.

1.37 As a result, where the Commissioner is entitled to pursue liabilities, including beyond four years, the supplier may be entitled to rely upon such a gross-up clause to pass on the burden of the tax to the recipient.

1.38 In this situation, where the nature of the gross-up clause is such that this payment does not result in an adjustment under Division 19 of the GST Act, the recipient is left bearing the burden of the tax. Despite the Commissioner seeking payment outside the limitation period, the entitlement to an input tax credit on the acquisition is not preserved. The exceptions outlined above apply only to the taxpayer who has been notified of a liability or engaged in fraud or evasion. It does not prevent the cessation of entitlement for recipients of suppliers engaging in fraud or evasion.

1.39 This approach reflects that, typically, where a supply has been incorrectly provided on the basis that it is GST-free, then the recipient has borne no GST and requires no relief. It is the supplier that bears the responsibility and the cost for their error.

1.40 However, this is not the case where a gross-up clause exists that allows the cost of the GST to be passed on to the recipient. Division 133 addresses this situation by providing that where a taxpayer must pay more as a result of a gross-up clause and they have ceased to be entitled to the input tax credit for the acquisition, the taxpayer will have a decreasing adjustment, reducing their GST liability. *[Schedule 1, item 8, subsection 133-5(1)]*

1.41 In some circumstances, gross-up clauses in contracts may be drafted in such a way as to allow the supplier to seek an extra payment if the supply is potentially taxable, even where the supplier can no longer be required to pay tax on the supply (such as where the limitation period for the Commissioner to seek payment of the liability has passed). In this case the matter is purely a contractual one between the supplier and recipient and no adjustment will be available as a result of these amendments. *[Schedule 1, item 8, paragraph 133-5(1)(c)]*

1.42 There will also be no adjustment under Division 133 where the underpayment occurred for some reason unrelated to tax. *[Schedule 1, item 8, paragraph 133-5(1)(a)]*

1.43 The amount of this decreasing adjustment will be equal to the difference between the amount of the input tax credit claimed and the amount which the taxpayer would have been entitled to claim (had the taxpayer held a relevant tax invoice). *[Schedule 1, item 8, subsection 133-5(2)]*

1.44 To avoid doubt, additional consideration is defined so as to include the payment of part of the consideration that parties may have treated as not being payable. [*Schedule 1, item 8, subsection 133-5(3)*]

Example 1.5

Michael operates a business selling ski gear and winter sports accessories that is registered for GST. In May 2005, he entered an agreement with Eli, who was closing his ski gear business (also registered for GST), to purchase Eli's remaining stock. The sale was treated as the supply of a GST-free going concern. The contract of sale contained a GST gross-up clause.

Eli was audited in November 2008. The auditor identified that the sale did not qualify as a going concern and the Commissioner assessed Eli in relation to the GST owing on the sale of the ski gear. In January 2009 Eli was issued with a notice requiring payment that met the requirements of section 105-50 of Schedule 1 to the TAA. Eli sought to have the decision of the auditor reviewed, but in June 2009 was told the decision had been confirmed. Eli then paid the outstanding GST and recovered the additional amount from Michael under the gross-up clause.

Michael was entitled to an input tax credit in relation to this sale, but this credit was attributable to May 2005 and so his entitlement has ceased. Michael will, however, have a decreasing adjustment to his GST liability or entitlement. He acquired the stock on the basis it was GST-free, has provided additional consideration due to the supply being found to be taxable, tax on the supply has been paid and Michael is no longer entitled to the input tax credit.

The amount of this decreasing adjustment will be the difference between the input tax credit Michael claimed, in this case zero, and the input tax credit to which Michael was entitled.

1.45 The amendments provide that, where a payment would result in a taxpayer having a decreasing adjustment also under Division 19, no adjustment will result under Division 19. This prevents the payment being, in effect, brought to account twice. This will not affect the obligations of the other taxpayers who may have an increasing adjustment under Division 19 for the same amount. [*Schedule 1, item 8, subparagraph 133-10*]

Application and transitional provisions

Application provisions

1.46 These amendments apply to GST returns and assessments for GST lodged or issued from the time of announcement (7.30 pm Australian Eastern Standard Time on 12 May 2009) and revisions to such returns and revised assessments issued or made after this time. *[Schedule 1, item 16]*

1.47 They apply to returns and assessment for the purpose of the Fuel Tax Act lodged or issued from 1 July 2010 and revisions to such returns and revised assessments issued or made after this time. *[Schedule 1, item 17]*

1.48 As the amendments apply to returns and assessments lodged after Budget night, it will affect taxpayers based on when they lodge a return, not the tax period to which the return relates. This means that the restriction on claiming input tax credits and fuel tax credits will apply to the tax period or fuel tax return period. Taxpayers will also not be able to claim input tax credits in tax periods that end before 12 May 2009 but for which they have not previously lodged returns, or been assessed or by seeking to amend earlier returns or assessments after this date.

Example 1.6

Rui operates a book binding business that is registered for GST, reporting on a monthly basis. In January of 2004 and again in September of 2008, Rui purchases additional book binding machines. Both of these purchases are creditable acquisitions and Rui receives a tax invoice and provides payment in the same month.

In June 2009, Rui realises that she has yet to claim an input tax credit for either purchase. As more than four years have elapsed since the end of the January 2004 tax period, Rui is no longer entitled to that input tax credit. She remains entitled to the input tax credit related to the September 2008 purchase.

Example 1.7

Sophie operates a restaurant that is registered for GST, reporting on a quarterly basis. In 2004 and 2005, she refurbishes her restaurant, acquiring new tables, purchasing some (and receiving a tax invoice) in the December 2004 quarter and the remainder in the June 2005 quarter. Sophie does not claim any input tax credits for these acquisitions.

In May 2009, Sophie identifies these unclaimed input tax credits and seeks to claim them in her return for the April 2009 quarter, which she lodges on 20 May. As this return has been lodged after 12 May 2009, the restriction applies. As a result, Sophie ceases to be entitled to the credits for the tables acquired in the December 2004 quarter, as this

input tax credit has not been taken into account in the calculation of a net amount in the required time. Sophie may, however, still claim the input tax credits for the tables acquired in the June 2005 quarter.

Example 1.8

Anthony operates a tree surgery business, accounting for GST monthly on a cash basis. In 2005, he purchases new tree felling equipment, providing payment in two instalments, one in April 2005 (when he receives the tax invoice for the whole transaction) and one in June 2005. He takes delivery of the equipment in July 2005. Anthony does not seek to claim the input tax credits for acquisitions at that time.

In his return for May 2009, Anthony seeks to claim the input tax credits for the acquisition. As this claim is made in a return after 12 May 2009, the restriction applies. As a result, Anthony may not claim that part of the input tax credits attributable to the April 2005 period under the rules in subsection 29-10(2). He has ceased to be entitled to this portion of the credit as he has not included it in the calculation of his net amount in the required time. He may, however, still claim the portion of the credit attributable under the general rules to June 2005.

