
Chapter #

Protection for discontinued announced measures

Outline of chapter

1.1 Schedule # amends the *Income Tax Assessment Act 1936* (ITAA 1936) to introduce a protection provision, which ensures that outcomes are preserved in relation to income tax assessments where:

- taxpayers have reasonably and in good faith anticipated the impact of identified announcements made by a previous government that the tax law would be amended with retrospective effect; and
- the current Government has now decided that the announced proposal to change the law will not proceed.

Context of amendments

1.2 The protection provision introduced by this Schedule applies in respect of particular past announcements that proposed a change to the tax law which the Government has decided not to proceed with. The primary purpose of the protection provision is to provide ongoing certainty for taxpayers that were impacted by an unenacted announcement, in the event that they self-assessed based on the announcement (often with the comfort of the Commissioner of Taxation (the Commissioner) having published an administrative treatment that he would not dedicate resources to enforce compliance with the law that related to the matter subject to the announcement).

1.3 On 6 November 2013, the Treasurer and the Assistant Treasurer announced (Joint Media Release, 'Restoring integrity in the Australian tax system') a process under which decisions would be made on how the Government would proceed with a backlog of 92 announced but unenacted tax and superannuation measures that were outstanding at the time of the Government coming to office. Under that process, the Government indicated that it had a disposition not to proceed with 64 of those 92 measures, but that final decisions on what would occur with these measures would be the subject of consultation.

1.4 Following this consultation, the Assistant Treasurer confirmed by way of further Media Release on 14 December 2013 ('Integrity restored to the Australian tax system') that the Government had decided not to proceed with 48 of the 64 measures that were considered in the consultation process.

1.5 As a matter of practice, taxpayers may in many cases anticipate the impacts of an announced proposal to change the law prior to its enactment, where that proposed change is intended to have a beneficial impact for taxpayers prior to the date on which it is enacted.

1.6 ATO Practice Statement PS LA 2007/11, which outlines the Commissioner's administrative treatment of taxpayers affected by announced but unenacted legislative measures which will apply retrospectively when enacted, contemplates that taxpayers might anticipate the impact of such measures. Consistent with this Practice Statement, the Commissioner has in many cases published administrative treatments that advised that the Commissioner would not dedicate resources to enforce compliance with the law where the announcement might reasonably be anticipated to apply in a favourable way to a taxpayer. The practical effect of publishing these treatments is to provide some comfort for taxpayers if they were to choose to anticipate the proposed change to the law when self-assessing their position.

1.7 The Commissioner is required to administer the existing law, and expects taxpayers and others to behave in accordance with that law. Nevertheless, the Commissioner's justification for adopting the approach set out in the Practice Statement is partly grounded on a reasonable assumption on his part that a government announcement of an intention to change the law will lead to legislation being enacted in due course. In this event, enforcing compliance with the existing law would not be an efficient and effective use of the Commissioner's resources when it is likely that any changes made to the taxpayer's position would require readjustment when that announced change is enacted.

1.8 Accordingly, the protection provision provides certainty for taxpayers and ensures that taxpayers in like assessment positions are treated similarly by providing:

- a continuing justification for the Commissioner to not dedicate compliance resources to address cases that were potentially impacted by discontinued measures; and
- that the Commissioner is not required by law to amend or adjust a taxpayer's position if he becomes aware in a specific case that a discontinued measure has been anticipated, provided that anticipation is reasonable and in good faith.

1.9 Importantly, protection is not available for all anticipation of the announcements that are identified for the purposes of the provision. In particular, taxpayers must have acted reasonably and in good faith on the basis of the announcement. The Commissioner's usual amendment and recovery powers apply in circumstances where the conditions for protection are not met.

Summary of new law

1.10 Schedule # introduces a protection provision to deal with cases where taxpayers have anticipated, reasonably and in good faith, the impact of an identified announcement (listed in the provision) made by a previous government of a proposed change to the tax law with retrospective effect, where the Government has now decided that the proposed change will not proceed.

1.11 This protection is primarily effected by placing a statutory bar on the Commissioner amending an income tax assessment to the extent that it reflects a taxpayer's anticipation of the impact of an announcement that meets the conditions set out in the provision.

