Glossary

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

Abbreviation	*Definition*
ATO	Australian Taxation Office
Commissioner	Commissioner of Taxation
Convention	The Multilateral Convention on Mutual Administrative Assistance in Tax Matters
CRS	Common Reporting Standard
CRS Commentary	*Commentaries on the Common Reporting Standard*
FATCA	Foreign Account Tax Compliance Act
MCAA	Multilateral Competent Authority Agreement
OECD	Organisation for Economic Co-operation and Development
TAA 1953	*Taxation Administration Act 1953*

General outline and financial impact

Common Reporting Standard

Schedule # to this Bill amends Schedule 1 to the *Taxation Administration Act 1953* to require certain Australian financial institutions to report information to the Commissioner of Taxation (Commissioner) about financial accounts held by foreign residents. In turn, the Commissioner will provide this information to the foreign residents' tax authorities, and in parallel, will receive information on Australian residents with financial accounts held overseas.

In order to identify relevant accounts, financial institutions will need to carry out the due diligence procedures outlined in the *Standard for Automatic Exchange of Financial Account Information in Tax Matters*, commonly known as the Common Reporting Standard (CRS).

Date of effect: Schedule # to this Bill applies from 1 January 2017.

Proposal announced: The Government announced this measure in the 2014–15 Mid-year Economic and Fiscal Outlook following the release of a discussion paper for public consultation on 19 June 2014 seeking stakeholder views on implementation of the CRS.

Chapter 1
Common Reporting Standard

Outline of chapter

1.1 Schedule # to this Bill amends Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) to require certain Australian financial institutions to report information to the Commissioner of Taxation (Commissioner) about financial accounts held by foreign residents. In turn, the Commissioner will provide this information to the foreign residents' tax authorities, and in parallel, will receive information on Australian residents with financial accounts held overseas.

1.2 In order to identify relevant accounts, financial institutions will need to carry out the due diligence procedures outlined in the *Standard for Automatic Exchange of Financial Account Information in Tax Matters*, commonly known as the Common Reporting Standard (CRS).

Context of amendments

1.3 Globalisation and other technological advances have made it easier for individuals to hold investments in financial institutions overseas. Whilst investment income earned by Australian residents in financial institutions in other countries may form part of their Australian assessable income, this income may not be subject to tax if it remains unreported to the Australian Taxation Office (ATO).

1.4 Tax evasion is a global problem and international cooperation and sharing of high quality, predictable information between revenue authorities will help them enforce compliance with local tax laws. The CRS is an international framework developed by the Organisation for Economic Co-operation and Development (OECD), working with G20 countries to tackle and deter cross-border tax evasion. It establishes a common international standard for financial institutions to identify the financial accounts of foreign residents, report information on those account holders and their financial accounts to their local tax authority and for the authority to exchange that information with the tax authority of the foreign resident.

The Common Reporting Standard

1.5 The CRS sets out the due diligence rules that financial institutions (Reporting Financial Institutions) of a Participating Jurisdiction must follow to identify Account Holders who are tax residents of another Participating Jurisdiction and to report the relevant account information to their local tax authority.

1.6 The CRS was endorsed by G20 Leaders at their meeting on 15 and 16 November 2014. Over 90 jurisdictions have committed to its implementation.

1.7 The CRS is based on and often mirrors the obligations imposed on financial institutions by the United States' Foreign Account Tax Compliance Act (FATCA). These obligations are imposed on Australian financial institutions through the operation of Division 396 of Schedule 1 to the TAA 1953 which, following the passage of the *Tax Laws Amendment (Implementation of the FATCA Agreement) Act 2014*, took effect on 1 July 2014.

1.8 The decision by countries to base the CRS on FATCA was taken to minimise compliance costs for financial institutions and governments. Accordingly, Australian financial institutions will be subject to similar due diligence and reporting requirements in the CRS as they currently are under FATCA. However, some adjustments have been made to adapt the CRS from a US-specific requirement to an international framework. For example, FATCA uses US citizenship information to determine an account holder's US tax residency, whereas the CRS uses other indicia (that is, it does not use citizenship as an indicium). In addition, the CRS applies to a wider range of financial institutions. For example, financial institutions with only low value accounts or with a local customer base (which do not need to comply with FATCA) are not specifically excluded under the CRS.