Consequential amendments

1.49 There are also amendments to a number of definitions, headings and several notes that need to be removed or changed because of amendments to the GST Act, the *Income Tax Assessment Act 1997* and Schedule 1 to the TAA. [*Schedule 1, items 1 to 6, 9 to 13 and 15 to 16*]

Chapter 2

Australian External Territory refund collection system

Outline of chapter

2.1 Schedule 2 to this exposure draft amends the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) and the *A New Tax System (Wine Equalisation Tax) Act 1999* (WET Act) to allow residents of Australia's External Territories (such as Norfolk, Cocos and Keeling and Christmas Islands) to claim refunds of GST, or GST and wine equalisation tax (WET) under the tourist refund scheme. Claims can be made if Australian External Territory residents can show proof that the goods have been exported to their External Territory within 60 days after the day on which the goods were acquired.

Context of amendments

2.2 Exports and other supplies for consumption outside Australia are GST-free under certain circumstances. For GST purposes, Australia's External Territories are considered to be outside Australia. As such, supplies of goods exported to Australian External Territories are generally GST-free. Similarly, sales of wine to Australian External Territories are generally not subject to WET.

2.3 A supply by a business to a visiting Australian External Territory resident will generally be GST-free as an export, provided the External Territory resident can provide evidence that the goods have been exported.

2.4 In addition, the tourist refund scheme operates to entitle individuals who take goods outside Australia (including to an Australian External Territory) to a refund of the GST and WET that was payable on the supply of the goods. The scheme is administered for the Commissioner of Taxation (Commissioner) by the Australian Customs and Border Protection Service. Goods must be of a kind specified in the regulations and exported as accompanied baggage to qualify for a refund.

2.5 The Board of Taxation, in its review of the legal framework for the administration of the GST, recommended that a system be introduced under which residents of Australia's External Territories (such as Norfolk,

Cocos and Keeling and Christmas Islands) can claim refunds under the tourist refund scheme on unaccompanied baggage if they can show proof of shipping of exported goods to their External Territory (recommendation no. 31).

2.6 The Government's response to the Board of Taxation's recommendations was announced in Media Release No. 042, by the former Assistant Treasurer and Minister for Competition Policy and Consumer Affairs on 12 May 2009 in the context of the 2009-10 Budget.

Summary of new law

2.7 The amendments allow residents of Australia's External Territories (such as Norfolk, Cocos and Keeling and Christmas Islands) to claim refunds under the tourist refund scheme on goods not taken as accompanied baggage. Australian External Territory residents must show proof that the goods have been exported to their External Territory within 60 days after the day on which the goods were acquired to qualify for a refund of GST and/or WET.

2.8 Unless otherwise stated, it is intended that the current tourist refund scheme rules must be met for an Australian External Territory resident to qualify for a refund of GST or GST and subsequently WET. This includes the need for Australian External territory residents to present goods that are taken as 'accompanied baggage' to an officer of the Australian Customs and Border Protection Service on request at the tourist refund scheme facility.

2.9 Under the amendments, goods cannot be sold to Australian External Territory residents as GST-free exports where the recipient has also made a claim for a refund of the GST, or GST and subsequently WET under the tourist refund scheme. For goods to be sold as GST-free exports, the recipient must declare to the supplier that the goods were not subject to a refund claim for GST and/or WET under the tourist refund scheme.

2.10 This principle ensures that the supply of goods is not GST-free where a refund of the tax paid is also claimed under the tourist refund scheme.

2.11 This principle also ensures that a supply of wine is not free of WET where a claim for a refund of the tax paid is also made under the tourist refund scheme.

2.12 In the event that an Australian External Territory resident makes a tourist refund scheme claim on a GST-free supply, any wrongly paid refund is payable to the Commonwealth. A general interest charge is payable on the whole, or any part, of the recoverable amount that remains unpaid. The general interest charge is calculated from the later of the day the refund was made and the day the supply became GST-free.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Refund collection system – GST Act	
<p>Division 168 is expanded to also allow unregistered residents (who are not required to be registered) of Australian External Territories to claim refunds of GST on goods that are not exported as accompanied baggage to their External Territory under the tourist refund scheme. The goods must have been a taxable supply and exported in the manner specified in the regulations to qualify.</p> <p>An entity must satisfy one of the following to be classified as a resident of an Australian External Territory:</p> <ul style="list-style-type: none"> • the entity resides in an External Territory; • the entity’s domicile is in an external territory; or • the entity has actually been in an External Territory, continuously or intermittently, during more than half of the last 12 months. 	<p>Division 168 provides for the refund of GST borne on goods by tourists who make a claim at a tourist refund scheme facility prior to departure. The supply must have been a taxable supply and goods must be exported as accompanied baggage in the manner specified in the regulations.</p>
Recipients of GST-free exports declaration	
<p>In addition to existing requirements under subsection 38-185(3), goods cannot be sold to Australian External Territory residents as a GST-free export where a refund claim has been made under the tourist refund scheme for the GST borne.</p> <p>Similarly, wine cannot be sold without WET if a claim has been made for GST and therefore the WET borne by the Australian External Territory resident.</p>	<p>Subsection 38-185(3) sets out when a supplier of goods is treated as having exported the goods from Australia as GST-free exports: These include:</p> <ul style="list-style-type: none"> • before export, the supplier supplies the goods to an entity that is not registered or required to be registered; • that entity exports the goods from Australia; • the goods have been entered for export under the <i>Customs Act 1901</i>; • the goods have not been altered in any way, except as necessary to prepare them for export; and • the supplier has sufficient documentary evidence to show that the goods were exported.

<i>New law</i>	<i>Current law</i>
Refund collection system – WET Act	
<p>Division 25 is expanded to allow unregistered residents (who are not required to be registered) of Australian External Territories to claim refunds of wine tax borne on wine that is not exported as accompanied baggage to their External Territory. To qualify, the Australian External Territory resident must also be able to claim a refund of GST under the tourist refund scheme, the goods must have borne wine tax and be exported in the manner specified in the regulations.</p>	<p>Division 25 provides for the refund of WET borne on wine to tourists who make a claim at a tourist refund scheme facility prior to departure. The supply must have borne wine tax and the wine must be exported as accompanied baggage in the manner specified in the regulations.</p>

Detailed explanation of new law

2.13 Under the GST Act, a supply to an entity that subsequently exports the goods for consumption outside Australia will generally be GST-free as an export, provided the entity can supply evidence that the goods have been exported.

2.14 For GST purposes, Australia’s External Territories (such as Norfolk, Cocos and Keeling and Christmas Islands) are considered to be outside Australia. As such, supplies of goods exported to Australian External Territories are generally GST-free. Similarly, sales of wine to Australian External Territories are generally not subject to WET.

2.15 Alternatively, Australian External Territory residents can claim a refund of GST on the taxable supply, or a refund of GST and subsequently WET on any wine tax borne via the tourist refund scheme.

2.16 The tourist refund scheme operates to entitle individuals who take goods outside Australia (including to an Australian External Territory) to a refund of the GST and WET that was payable on the supply of the goods. The scheme is administered for the Commissioner by the Australian Customs and Border Protection Service. Exported goods must satisfy the following to qualify:

- The goods acquired must have been a taxable supply or borne wine tax;
- The goods purchased must total A\$300 (GST inclusive) or more;

- The goods are of a kind included in the GST regulations or the WET regulations; and
- The individual leaves Australia and exports the goods from Australia as accompanied baggage, in the circumstances set out in the regulations.