1.12 In addition, where a taxpayer's anticipation of the impact of an announcement would otherwise give rise to a liability for an administrative overpayment, protection will be effected by treating the taxpayer as being entitled to that amount if the conditions set out in the provision are satisfied.

1.13 In broad terms, these conditions are to be met for protection to be available:

- The taxpayer's self-assessed position, as reflected in its return and the assessment that is made on or following the lodgment of that return, reasonably and in good faith reflects an announced proposal to change the law, specifically listed in the law, which has now been discontinued;
- Either of the following is met while the announcement for the discontinued measure was current¹:
 - the taxpayer lodged their return; or

¹ An announcement will have been current between the time it was originally announced by a previous government and 14 December 2013, when the Government confirmed that the announced proposal to change the law would no longer proceed.

- the events happened or the circumstances existed that enabled the taxpayer to anticipate the announced proposal; and
- The taxpayer would be subject to a less favourable outcome if the Commissioner were to amend or adjust the self-assessed position of the taxpayer to reflect the fact that the listed announced proposal has not been enacted.

1.14 It is only necessary to provide protection in relation to income tax assessments, as the only announcements that may meet the conditions, as listed in the provision, involved proposals to amend the income tax law.

1.15 Taxpayers can choose not to have eligible self-assessed positions protected. In these circumstances, the Commissioner may amend the taxpayer's self-assessed position on request to reflect the ongoing operation of the law.

1.16 The operation of the protection provision can also be overridden in circumstances where:

- the Commissioner is amending an assessment to give effect to an objection decision, or a decision of the Administrative Appeals Tribunal (AAT) or Court on review or appeal; or
- the taxpayer makes a statement in a return for a later income year that is inconsistent with an earlier anticipation of an announcement, where continuing to anticipate the announcement would give rise to a less favourable outcome in that later income year.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
The Commissioner is prevented from amending income tax assessments reflecting self-assessed positions anticipating the impact of certain announced but discontinued measures in a way that meet the conditions set out in the law.	If he became aware of such self-assessed positions, the Commissioner would most likely be required to amend the relevant income tax assessments.
Taxpayers are taken to be entitled to payments made on the basis of income tax assessments reflecting such self-assessed positions.	Taxpayers may have been subject to a liability for an administrative overpayment in relation to such self-assessed positions.

Detailed explanation of new law

1.17 This explanation of the protection provision has been organised in the following way:

- **Means of providing protection** (paragraphs 1.18 to 1.29),
- **Conditions under which positions will be protected** (paragraphs 1.30 to 1.64), and
- **Exceptions** (paragraphs 1.65 to 1.73).

Means of providing protection

1.18 The primary means by which protection is provided to a taxpayer meeting the conditions for protection (see paragraph 1.30 to 1.64 below) is to prevent the Commissioner from amending assessments in relation to protected self-assessed positions in a way that would produce a less favourable result for the taxpayer. [*Schedule #, item 2, subsection 170B(3)*]

1.19 This approach reflects that any anticipation by a taxpayer of an announced proposal to change the law occurs in a self-assessment setting. Under a self-assessment system, the returns of taxpayers are most often accepted on face value and reflected in assessments that are made by the Commissioner based on those returns. In some cases (for example, in relation to income tax for companies and superannuation funds), the returns lodged by taxpayers for a particular income year are deemed to be an assessment for that year. The Commissioner's administrative treatment of announced but unenacted legislative measures which will apply retrospectively when enacted (explained at paragraphs 1.6 and 1.7 above) is based on this self-assessment context.

1.20 The approach also reflects the Government's decision not to proceed with the majority of announced but unenacted measures that were outstanding when the Government came to office and provides certainty for taxpayers where they have acted reasonably and in good faith while the announcement was current. In contrast, the purpose of the provision is not to effectively enact the measures that the Government has decided not to proceed with for a limited period of time.

1.21 On this basis, it is not intended to allow taxpayers that previously did not anticipate the impact of listed announcements in their returns to now seek an amendment or adjustment of their position.

1.22 Importantly, the protection provided is also limited to those particulars of an assessment that reflect the taxpayer's anticipation of the impact of an announcement that is listed for the purposes of the provision. All other particulars of the assessment are subject to the usual rules governing amendments. [*Schedule #, item 2, paragraph 170B(1)(d) and subsection 170B(3)*]

Less favourable result

1.23 The operation of the concept of a "less favourable result" is intended to mirror the "more favourable result" concept that is used in the existing tax rulings provisions (see subsection 357-70(1) of Schedule 1 to the *Taxation Administration Act 1953*). [*Schedule #, item 2, subsection 170B(3)*]

1.24 In an income tax context, a "less favourable result" would be most manifestly reflected in an amendment to an assessment that creates a liability to tax by increasing income tax payable.

1.25 However, a "less favourable result" is also intended to contemplate an amendment to an assessment that increases taxable income without increasing income tax payable. Such a scenario might arise because of the application of the tax-free threshold or tax offsets. While an immediate exposure to an income tax liability may not arise in relation to such an amendment, the increase in taxable income nevertheless gives rise to a greater exposure to an income tax liability in the future in the event that there is a further amendment of the assessment. Given this possibility, an amendment that only increases taxable income without increasing income tax payable is still considered to produce a "less favourable result" for the taxpayer.

Example 1.1

Bronwyn was impacted by a natural disaster in December 2012 and anticipated the 'CGT relief for natural disasters' announcement (listed at item 3 of the table in subsection 170B(9)). This anticipation, which meets the conditions set out in subsection 170B(1), has the effect of reducing, her net capital gain for the 2012-13 income year under section 102-5 of the *Income Tax Assessment Act 1997* by \$30,000.

Taking this \$30,000 reduction in her net capital gain into account, Bronwyn reports in her income tax return that her assessable income for the 2012-13 income year is \$150,000, and her deductions for that income year is \$175,000. Accordingly, the Commissioner makes an assessment of nil taxable income and nil tax payable for the income year, and Bronwyn has a tax loss of \$25,000.

In the absence of the protection provision, the Commissioner may make an amended assessment for Bronwyn that increases her taxable income to \$5,000. This would reflect an increase in her net capital gain of \$30,000, which would in turn increase her assessable income for the income year to \$180,000.

The operation of the tax-free threshold would ensure that no income tax liability would immediately arise from such an amendment.

However, if this amendment was made, Bronwyn would be exposed to a greater liability in the event that a further amendment to her assessment was made that increased her income tax liability. Accordingly, any amendment to increase her taxable income to \$5,000 produces a less favourable result for her. As her anticipation of the listed announcement meets the conditions for protection, the Commissioner is prevented from making this amendment.

1.26 It is also possible that there can be a 'less favourable result' for a taxpayer at a later time where the anticipation of an announced proposal to change the law is initially reflected in an assessment for an income year in which a tax loss arises and any reversal of that anticipation would *not* immediately result in an amended assessment. Under the law, there can only be an amended assessment if the amounts of taxable income or income tax payable on that taxable income change. Accordingly, there would be no amendment of an assessment only to reverse an anticipated position where the impact of that anticipation is less than the amount of a tax loss. The protection provision may nevertheless take effect at a later time where:

- There are further adjustments to the particulars of the assessment within the time limits set out in subsection 170(1) of the ITAA 1936 that, together with any reversal of the anticipated position, would result in an amended assessment, or
- The tax loss is sought to be applied as a deduction in a later income year.

Example 1.2

Assume the same facts as Example 1.1, where Bronwyn has a tax loss of \$25,000, except now:

- her assessable income for the income year is \$170,000 because the impact of anticipation on her net capital gain for the 2012-13 income year is a reduction of \$10,000 rather than \$30,000; and
- her deductions for that income year are \$195,000 rather than \$175,000.

In this case, the operation of the protection provision would not have an immediate impact for Bronwyn's assessment. Increasing her net capital gain by \$10,000 alone would not result in an amendment of her assessment as her taxable income and income tax payable would both remain nil. Her tax loss that is available to be carried forward would be reduced from \$25,000 to \$15,000.

However, if the Commissioner also came to the view (prior to the time limits for amendment expiring) that Bronwyn was not entitled to a deduction of \$50,000 that had been allowed in her 2012-13 income year assessment, the protection provision would have an impact. The protection provision would prevent the Commissioner from making an amendment about the net capital gain particular.