2.17 The amendments allow unregistered residents (who are not required to be registered) of Australian External Territories to claim refunds of GST, or GST and subsequently WET on goods that are exported to their External Territory under the tourist refund scheme. The amendments only apply to goods not exported as accompanied baggage. For accompanied baggage, claims can still be made under subsection 168-5(1). [*Schedule 2, item 7, subsection 168-5 (1) (GST), item 14, subsection 25-5(1) (WET)*]

2.18 For an Australian External Territory resident to qualify for a refund of GST, or GST and subsequently WET on unaccompanied baggage, they must satisfy the conditions outlined in the *A New Tax System (Goods and Services Tax) Regulations 1999* (GST regulations). If the goods are wine, the conditions outlined in the *A New Tax System (Wine Equalisation Tax) Regulations 2000* (WET regulations) must also be satisfied for an Australian External Territory resident to qualify for a refund of GST and subsequently WET. These conditions for lodging a tourist refund scheme claim and providing documentary evidence of export are outlined below for completeness. However, these conditions are not contained in the legislation but in the regulations to be issued.

2.19 To ensure that amounts are recoverable where supplies are later found to be GST-free supplies and where claimants have also been paid a refund under section 168-5, claimants will be liable to repay the amount claimed under the tourist refund scheme. This applies for GST and for GST and subsequently WET. A general interest charge is payable on the whole, or any part, of the recoverable amount that remains unpaid. The general interest charge is calculated from the later of the day the refund was made and the day the supply became GST-free. [*Schedule 2, item 11, section 168-10 (GST), item 18, section 25-10 (WET)*]

Lodging Tourist Refund Scheme claim

2.20 These conditions for lodging a claim are contained in the regulations. Australian External Territory residents must present themselves at a tourist refund facility within 60 days after the day on which the goods were acquired, to claim and prove an entitlement to a refund of any tax payable. When making the tourist refund scheme claim, Australian External Territory residents must also show evidence of exportation, or evidence that they have put in place arrangements so that

the goods will be exported from Australia to an Australian External Territory within 60 days after the day on which the goods were acquired.

2.21 The intention of extending the tourist refund scheme is to provide a mechanism for Australian External Territory residents to obtain refunds of GST and WET on goods that are unable to be exported as accompanied baggage to an Australian External Territory.

2.22 Unless otherwise stated, it is intended that the current tourist refund scheme rules must be met for an Australian External Territory resident to qualify for a refund of GST or WET. This includes the need for Australian External territory residents to present goods that are taken as 'accompanied baggage' to an officer of the Australian Customs and Border Protection Service on request at the tourist refund scheme facility.

Providing documentary evidence of export

2.23 These conditions regarding documentary evidence will be contained in the regulations. When Australian External Territory residents lodge a refund claim at a tourist refund facility, they must provide documentary evidence to the Australian Customs and Border Protection Service that they have been exported, or evidence that they have put in place arrangements so that the goods will be exported from Australia to an Australian External Territory within 60 days after the day on which the goods were acquired.

2.24 Documentary evidence includes:

- proof of Australian External Territory residence;
- a tax invoice that includes GST or GST and consequently WET; and
- proof that the goods have been exported, or arrangements have been put in place for the goods to be exported, within 60 days after the day on which the goods were acquired.

2.25 If documentary evidence of actual export within 60 days after the day on which the goods were acquired, is not provided at the time of making the tourist refund scheme claim, it must be provided to the Australian Customs and Border Protection Service within 90 days after the day on which the goods were acquired.

2.26 The GST and/or WET refund will be paid once all documentation has been received and processed by the Australian Customs and Border Protection Service on the Commissioner's behalf.

Example 2.9

Julian, a resident of Norfolk Island (who is not registered or required to be registered for GST), purchases a washing machine for \$400 on 3 September 2010. The supply to Julian was a taxable supply. Julian makes arrangements for the washing machine to be separately exported on 22 October 2010. Julian arrives at the airport on 15 October 2010 to board his flight home. Prior to departure, Julian makes a claim at the tourist refund scheme facility for a refund of the GST paid on the washing machine. To make a claim Julian provides the officer of Customs with:

- proof of Norfolk Island residence;
- a tax invoice showing the amount of GST paid;
- a bill of lading showing arrangements have been put in place for the washing machine to be exported to Norfolk Island within 60 days after the day on which the goods were acquired; and
- other necessary documentation specified in the GST Regulations, such as a boarding pass.

As documentation of actual exportation was not provided at this time, the refund claim is put on hold. After returning home to Norfolk Island, Julian sends documentation to the Australian Customs and Border Protection Service that the washing machine was exported from Australia. The Australian Customs and Border Protection Service receive this documentation on 29 October 2010 and complete Julian's refund claim.

Recipients of GST-free exports to Australian External Territories declaration

2.27 Subsection 38-185(3) of the GST Act outlines when a supplier of goods is treated as having exported the goods from Australia as a GST-free export. The exposure draft clarifies that goods can only be sold as a GST-free export to an Australian External Territory resident if the recipient declares to the supplier that the goods were not the subject of a refund claim for GST and/or WET under the tourist refund scheme.
[Schedule 2, item 1, subsection 38-185(3)]

2.28 The declaration must be presented to the supplier at the time 'sufficient documentary evidence of exportation' is provided.

2.29 This principle ensures that the supply of goods is not GST-free where a refund of the tax paid is also claimed under the tourist refund scheme.

2.30 This principle also ensures that a supply of wine is not free of WET where a claim for a refund of the tax paid is also made under the tourist refund scheme.

Example 2.10

Kathryn, a resident of Cocos (Keeling) Islands, purchases a television from an Australian retail outlet. The television cost \$3,000 including GST. The supply to Kathryn was a taxable supply as the Australian retailer was not satisfied the GST-free provisions of subsection 38-185(3) are met. Namely, Kathryn did not provide sufficient documentary evidence to show that the goods were exported.

Upon returning home, Kathryn fills out a declaration stating a tourist refund scheme claim was not made for a refund of the GST. Kathryn sends the completed declaration, along with sufficient documentary evidence to show the goods were exported, to the Australian retailer. After receiving the declaration and evidence of export, the Australian retailer provides a refund of GST to Kathryn and treats the supply as a GST-free supply.

Example 2.11

Jimmy, a resident of Cocos (Keeling) Islands, purchases a fridge from an Australian retail outlet. The fridge cost \$1,500 including GST. The supply to Jimmy was a taxable supply as the Australian retailer was not satisfied the GST-free provisions of subsection 38-185(3) are met. Namely, Jimmy did not provide sufficient documentary evidence to show that the goods were exported. However, upon leaving Australia, Jimmy satisfies the amended rules of the tourist refund scheme and receives a refund of the GST borne.

After returning home, Jimmy sends sufficient documentary evidence to the Australian retailer to show the goods were exported. Jimmy is not entitled to a refund of GST from the supplier in this instance, as a refund of the GST borne was supplied via the tourist refund scheme. In addition, Jimmy did not provide the Australian retailer with a completed declaration.

Application and transitional provisions

2.31 The amendments commence on 1 July 2010 and apply to goods purchased on or after 1 July 2010.

Chapter 3

Agency provisions

Outline of chapter

3.1 Schedule 3 to this exposure draft amends the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) to increase the range of entities entitled to act as a principal for GST accounting purposes.

Context of amendments

3.2 The amendments allow those acting for a principal who are not agents in the common law sense to access the simplified accounting procedure in Subdivision 153-B of the GST Act.

3.3 Under the general GST accounting rules, supplies and acquisitions made or facilitated through an agent are made by the principal. The principal must account for the GST on such transactions between the agent and the customer as part of the principal's own supplies and acquisitions. The principal and agent must also separately account for the GST and input tax credits on any commissions paid to the agent for their services by the principal.

3.4 However, Subdivision 153-B of the GST Act allows registered entities to agree in writing to treat the agent as a separate supplier and/or acquirer. The effect of this is that the principal and agent are treated as acting in a principal to principal relationship in relation to the supplies and acquisitions identified in the agreement. This simplifies the way principals and agents account for GST.

3.5 The Subdivision only applies to an entity that would qualify under the common law as an agent. This means that the agent must be authorised to act on behalf on the principal so as to create or affect legal relations between the principal and third parties. Representatives of the principal who are not agents at common law (for example, paying agents, billing agents and commission agents) are not covered by the Subdivision.

3.6 For example, the Subdivision cannot be used by entities ('intermediaries') who make or receive payments on behalf of another entity (the 'principal') for supplies or acquisitions to or from third parties, but do not make those supplies or acquisitions on that other entity's

behalf. Nor can certain other service providers who perform functions for the principal but fall short of the legal definition of an agent, use Subdivision 153-B.

3.7 The former Assistant Treasurer, in his Media Release No. 42 of 12 May 2009, announced that the Government would allow intermediaries that are not common law agents to utilise Subdivision 153-B. This was part of a package of measures designed to reduce the cost to businesses of complying with the GST.

Summary of new law

3.8 The amendments will allow entities who facilitate supplies or acquisitions for another to utilise the simplified accounting procedures in Subdivision 153-B, subject broadly to the principal and intermediary agreeing that the intermediary will take responsibility for using these accounting procedures in relation to certain transactions.

3.9 Under these simplified accounting procedures, taxable supplies and creditable acquisitions made by the principal to or from a third party will be taken, for GST purposes, to be taxable supplies or creditable acquisitions made by the intermediary to or from the third party. Amongst other things, this means that intermediaries entering into such arrangements will issue tax invoices for, and be liable for GST payable on taxable supplies they are taken to make to a third party, and be entitled to input tax credits for creditable acquisitions they are taken to make from a third party. These will be recorded on the intermediary's own Business Activity Statement. Under the simplified accounting procedures, principals will also be taken to either make or receive a supply to or from the intermediary.

3.10 The amendments will reduce the compliance costs of GST accounting where paying agents, billing agents and other transaction facilitators are used by another entity.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Intermediaries that are not common law agents will be able to enter into agreements with principals concerning the supplies and acquisitions that they facilitate and have certain of those supplies and acquisitions treated for GST purposes as taxable supplies and creditable acquisitions made by the intermediary to or from the principal.	Only intermediaries that are common law agents are able to enter into agreements with principals concerning the supplies and acquisitions that they make for principals and have certain of those supplies and acquisitions treated for GST purposes as taxable supplies and creditable acquisitions made by the agent to or from the principal.

Detailed explanation of new law

3.11 The amendments allow entities that facilitate the supplies or acquisitions of an enterprise carried on by another entity through acting as an intermediary to use Subdivision 153-B, irrespective of whether the intermediary can legally bind the principal by their acts. Billing and paying agents, among others, would be able to access these accounting procedures.

3.12 To use Subdivision 153-B, the principal and the intermediary would have to enter into an agreement in writing that the intermediary will facilitate supplies to third parties, acquisitions from third parties or both on behalf of the principal. The agreement would also need to specify the other matters required in section 153-50, such as the kinds of supplies and acquisitions to which the agreement will apply and the requirement for the intermediary to issue tax invoices to third parties instead of the principal. The intermediary and principal will have to be registered for GST purposes. *[Schedule 3, items 6 to 10, section 153-50]*

3.13 If such agreement is made, the principal and intermediary will be taken, for GST purposes, as acting as separate suppliers and acquirers in relation to the supplies and acquisitions covered by the agreement. If the principal makes a creditable acquisition that is covered by the agreement from a third party and the intermediary pays an amount on behalf of the principal to the third party customer, the intermediary will be taken as having made the creditable acquisition. Additionally, the intermediary will be taken to make a taxable supply of the same thing to the principal. Any commission payable by the principal to the intermediary for the intermediary's services is taken to be included in the value of the taxable supply made by the intermediary to the principal. GST is payable on 1/11th of this (increased) value. This acquisition by the

principal from the intermediary will be a creditable acquisition by the intermediary if the acquisition of the goods or services from the third party by the principal would have been a creditable acquisition if it had occurred without the involvement of the intermediary. [*Schedule 3, items 19-26, section 153-60*]

Example 3.12

Patrick is a paying agent for Melissa (but not a common law agent). Melissa orders \$110 worth of goods (including GST) from Jonathan, which he agrees to supply if Patrick pays the money to him. Patrick pays Jonathan \$110 and acquires the goods from him which he forwards to Melissa. Patrick is entitled to a \$22 commission (including GST) from Melissa for his services. Patrick has made a creditable acquisition of goods for \$110 from Jonathan and makes a taxable supply of the same thing for \$132 (including GST) to Melissa. Patrick is entitled to a \$10 input tax credit for the acquisition he is taken to make from Jonathan and is liable to pay \$12 GST on the supply he is taken to make to Melissa.

3.14 If a principal makes a taxable supply to a third party that is covered by a Subdivision 153-B arrangement, and the intermediary bills an amount to the third party customer on behalf of the principal, then provision of the goods or services to the customer is taken as a taxable supply by the intermediary to the customer. Additionally, the principal is taken to make a taxable supply to the intermediary of the same thing. Any commission payable by the principal to the intermediary for the intermediary's services is accounted for in the value of the taxable supply made by the principal to the intermediary. GST is payable by the principal on 1/11th of this (reduced) value. The intermediary will be entitled to an input tax credit of an equivalent amount. [*Schedule 3, items 11-18, section 153-55*]

3.15 The Commissioner of Taxation also will have the same power to issue determinations that separate party accounting will apply to certain arrangements between principals and intermediaries as he does with respect to principals and common law agents. Principals and intermediaries will have the same capacity to opt out of these determinations as principals and agents. [*Schedule 3, items 27-29, section 153-65*]

3.16 The amendments do not affect the operation of Subdivision 153-B with respect to common law agents.

Application and transitional provisions

3.17 The amendments will apply to supplies and acquisitions by intermediaries attributable to tax periods commencing on or after 1 July 2010. A pre-existing written agreement may be used as long as it meets the conditions in the section 153-50.