In the absence of the protection provision, Bronwyn's taxable income may be increased by amendment to \$35,000. This would reflect assessable income for the income year of \$180,000 (increased by \$10,000 to take account of the change to her net capital gain) less deductions of \$145,000 (decreased by \$50,000 to take account of the over-claimed deduction).

With the protection provision, Bronwyn's taxable income may only be increased by amendment to \$25,000. This would reflect assessable income for the income year of \$170,000 (reflecting the net capital gain Bronwyn reported in her income tax return) less deductions of \$145,000.

Alternatively, if Bronwyn was in a position to claim a deduction for her 2012-13 tax loss in the 2013-14 income year prior to the Commissioner becoming aware of the over-claimed deduction of \$50,000, the protection provision would prevent an amendment of her 2013-14 income year assessment to reduce her prior year tax loss deduction from \$25,000 to \$15,000.

1.27 There may also be circumstances where a taxpayer may be immediately exposed to a "less favourable result" without there being an amended assessment. An example is where, on the basis of an original assessment reflecting an anticipation of the impact of an announced proposal by the taxpayer (such as the announcement listed in item 13 of the table in subsection 170B(9)), excess refundable tax offsets (such as tax offsets for franked distributions) are refunded. In such cases, an administrative overpayment may arise for the taxpayer without any amendment being made to the underlying assessment. Provided the protection conditions are met in these circumstances, the law ensures that the taxpayer is not exposed to a liability for an administrative overpayment under section 8AAZN of the *Taxation Administration Act 1953*, as the taxpayer is taken to be entitled to the amount that reflects the anticipation of the impact of the announcement. [*Schedule #, item 2, subsection 170B(4)*]

1.28 The concept of a “less favourable result” also ensures that the Commissioner retains the ability to amend an assessment to reverse the anticipation of the impact of an announcement by a taxpayer where doing so would produce a more favourable result for the taxpayer.

1.29 To ensure the protection provision has its intended impact, the effect of the provision will override any other provision in the taxation law. This priority rule is subject to the specific exceptions listed in the provision, which are discussed further at paragraphs 1.65 to 1.73 below. *[Schedule #, item 2, subsection 170B(5)]*

Conditions under which positions will be protected

1.30 Apart from the “less favourable result” concept explained above, the provision sets out the other conditions that must be satisfied before protection will be available, specifically:

- The taxpayer’s self-assessed position for an income year, as reflected in a statement in their return, is consistent with amendments to the law that would reasonably reflect an announcement listed for the purposes of the provision; *[Schedule #, item 2, paragraph 170B(1)(a)]*
- The taxpayer’s self-assessed position for an income year, as reflected in a statement in their return, is made in good faith; *[Schedule #, item 2, paragraph 170B(1)(b)]*
- Either of the following is met while the announcement for the discontinued measure was current:
 - the taxpayer lodged their return for the income year, provided it was not required to be lodged before the original announcement was made; *[Schedule #, item 2, subparagraph 170B(1)(c)(i)]* or
 - the events happened or the circumstances existed that enabled the taxpayer to anticipate the impact of the announcement listed for the purposes of the provision; *[Schedule #, item 2, subparagraph 170B(1)(c)(ii)]* and
- The assessment that is made for the taxpayer for the income year is consistent with amendments to the law that would reasonably reflect an announcement listed for the purposes of the provision. *[Schedule #, item 2, paragraph 170B(1)(d)]*

Self-assessed positions consistent with amendments that would reasonably reflect an announcement

1.31 For the protection to be available, it is necessary for the taxpayer's self-assessed position that anticipates the announcement, as reflected in a statement in the taxpayer's income tax return, to be consistent with amendments to the law that would reasonably give effect to that announcement. *[Schedule #, item 2, paragraph 170B(1)(a)]*

Self-assessed positions: Statements in a return of the taxpayer

1.32 As discussed earlier (see paragraph 1.19), protection is made available under the provision in a self-assessment context.

1.33 Accordingly, any self-assessed position that is eligible for protection will have been reflected in a statement in the income tax return of the taxpayer. *[Schedule #, item 2, paragraph 170B(1)(a)]*

1.34 This is intended also to contemplate circumstances where, consistent with an announcement, amounts or items are omitted from a taxpayer's return.