Consequential amendments

3.18 The exposure draft also makes certain consequential amendments. Broadly, the amendments will allow an intermediary to treat the value of any taxable supply that they are taken to make under Subdivision 153-B, as being an amount equal to the 'value' of the commission or similar payment that the principal is liable to pay to them for their services relating to that supply. If an intermediary chooses to work out their GST turnover in this manner, their GST turnover would be equal to the amount that would have been their GST turnover, had they not entered into a Subdivision 153-B arrangement. *[Schedule 3, item 30, section 188-24]*

Chapter 4

Gambling supplies to entities outside Australia

Outline of chapter

4.1 Schedule 4 to the exposure draft amends the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) to clarify how the gambling operator's margin is calculated where the supplies made by the operator are GST-free.

Context of amendments

4.2 The GST applies to gambling supplies on a global rather than an individual basis. This reflects the difficulty of applying GST to every gambling transaction and allowing input tax credits for the prize money paid out on each bet. Instead GST is applied to the gambling operator's margin. This is intended to be broadly comparable to applying GST to individual bets and allowing input tax credits to the operator for prizes paid out.

4.3 The GST payable is based on a global formula, in which the net amount of GST payable is related to the global GST amount. The global GST amount is one-eleventh of the 'total amount wagered' less the 'total monetary prizes' that the gambling operator is liable to pay ('the gambling operator's margin'). The terms 'total amount wagered' and 'total monetary prizes' are defined terms in the GST Act. Broadly, 'the total amount wagered' is the total value of bets placed with the gambling operator in a tax period, excluding those bets that are GST-free.

4.4 There is uncertainty in calculating the margin where the bets accepted are GST-free and prize money is to be paid out on those bets. The total amount wagered is related to the GST on the individual bets. For example, bets enjoyed by entities outside Australia are not subject to GST and should be excluded from the total amount wagered. Consequently, total monetary prizes should exclude the prize money paid out by the gambling operator on bets made by entities outside Australia.

4.5 This is the basis on which the Commissioner of Taxation administers the law. However, on a literal reading of the relevant section of the GST Act, gambling operators may conclude that the prize money paid to entities outside Australia is not excluded from total monetary prizes.

Summary of new law

4.6 Schedule 4 of the exposure draft excludes from total monetary prizes amounts that the gambling operator is liable to pay out on supplies (bets) that are GST-free. This will mean that the prize money that the gambling operator is liable to pay to entities outside Australia will be excluded from total monetary prizes (because supplies made to entities outside Australia are GST-free).

4.7 The change will apply to monetary prizes that arise in the first or subsequent tax periods of the gambling operator on or after the first quarterly tax period after Royal Assent.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
'Total monetary prizes' explicitly exclude prize money paid in relation to GST-free supplies.	'Total monetary prizes' only explicitly exclude prize money paid in relation to supplies that are GST-free if they arise out of gambling events conducted by gift-deductible entities or are otherwise GST-free under section 38-270 of the GST Act.

Detailed explanation of new law

4.8 GST is applied to the gambling operator's margin, which reflects the difference between bets accepted by the gambling operator and the monetary prizes it is liable to pay out on the bets. Where the individual bets are excluded from the gambling operator's global GST amount, it is appropriate to exclude prize money liable to be paid to entities outside Australia. This will ensure that, over time, GST is applied to an amount that reflects the value added by the gambling operator for consumption in Australia.

4.9 Under the current law, the GST payable on gambling is based on a global formula, under which the net amount of GST payable is the sum of the global GST amount and other GST less input tax credits (that relate to amounts other than prize money). The global GST amount (the gambling operator's margin) is one-eleventh of the total amount wagered less the total monetary prizes. The total amount wagered reflects the consideration for the gambling supplies made by the gambling operator in a particular tax period. The total monetary prizes are:

- the prize money that the gambling operator is liable to pay in that tax period on the outcome of gambling events. (The gambling event or the gambling supplies do not have to take place during that tax period); and
- any refunds of losses, whole or in part, that the gambling operator is required to make in that tax period. (The refunds do not have to relate to gambling supplies in that tax period.)

4.10 Wagers by entities outside Australia are GST-free by virtue of item 2 or 3 of subsection 38-190(1) of the GST Act. Hence, they are not taxable supplies. Since the total amount wagered includes only gambling supplies, which are taxable supplies, the total amount wagered will exclude bets made by entities outside Australia. However, on a literal interpretation, total monetary prizes include prize money liable to be paid out on all bets¹, including bets by entities outside Australia. Total monetary prizes include any amount of money the gambling operator is liable to pay out on the outcome of gambling events and these amounts are not restricted to gambling supplies. This would mean the gambling operator's margin does not reflect the value added over time for consumption in Australia.

4.11 Under the amendments, amounts are not included in total monetary prizes where the amounts are prize money liable to be paid out on GST-free wagers. Currently, the GST law only excludes from the global GST amount prize money paid out in relation to wagers that are GST-free under subsection 38-270 (that is, broadly, prize money paid out on gambling competitions run by gift-deductible entities). This amendment will mainly affect prize money paid to entities outside Australia on their wagers. However, the monetary prizes paid out in relation to other GST-free wagers would be excluded from the global GST amount also, even where the wagers were not placed with gift-deductible entities. The treatment of gambling competitions run by gift-deductible and similar entities is not affected by the amendments. (*Schedule 4, item 1, subsection 126-10(3)*)

¹ Unless otherwise excluded, for example, by subsection 126-10(3)

4.12 For prize money to be excluded from total monetary prizes, the prize money must relate to supplies that reflect the issue of a ticket, however described, or acceptance of a bet in a gambling event (as in the current law). The amendments do not alter the nexus required between supplies and the liability to pay prize money under the current law.

Example 4.13

David is a gambling operator who only accepts wagers from entities outside Australia. In the global GST amount, the total amounts wagered and the total monetary prizes are zero and David has no GST liability on his margin (although he may have a GST liability or refund as a result of supplies and acquisitions he makes that do not relate to the outcome of gambling events).
(Schedule 4, item 2)

Application and transitional provisions

4.13 The amendments apply to monetary prizes for which liability arises in a tax period that commences on or after the first quarterly tax period that commences on or after Royal Assent. The supplies or gambling events to which those monetary prizes relate do not have to arise in that tax period. This means that the gambling operator will not have to match up its monetary prizes with the particular gambling supplies on which the liability to pay arises.

4.14 These amendments do not affect the treatment of gambling supplies.

Chapter 5

Recovering overpaid refunds

Outline of chapter

- 5.1 Schedule 5 to the exposure draft amends the:
- *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) so that an overpaid refund under section 35-5 of the Act is treated as an amount due and payable from the date of the overpayment;
 - *A New Tax System (Luxury Car Tax) Act 1999* (LCT Act) so that an overpaid refund under section 17-5 of the Act is treated as an amount due and payable from the date of the overpayment; and the
 - *Fuel Tax Act 2006* (Fuel Tax Act) so that an overpaid refund under section 61-5 of the Act is treated as an amount due and payable from the date of the overpayment.

Context of amendments

5.2 The Board of Taxation, in its review of the legal framework for the administration of the GST, recommended that the law be amended to allow overclaimed refunds to be treated as an amount of tax that becomes payable when either refunded to the taxpayer or applied against a tax debt (recommendation no. 44).