1.35 It is not necessary for the reflection of the announcement to be readily apparent in the statements made in the return. Given the Commissioner's administrative treatment of announced but unenacted legislative measures which will apply retrospectively when enacted, as set out in ATO Practice Statement PS LA 2007/11, it is expected that the anticipation would not be readily apparent. This position is consistent with the how the concept of a "statement" applies in the law that deals with administrative penalties for false and misleading statements (see Subdivision 284-B of Schedule 1 to the *Taxation Administration Act 1953*).

Statements in returns in an earlier income year

1.36 Protection is not limited to circumstances where the anticipation of the impact of an announcement will have an impact on the taxpayer's position in the income year for which the taxpayer prepares its return. There are circumstances where anticipation of an announcement may have a deferred or an ongoing impact beyond the income year in which the anticipation is reflected in a return. Accordingly, protection may be available where a statement reflecting anticipation of the impact of an announcement is made in a return for an earlier income year. *[Schedule #, item 2, paragraph 170B(1)(a)]*

1.37 An example of where this may arise is the tax loss scenario discussed at paragraph 1.26 and illustrated in Example 1.2, in particular where the tax loss is claimed as a deduction in a later income year. Another example would be where capital allowance deductions are claimed over a number of years based on a tax cost that would have been impacted by an announced proposal to change the law.

1.38 In cases where anticipation has a deferred or ongoing impact, protection will be given effect for the later income years where assessments are made on a basis that continues to be consistent with the taxpayer's initial anticipation of the impact of the announcement. [Schedule #, item 2, paragraph 170B(1)(d)]

Consistency with amendments that would reasonably reflect an announcement

1.39 To provide a benchmark against which protection can be provided, the law contemplates amendments that may have been made to the law that would *reasonably* reflect a listed announcement. These amendments are referred to in the protection provision as the taxpayer's "anticipated amendments". [Schedule #, item 2, paragraph 170B(1)(a)]

1.40 This reasonableness test recognises that the exact amendments that would give effect to the announcement may not be known with absolute precision. Nevertheless, there should be sufficient detail associated with an announced proposal to change the law to allow an objective basis on which to reasonably anticipate its likely impact.

1.41 From this basis, the condition in paragraph 170B(1)(a) considers whether a taxpayer's self-assessed position, as reflected in a statement in its return, is consistent with how the announced proposal to change the law might *reasonably* been given effect by way of amendment to the law had the change been enacted. Accordingly, there are two steps associated with satisfying the condition:

- First, identify hypothetical amendments (the "anticipated amendments") to the law that are consistent with the statements in the taxpayer's return that anticipate the impact of the listed announced proposal to change the law; and
- Secondly, assess whether those anticipated amendments would reasonably reflect that announcement.

1.42 The law lists factors to be taken into account in applying the reasonableness test in paragraph 170B(1)(a), including:

- the terms of the announcement, which will generally be set out in Budget Papers and associated media releases, as identified in the table of listed announcements in subsection 170B(9); [*Schedule #, item 2, paragraph 170B(2)(a)*]
- any related document published after the announcement on behalf of the Commonwealth Government, the Department of the Treasury or the Commissioner, which will include discussion papers and exposure drafts; [*Schedule #, item 2, paragraph 170B(2)(b)*]
- any specific schemes or practices that the announcement was proposed to apply to, which will contemplate more specifically whether the taxpayer has entered into such schemes or engaged such practices, making it more likely that the “anticipated amendments” would reasonably reflect the announcement; [*Schedule #, item 2, paragraph 170B(2)(c)*] and
- comparable provisions in the existing tax law that, in relation to another matter, give effect to the same or a substantially similar result as that proposed by the announcement [*Schedule #, item 2, paragraph 170B(2)(d)*].

1.43 An example of where the last of these factors will be relevant is where an announcement contemplated that there would be a CGT roll-over in a particular set of circumstances. There are a number of precedents in the current law that provide for a CGT roll-over which might reasonably form a basis for anticipating what amendments could have been made to the law to give effect to such an announcement.