5.3 The Government's response to the Board of Taxation review measures was announced by the former Assistant Treasurer and Minister for Competition Policy and Consumer Affairs' Media Release No. 042 of 12 May 2009 in the context of the 2009-10 Budget. In particular, the Government accepted the majority of the Board's recommendation, including in relation to overpaid refunds.

Summary of new law

5.4 Schedule 5 inserts a new subsection 35-5(2) in the GST Act to recover overpaid amounts paid where a GST return for a tax period has a net amount less than zero.

5.5 Subsection 35-5(2) provides that if an amount refunded under section 35-5 of the GST Act for a tax period is later reduced to a lesser amount by an assessment that is made or amended by the Commissioner of Taxation (Commissioner) or by a taxpayer revising their business activity statement (BAS), the amount by which the overpaid refund has been reduced is treated as if it were GST that became due and payable from the time it was paid to the taxpayer or applied against a tax debt.

5.6 Schedule 5 inserts a new section 17-15 in the LCT Act to recover an overpaid refund of luxury car tax (LCT) credits.

5.7 Section 17-15 provides that an overpayment of a luxury car tax credit to a non-registered entity is treated as if it were luxury car tax that became due and payable from the date it was paid or applied to the entity.

5.8 Schedule 5 inserts a new subsection 61-5(3) in the Fuel Tax Act to recover an overpaid refund of fuel tax credits.

5.9 Subsection 61-5(3) provides that if an amount refunded under section 61-5 of the Fuel Tax Act for a tax period or fuel tax return period is subsequently reduced to a lesser amount by the Commissioner making an assessment or amending an assessment or by a taxpayer revising their fuel tax return, the amount by which the overpaid refund has been reduced is treated as if it were a net fuel amount that became due and payable from the time it was paid to the taxpayer or applied against a tax debt.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Overpaid refund of net amount Where an amount refunded under section 35-5 of the GST Act has been overpaid, the amount by which the overpaid refund exceeds entitlements is treated as if it were GST that became due and payable from the time it was paid to the taxpayer or applied against a tax debt.	Overpaid refund of net amount The Commissioner applies the <i>Taxation Administration Act 1953</i> (TAA) to treat overpaid refunds of a net amount as administrative overpayments with GIC calculated on the resulting running balance account (RBA) deficit debt when the administrative overpayment is allocated to the RBA.

<i>New law</i>	<i>Current law</i>
<p>Overpayments under section 35-5 of the GST Act are subject to general interest charge (GIC) from the date of overpayment.</p>	
<p>Overpaid refund of LCT credits</p> <p>An overpayment of a luxury car tax credit to a non-registered entity is treated as if it were luxury car tax that became due and payable from the date it was paid or applied to the entity.</p> <p>Overpayments under section 17-5 of the <i>A New Tax System (Wine Equalisation Tax) Act 1999</i> (WET Act) are subject to GIC from the date of overpayment.</p>	<p>Overpaid refund of LCT credits</p> <p>The Commissioner applies the TAA to treat overpaid refunds of LCT credits as administrative overpayments with GIC calculated on the resulting RBA deficit debt when the administrative overpayment is allocated to the RBA.</p>
<p>Overpaid refund of fuel tax credits</p> <p>If an amount refunded under section 61-5 of the Fuel Tax Act for a tax period or fuel tax return period has been overpaid, the amount by which the overpaid refund exceeds entitlements is treated as if it were a net fuel amount that became due and payable from the time it was paid to the taxpayer or applied against a tax debt.</p> <p>Overpayments under section 61-5 of the Fuel Tax Act are subject to GIC from the date of overpayment.</p>	<p>Overpaid refund of fuel tax credits</p> <p>The Commissioner applies the TAA to treat overpaid refunds of fuel tax credits as administrative overpayments with GIC calculated on the resulting RBA deficit debt when the administrative overpayment is allocated to the RBA.</p>

Detailed explanation of new law

5.10 Under the indirect tax law, taxpayers are obliged to correctly determine their net amount for each tax period. The purpose of these amendments is to ensure equity of treatment between those taxpayers who incorrectly determine their liability to pay GST or other indirect taxes, and taxpayers who incorrectly determine their entitlement to a refund.

5.11 Taxpayers who understate their liability to pay tax incur the GIC on the underpaid amounts from when they should have made payment of

the correct amount (that is, the due date for payment for the relevant tax period). Under the amendments, taxpayers who have overclaimed refunds will be liable for GIC from the date that they receive the benefit of the overpayment. This is seen as an appropriate and equitable outcome.

5.12 However, the Commissioner has discretion to remit GIC in part or in full in appropriate circumstances. This will include circumstances where it is fair and reasonable to do so, based on the particular facts of each individual case.

Overpaid refund of net amount

5.13 The net amount for a tax period is worked out under section 17-5 of the GST Act as, broadly, the sum of the amount of GST payable less any input tax credit entitlements. The net amount includes any amount of wine tax or wine tax credits applicable under the WET Act for the period and any amount of LCT payable under the LCT Act for the period.

5.14 Under section 33 of the GST Act, if a net amount for a tax period is greater than zero, taxpayers have to pay the net amount to the Commissioner on or before a certain date. Any amount that remains unpaid after the due date is subject to the GIC under section 105-80 of Schedule 1 to the TAA.

5.15 Under section 35 of the GST Act, if a net amount for a tax period is less than zero, the Commissioner must pay you a refund.

5.16 Where a taxpayer revises their BAS or the Commissioner assesses that a refund paid under section 35-5 of the GST Act has been overpaid, the amount by which the overpaid refund has been reduced is not currently a 'liability' that is due and payable from a certain date under the GST Act. Nor is the overpaid refund an amount that is subject to the imposition of the GIC under section 105-80 of Schedule 1 to the TAA.

5.17 The Commissioner applies the TAA to treat refunds overpaid under section 35-5 as administrative overpayments with GIC calculated on the resulting running balance account (RBA) deficit debt when the administrative overpayment is allocated to the RBA (section 8AAZF). An administrative overpayment is an amount that the Commissioner has paid to a person by mistake, being an amount to which the person is not entitled (subsection 8AAZN(3)).

5.18 The amendments will ensure that if an amount refunded under section 35-5 of the GST Act for a tax period is subsequently reduced to a lesser amount by the Commissioner making an assessment or amending

an assessment or by a taxpayer revising their BAS, the amount by which the overpaid refund has been reduced is treated as if it were GST that became due and payable from the time it was paid to the taxpayer or applied against a tax debt. *[Schedule 5, item 2, subsection 35-5(2)]*

Example 5.14

Sarah lodges a BAS for the September 2008 quarter. The net amount for the tax period is -\$700. As the net amount is less than zero the Commissioner pays her a refund of \$700 under section 35-5 of the GST Act.

Subsequently, the Commissioner makes a reassessment of Sarah's net amount for the tax period. The reassessed net amount is -\$500.

The Commissioner's reassessment results in an excess amount paid under subsection 35-5(1) of \$200. The \$200:

- will be treated as if it were GST that became due and payable from the time the original refund was paid or applied;
- is the relevant amount for which the Commissioner can demand payment under subsection 255-5 of Schedule 1 to the TAA; and
- is subject to the GIC under subsection 105-80(2)(b) of Schedule 1 to the TAA.

Overpaid refund of LCT credits

5.19 The LCT Act and the WET Act provide for the payment of credits in certain circumstances to non-registered entities. These credits do not form part of a net amount and are claimed on an approved form. Section 17-25 of the WET Act imposes a liability on non-registered entities where wine tax credits have been overpaid by making the overpaid credit an amount of wine tax due and payable from the date of overpayment. There is no corresponding provision in the LCT Act that makes an overpayment of an amount of luxury car tax credit due and payable from the date of the overpayment to a non-registered entity.

5.20 The Commissioner applies the TAA to treat overpaid refunds of LCT credits as administrative overpayments with GIC calculated on the resulting RBA deficit debt when the administrative overpayment is allocated to the RBA.

5.21 The amendments will ensure that an overpayment of a luxury car tax credit to a non-registered entity will be treated as if it were luxury car tax that became due and payable from the date it was paid or applied to the entity. *[Schedule 5, item 4, section 17-15]*

Example 5.15

Section 17-5 of the LCT Act provides for the payment of credits in certain circumstances to non-registered recipients of a luxury car tax supply.

Simon is not registered for the GST. He has a credit entitlement under section 17-5 of the LCT Act and no one else has made a valid claim for a credit in relation to the credit entitlement. However, the Commissioner has overpaid Simon \$300 of luxury car tax credit. The \$300 overpaid:

- is treated as if it were luxury car tax that became due and payable from the date of overpayment;
- is the relevant amount for which the Commissioner can demand payment under subsection 255-5 of Schedule 1 to the TAA; and
- is subject to the GIC under subsection 105-80(2)(b) of Schedule 1 to the TAA.

Overpaid refund of fuel tax credits

5.22 Where a taxpayer revises their fuel tax return or the Commissioner assesses that a refund of fuel tax credits under section 61-5 of the Fuel Tax Act has been overpaid, the amount by which the overpaid refund has been reduced is not currently a 'liability' for the purposes of the Fuel Tax Act. Therefore, the imposition of the GIC does not arise under the indirect tax provisions of the TAA.

5.23 The Commissioner applies the TAA to treat overpaid refunds of fuel tax credits as administrative overpayments with GIC calculated on the resulting RBA deficit debt when the administrative overpayment is allocated to the RBA.

5.24 The amendments ensure that, if an amount refunded under section 61-5 of the Fuel Tax Act for a tax period or a fuel tax return period is subsequently reduced to a lesser amount by the Commissioner making an assessment or amending an assessment or by a taxpayer revising their fuel tax return, the amount by which the overpaid refund has been reduced is treated as if it were a net fuel amount that became due and payable from the time it was paid to the taxpayer or applied against a tax debt.

[Schedule 5, item 6, subsection 61-5(3)]

Example 5.16

Luke lodges a fuel tax return for the March 2008 quarter. The net fuel amount for the fuel tax return period is -\$700. As the net fuel amount

is less than zero the Commissioner pays him a refund of \$700 under section 61-5 of the Fuel Tax Act.

Subsequently, the Commissioner makes a reassessment of Luke's net fuel amount for the tax period. The reassessed net fuel amount is -\$500.

The Commissioner's reassessment results in an excess amount paid under subsection 61-5(3) of \$200. The \$200:

- will be treated as if it were a net fuel amount that became due and payable from the time the original refund was paid or applied;
- is the relevant amount for which the Commissioner can demand payment under subsection 255-5 of Schedule 1 to the TAA; and
- is subject to the GIC under subsection 105-80(2)(a) of Schedule 1 to the TAA.

Application and transitional provisions

5.25 The amendment applies to overpayments made by the Commissioner from the start of the first quarterly tax period after Royal Assent. [*Schedule 5, items 3, 5 and 7*]

Consequential amendments

5.26 As a consequence of an additional subsection in Division 35 of the GST Act, an amendment has been made to subsection 250-10(2) of Schedule 1 to the TAA to include the new provision in the Schedule as a tax-related liability.

5.27 As a consequence of an additional provision in Division 61 of the Fuel Tax Act, an amendment has been made to the table in subsection 250-10(2) of Schedule 1 to the TAA to include the new provision in the Schedule as a tax-related liability.

5.28 Amendments to the LCT Act to include a provision similar to section 17-25 of the WET Act requires a consequential amendment to the table in subsection 250-10(2) of Schedule 1 to the TAA. The table is amended to include a reference to section 17-15 of the LCT Act. The table is also amended to include a reference to section 17-25 of the WET Act.

Chapter 6

Interaction of associate provisions

Outline of chapter

6.1 Schedule 6 of the exposure draft amends the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) to ensure the GST treatment of a supply to an associate without consideration is as an input taxed supply or a GST-free supply where appropriate.

6.2 The proposed amendments also ensure that a supply to an associate that would be a sale (or some other particular kind of supply) if made for consideration will be taken to be a supply of such a kind, despite there being no consideration. Similarly, an acquisition from an associate that would be by way of sale (or some other particular means) if consideration was provided will be taken to be an acquisition by that means despite there being no consideration.

6.3 These provisions take effect from the date of Royal Assent.

Context of amendments

6.4 The Board of Taxation, in its review of the legal framework for the administration of the GST, recommended that the GST law be amended to remedy the interaction of the associate provisions and other provisions such as those relating to input taxed and GST-free supplies (recommendation no. 46).

6.5 The Government's response to the Board of Taxation review measures was announced by the former Assistant Treasurer and Minister for Competition Policy and Consumer Affairs' Media Release No. 042. of 12 May 2009 in the context of the 2009-10 Budget. In particular, the Government accepted the majority of the Board's recommendations, including in relation to the associate provisions.

Summary of new law

6.6 Schedule 6 of the exposure draft inserts new sections 72-20 and 72-25 in the GST Act in relation to supplies and acquisitions between associates without consideration.

6.7 Section 72-25 provides that in the case of supplies between associates, the fact that there may be no consideration does not prevent such supplies from being input taxed or GST-free supplies.

6.8 Subsection 72-20(1) provides that where a supply between associates would be a sale or some other kind of supply apart from a lack of consideration, it will be taken to be a supply of that kind. Subsection 72-20(2) provides that if an acquisition from an associate would be by sale or some other means apart from a lack of consideration, the acquisition is taken to be an acquisition by that means.

6.9 Schedule 6 also amends section 38-185 of the GST Act in relation to the export of goods that are GST-free if certain conditions are met. In particular, new item 2A is inserted into the table in subsection 38-185(1) to provide that a supply of goods without consideration to an associate is GST-free if the supplier exports the goods from Australia.

6.10 New subsection 38-185(4) sets out the conditions where a supplier is treated as having exported the goods from Australia where they are supplied to an associate who is not registered or required to be registered who in turn exports the goods from Australia.