1.44 Any other relevant matters may also be taken into account in applying this reasonableness test. [*Schedule #, item 2, paragraph 170B(2)(e)*]

1.45 It is not necessary for the taxpayer to be aware of the announcement to satisfy the condition in paragraph 170B(1)(a). The condition merely requires the taxpayer’s statements in their return to be consistent with the “anticipated amendments”.

Announcements listed for the purposes of the provision

1.46 Of the 48 measures that the Government has decided not to proceed with, the provision lists those announcements where the protection provision is relevant. The protection provision will not apply to discontinued announcements that are not listed. [*Schedule #, item 2, paragraph 170B(1)(a) and subsection 170B(9)*]

1.47 Some of the listed announcements had potential impacts that would have been favourable to taxpayers, as well as other potential impacts that would not have been favourable to taxpayers. An example is the related party bad debts announcement listed at item 1 of the table in subsection 170B(9). Provided all of the other conditions required for protection to be available are satisfied, the protection provision may apply to the extent that these announcements would have had favourable impacts that were anticipated by taxpayers. The “less favourable result” concept, discussed at paragraphs 1.23 to 1.29, ensures this outcome is achieved.²

1.48 Some of the 37 measures³ in the original backlog that the Government has decided should proceed are intended to have a beneficial impact for taxpayers prior to enactment. The protection provision is not intended to apply to measures that are proposed to proceed. Accordingly, any taxpayer that anticipates such a measure will need to consider their position in accordance with the Commissioner’s administrative treatment in Practice Statement PS LA 2007/11 in the event that the measure is enacted. However, if any of these measures are discontinued for any reason, it is intended that they will be added to the list of announcements for the purposes of the protection provision.

Statements made in good faith

1.49 The statements in income tax returns which form the source of protected positions must also be made in good faith. This condition more specifically contemplates whether the taxpayer’s anticipation of the impact of the listed announcement is bona fide given their particular circumstances. [*Schedule #, item 2, paragraph 170B(1)(b)*]

1.50 The matter of whether the taxpayer’s position reflected in the statements in its income tax return is reasonable in the context of the announcement, and the extent to which the taxpayer is aware of the reasonableness or otherwise of their position, are both relevant to the application of the good faith test. This is different from the reasonableness test in paragraph 170B(1)(a), which applies in assessing whether

² In any case where a taxpayer anticipates an unfavourable outcome of a listed announcement, the taxpayer may seek an amendment of their assessment, and the Commissioner may make an amended assessment subject to any limitations in section 170 of the ITAA 1936.

³ The Government indicated its intention to proceed with 21 of these 37 measures in the 6 November 2013 Joint Media Release of the Treasurer and the Assistant Treasurer. The Government indicated its intention to proceed with the remaining 16 measures considered in the consultation process, including the measure to limit the scope of the integrity rule in the debt-equity provisions and the CGT earn out and instalment warrant measures, in the Assistant Treasurer’s 14 December 2013 Media Release.

hypothetical amendments that are consistent with the taxpayer's position would reasonably reflect the announced proposal to change the law.

1.51 The "good faith" test will allow regard to be had more broadly to the behaviour of the taxpayer or its agent in completing the taxpayer's return. For example, if the taxpayer's anticipation of the impact of the announced proposal to change the law is such that it reflects a statement of facts that are known to be untrue, then that statement would not be made in good faith. Similarly, if the taxpayer or its agent knows that the announcement would not apply to the taxpayer's circumstances, or is reckless as to whether this would be the case, then any statement that anticipates that there would be an impact for the taxpayer would not be in good faith.

1.52 Consistent with the way that the concept of "good faith" has been interpreted in other similar statutory contexts, this condition will allow for a consideration of whether the taxpayer's self-assessed position reflects an arbitrary anticipation of the impact of the announcement, or the absence of reasonable caution and diligence in this regard.

1.53 Given the context in which the "good faith" condition is being applied, the anticipation of an announcement of itself cannot lead to a conclusion that the statement in the income tax return was made other than in good faith.

1.54 Unlike some other cases that are dealt with explicitly in the provision (see paragraphs 1.65 to 1.73 below), there are no specific exceptions applying in relation to the ability of the Commissioner to amend an assessment if he is of the opinion there has been fraud or evasion (see item 5 of the table in subsection 170(1) of the ITAA 1936). If a taxpayer's anticipation of an announcement has been tainted by fraud or evasion, it is considered that the statement of the taxpayer in its income tax return would not be in good faith.