6.11 The amendments in Schedule 6 of the exposure draft commence on the date of Royal Assent.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
A supply to an associate may be an input taxed or GST-free supply despite the supply being without consideration.	The interaction between the provisions dealing with supplies between associates and the provisions providing that certain supplies are input taxed or GST-free may result in anomalous GST treatment. In particular, the current provisions may apply to treat an otherwise input taxed or GST-free supply to an associate (if it had been made for consideration) as a taxable supply where it is made for no consideration.
A supply to an associate may be taken to be a sale or some other kind of supply despite being without consideration. Similarly, if an acquisition from an	A supply between associates may not be a sale or a supply of some other kind if the supply is made for no consideration. An acquisition between associates

<i>New law</i>	<i>Current law</i>
associate would be by sale or some other means, the acquisition may be taken to be an acquisition by that means despite being without consideration.	that would be an acquisition from an associate by sale or some other means may not be taken to be an acquisition by that means if there is no consideration.
A supply is GST-free where there is a supply of goods between associates without consideration and the supplier has exported the goods from Australia.	Where a supply of goods between associates is without consideration and the supplier exports the goods, the supply may be a taxable supply.

Detailed explanation of new law

6.12 The interaction between the provisions dealing with supplies between associates and the provisions providing that certain supplies are input taxed or GST-free may result in anomalous outcomes.

6.13 Section 9-5 of the GST Act sets out the requirements for a supply to be a taxable supply, including that the supply is made for consideration. Section 9-5 further provides that a supply is not a taxable supply to the extent that it is GST-free or input taxed. Section 9-30 provides that a supply is GST-free if it is GST-free under Division 38 and is input taxed if it is input taxed under Division 40. There are a number of provisions dealing with GST-free and input taxed supplies that require that the supply is 'for consideration' or refer to a 'sale'.

6.14 Subsection 72-5(2) specifically provides that a supply to an associate without consideration may be a taxable supply despite the requirement in paragraph 9-5(a) that a taxable supply must be for consideration. Division 72 creates a GST liability on a supply by deeming a value of the supply equal to the GST exclusive market value of the supply but does not deem any consideration for the supply (see section 72-10). Therefore, an otherwise input taxed or GST-free supply to an associate (if made for consideration) may be treated as a taxable supply if it is without consideration.

6.15 There are two main areas where a supply, that would otherwise be an input taxed supply if made for consideration, may be a taxable supply where the supply is to an associate without consideration:

- a transfer of residential premises (that is, not new residential premises or commercial residential premises) to an associated entity that is either not registered or has acquired the supply for a purpose that is not solely creditable; and

- a financial supply made to an associated entity that is either not registered or has acquired the supply for a purpose that is not solely creditable.

6.16 A supply is input taxed under section 40-65 if it is a sale of residential premises (other than new residential premises or commercial residential premises). It is arguable that a supply between associates without consideration is not a 'sale' (for example, an in specie distribution of residential premises). Under this view, such a supply is not a 'sale', cannot be an input taxed supply under section 40-65 and may be treated as a taxable supply.

6.17 A similar outcome to the sale of residential premises arises in relation to financial supplies. A financial supply is defined in regulation 40-5.09 of the *A New Tax System (Goods and Services Tax) Regulations 1999* to be the provision, acquisition or disposal of a financial interest for, inter alia, consideration. Therefore, a transaction between associates involving a financial interest cannot be an input taxed financial supply if it is without consideration and will instead be subject to GST. This can arise, for example, by way of an in specie distribution of a parcel of shares from a trust (registered) to a beneficiary of the trust (not registered or required to be registered).

6.18 The result in the case of residential premises and financial supplies is inconsistent with the intention of the GST law. That is, the fact that a supply to an associate is without consideration should not result in an otherwise input taxed supply being treated as a taxable supply.

6.19 New subsection 72-25 ensures that Division 72 of the GST Act applies such that, provided all other conditions are satisfied, a supply to or from an associate may be an input taxed supply or a GST-free supply despite being without consideration. [*Schedule 6, item 3*]

6.20 In addition, new subsection 72-20(1) ensures that a supply to an associate, that would otherwise be a sale or some other kind of supply if it was for consideration, is taken to be a sale or that other kind of supply despite the lack of consideration. Similarly, subsection 72-20(2) ensures that if, apart from a lack of consideration, an acquisition from an associate would be by sale or some other means, the acquisition is taken to be an acquisition by that means. [*Schedule 6, item 3*]

6.21 However, proposed new sections 72-20 and 72-25 may not be sufficient to ensure the appropriate GST treatment in relation to the supply of goods between associates without consideration where the supplier has exported the goods from Australia.

6.22 Under Subdivision 38-E of the GST law, one of the conditions for a supply to be GST-free is that the supplier exports goods from Australia before, or within 60 days after, the day on which the supplier receives any of the consideration for the supply (see subitem 1(a) in the table in section 38-185). However, if before any of the consideration for the supply is received, the supplier gives an invoice for the supply, then the supplier must export the goods within 60 days of the day the invoice was given (see subitem 1(b) in the table in section 38-185). Broadly, the 60 day requirement in item 1 in the table in subsection 38-185(1) begins from an event that could trigger attribution of any GST payable (in the event the relevant supply is taxable) or any input tax credit entitlement.

6.23 In circumstances where the supply is between associates without consideration, neither of the conditions in item 1 in section 38-185 can be satisfied. This is because the first condition requires that the supplier actually receive consideration (see subitem 1(a)). Further, the second condition refers to an invoice issued by the supplier before any consideration is received – that is, it is referring to a day that occurs before the day on which the supplier received consideration (see subitem 1(b)). In addition, the term *invoice* is defined in section 195-1 of the GST Act to mean a document notifying an obligation to make a payment. Thus, in cases involving no consideration, the second condition in item 1 could not be satisfied in any event.

6.24 As a result, such a supply could be treated as a taxable supply if all the other conditions in section 9-5 are met. This outcome is inconsistent with the broad proposal that a supply between associates should not be prevented from being an input taxed or GST-free supply on the basis that it is without consideration.

6.25 Schedule 6 of the exposure draft inserts new item 2A into the table after subsection 38-185(1) to provide that a supply of goods without consideration to an associate is GST-free if the supplier exports the goods from Australia. [*Schedule 6, item 1*]

6.26 Under the current law, if a supply of goods is made between associates without consideration and the supplier exports the goods, any GST payable on the supply would be attributable in accordance with the attribution rule in section 72-15. Under this section, any GST payable on the supply would be attributable to the tax period in which the supplier exports the goods. As a result, a 60-day period is not required as, at the time a supplier would be required to attribute any GST, the supplier (and recipient) would know whether the supply is taxable or GST-free, that is, they would know whether the goods have been exported.

6.27 Schedule 6 of the exposure draft also inserts new subsection 38-185(4) which sets out the conditions where a supplier is treated as having exported the goods from Australia despite the goods actually being exported by the supplier's associate. These conditions include that the goods are supplied to an associate who is not registered or required to be registered who in turn exports the goods from Australia. This subsection ensures that a supply made from an entity to an unregistered associate without consideration will still be GST-free if the acquiring associate exports the goods within 60 days after the goods were delivered or made available in Australia to the associate. *[Schedule 6, item 2]*

Application and transitional provisions

6.28 The amendments made by Schedule 6 commence on the date of Royal Assent. *[Schedule 6, item 4]*