Lodgment or events while the announcement was current

1.55 The application rules for the protection provision are effectively dealt with through the taxpayer meeting one or both of two alternative timing conditions that relate to the period during which the announcements listed in subsection (9) were current or "on foot", namely:

- ***Lodgment-based eligibility***: the taxpayer lodged their return for the income year during that period, provided the return was not required to be lodged before the original announcement was made; [*Schedule #, item 2, subparagraph 170B(1)(c)(i)*] or

- **Event-based eligibility:** the events or circumstances that enabled the taxpayer to anticipate the announcement in an income tax return happened or existed during that period. [Schedule#, item 2, subparagraph 170B(1)(c)(ii)]

Lodgment-based eligibility

1.56 Any anticipation of a listed announcement will ultimately be reflected in information provided in an income tax return lodged by the taxpayer. Once an announcement is “live”, the potential for taxpayers to anticipate it through their income tax return, on the assumption that the proposed change to the law will be enacted by Parliament, is enlivened. For the listed announcements, such an assumption could have continued until 14 December 2013, when the Government announced it had decided not to proceed with those announcements.

1.57 Any income tax return that is lodged while the announcement is on foot must be for an income year to which the proposal to change the law would have applied. However, it is not necessary for that income year to have started or ended after the original announcement was made. Nor is it necessary, if lodgment of the return occurs while the announcement is on foot, for the events or the circumstances that allow for anticipation to have occurred while the announcement is on foot. In some cases, an announced proposal to change to the law will contemplate the application of the proposed change well before the announcement is made, so these events and circumstances may have occurred before the announcement was on foot.

1.58 Nevertheless, to avoid the potential for compliant taxpayers that lodged in a timely fashion to be disadvantaged, lodgment-based eligibility will not be available if the return was due to be lodged before the original announcement was made. This means lodgment-based eligibility will not be available for late lodgers if this late lodgment is the only basis on which that eligibility is established.

Event-based eligibility

1.59 Alternatively, transactions may have been entered into or other events or circumstances may have occurred or happened while the announcement was on foot that allow for anticipation of the announced proposal, even if lodgment of the income tax return occurred after the announcement was discontinued on 14 December 2013. Once these events or circumstances occur or happen while the announcement is on foot, the taxpayer will have a basis on which to anticipate the announced proposal to change the law in its income tax returns. This ensures that protection continues to be provided in a self-assessment context. This will be so even where the lodgment of the taxpayer’s return in respect of those events and circumstances occurs after 14 December 2013.

Announcements “on foot”

1.60 The time while a relevant announcement is “on foot” defines the period during which lodgment-based eligibility or event-based eligibility might be established. This period will vary from announcement to announcement. The table of listed announcements identifies the start date of this period for each of these announcements. The end date of this period is 14 December 2013, when the Government announced it had decided not to proceed with the listed announcements. [*Schedule #, item 2, subsection 170B(9)*]

Assessment consistent with amendments that would reasonably reflect the announcement

1.61 As protection is provided in relation to particulars of an assessment that reflect the taxpayer’s anticipation of the impact of an announcement (see generally paragraphs 1.18 to 1.29 above), it is necessary to connect those particulars to the set of hypothetical amendments to the law that may be considered to reasonably reflect the announcement. [*Schedule #, item 2, paragraph 170B(1)(d)*]

1.62 In effect, this condition requires the taxpayer’s statement in a return for an income year to be fully reflected in the assessments that are ultimately made. This will happen automatically for full self-assessment taxpayers (such as companies and superannuation funds) under subsection 166A(3) of the ITAA 1936. For other taxpayers, this condition will be met where the Commissioner has, for the purposes of making the assessment in relation to the taxpayer, wholly accepted the statement in the return that was the subject of the conditions in paragraphs 170B(1)(a), (b) and (c).

1.63 This consistency condition also ensures ongoing protection in later income years where anticipated self-assessed positions will have a deferred or ongoing impact (see further paragraphs 1.36 to 1.38 above).

1.64 Another intended effect of this condition is to ensure that taxpayers cannot seek an amendment to an assessment to anticipate the impact of an announcement, where their prevailing assessment does not reflect anticipation.

Exceptions

1.65 There are three specified sets of circumstances where the protection that would otherwise be provided by subsections 170B(3) or (4) will not apply. [*Schedule #, item 2, subsection 170B(5)*]

Exception 1: Taxpayer chooses not to have an eligible assessment protected

1.66 A taxpayer may choose not to have eligible particulars of an assessment protected. Where this choice is made there is no limitation (subject to any other limitations applying to the amendment of assessments, particularly those in subsection 170(1) of the ITAA 1936) on the Commissioner amending an assessment of the taxpayer in relation to those particulars. It is intended that this choice would be accommodated simply by way of the usual process that taxpayers have available to contact the Commissioner to seek an amendment to their assessment. [Schedule #, item 2, subsection 170B(6)]

Exception 2: Amendments to give effect to decision on review or appeal

1.67 The operation of the protection provision may be the subject of review or appeal under Part IVC of the *Taxation Administration Act 1953*. The purpose of item 6 of the table in subsection 170(1) of the ITAA 1936 is to ensure that the Commissioner has the power at any time to amend an assessment to reflect decisions made under Part IVC, which covers objection decisions and decisions made by the Administrative Appeals Tribunal and the Courts. Accordingly, this power is to prevail over the protection provision. [Schedule #, item 2, subsection 170B(7)]

Exception 3: Later inconsistent statements

1.68 Some of the announcements that are listed for the purposes of the provision contemplated changes to the law that would have a beneficial impact for taxpayers when initially anticipated, but at a later time may have a related or associated impact that is not beneficial.

1.69 For example, a number of the announcements listed in subsection 170B(9) proposed to introduce CGT roll-overs. A CGT roll-over generally involves any capital gains being disregarded when a certain CGT event occurs, but also involves the original cost base of the asset to which that event occurs being maintained and used in relation to a later CGT event that happens to that asset or a replacement asset.

1.70 The deferral of a capital gain on the roll-over transaction would be an anticipated benefit under the protection measure. However, maintaining the original cost base will most likely mean that there is a larger capital gain or smaller capital loss if a later CGT event happens.

1.71 Such situations give rise to the possibility that a taxpayer may rely on the protection provision to ensure that the anticipated benefit is obtained in the first instance, while in a later income year relying on the operation of the law in their return to obtain a further benefit that is inconsistent with their initial anticipation of the announcement.

1.72 To ensure that taxpayers do not obtain a later inconsistent benefit, the protection provided by the provision will cease to be available should a statement be made in a later income tax return that is inconsistent with the anticipated amendments, where an assessment for the later income year would have a less favourable result for the taxpayer if made on the basis of the anticipated amendments. *[Schedule #, item 2, subsection 170B(8)]*

1.73 To facilitate this outcome, the Commissioner will have the power to amend assessments, including the assessments where the taxpayer originally anticipated the announcement, at any time where the conditions for this exception are met. *[Schedule #, item 1, item 27A of the table in subsection 170(10)]*

Definitions

1.74 The term “taxation law” is referred to in a number of places in the protection provision. *[Schedule #, item 2, paragraphs 170B(1)(a) and (c); paragraph 170B(2)(d); subsection 170B(4)]*

1.75 This term has a meaning as defined in subsection 995-1(1) of the *Income Tax Assessment Act 1997*. That definition includes any Act of which the Commissioner has the general administration. *[Schedule #, item 2, paragraph 170B(10)]*

1.76 While the listed announcements in subsection 170B(9) only had potential impacts on income tax positions of taxpayers, it is possible that the amendments that reasonably reflect those announcements may extend to taxation laws other than the income tax law, in particular the *Taxation Administration Act 1953*. In addition, there is the need for the protection provision to explicitly deal with the potential for “administrative overpayments” (see paragraph 1.27 above), which is a concept that is found in the *Taxation Administration Act 1953*.

Application and transitional provisions

1.77 The protection provision commences on the day the Act receives the Royal Assent. The application provisions are effectively incorporated in the timing conditions that are discussed at paragraphs 1.55 to 1.60 above.