The international framework for sharing information

1.9 There are different legal bases for the automatic exchange of information, including Australia's bilateral tax treaties and the *Multilateral Convention on Mutual Administrative Assistance in Tax Matters* (the Convention). The Convention provides for all forms of administrative cooperation and contains strict rules on confidentiality and proper use of information. Australia signed the amended Convention in 2011.

1.10 Automatic exchange under the Convention requires an administrative agreement between the ATO and other countries' tax authorities. On 3 June 2015, Australia signed the *Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information* (MCAA), which is based on Article 6 of the Convention. This agreement has been signed by over 60 jurisdictions.

1.11 The MCAA provides a framework for the bilateral exchange of information with other signatories. For example, it includes broad guidelines on how countries should establish confidentiality safeguards, collaborate on compliance and enforcement issues and engage in consultation. However, arrangements relating to the specific timing and manner of the automatic exchange of information between countries that are to exchange CRS information will be made at the administrative level (between the ATO and other countries' tax authorities) and will take effect once each country notifies the OECD.

1.12 To protect the confidentiality of account holders' information, Australia does not intend to enter an agreement to automatically exchange information with another country unless that country has the legal and administrative capacity to ensure confidentiality. In addition, the ATO will be able to suspend the exchange of information with another country's tax authority if it determines that there is or has been significant non-compliance with confidentiality safeguards.

Summary of new law

1.13 These amendments insert a new Subdivision, 'Subdivision 396-C — Common Reporting Standard' into 'Part 5-25 — Record-keeping and other obligations of taxpayers' in Schedule 1 to the TAA 1953.

1.14 To ensure consistency with the CRS, these amendments adopt meanings and concepts used in the CRS. This means the reporting obligations apply to Australian 'Reporting Financial Institutions' that maintain at least one 'Reportable Account' in a calendar year.

Comparison of key features of new law and current law

New law	*Current law*
Financial institutions will need to carry out CRS due diligence procedures to identify Reportable Accounts held by foreign residents and provide a statement to the Commissioner about those accounts.	Financial institutions have similar due diligence obligations to identify and report on accounts held by US citizens or tax residents.
Financial institutions will need to keep records for at least five years that explain the procedures used for identifying these accounts.	Financial institutions have similar record keeping requirements in relation to their obligations to identify and report on accounts held by US citizens or tax residents.

Detailed explanation of new law

The Common Reporting Standard

1.15 The 'Common Standard on Reporting and Due Diligence for Financial Account Information' (the Common Reporting Standard) is contained in Annex II.B of the *Standard for Automatic Exchange of Financial Account Information in Tax Matters*, which was approved on 15 July 2014 by the Council of the OECD. ***[Schedule #, item 12, subsection 396-110(1)]***

1.16 A copy of this document is available on the OECD website (www.oecd.org).

1.17 The CRS is accompanied by the *Commentaries on the Common Reporting Standard* (CRS Commentary) that provides additional information on how financial institutions should apply the due diligence procedures to ensure consistency across jurisdictions. For example, the CRS Commentary provides the type of documentary evidence required in applying the residence address test contained in Section III B(1) of the CRS. In determining their reporting obligations under these amendments, financial institutions should, subject to the specifications as set out in paragraphs 1.23 to 1.40, apply the CRS consistently with the CRS Commentary. ***[Schedule #, item 12, subsection 396-110(2)]***

Reportable Accounts — the reporting obligation

1.18 Reporting Financial Institutions in Australia that maintain at least one Reportable Account at any time during a calendar year will need to give a statement to the Commissioner in relation to each of those accounts. This statement will need to contain information that the CRS states the financial institution must report. ***[Schedule #, item 12, subsections 396-105(1) and (2)]***

1.19 Implicit in this obligation is the requirement that such financial institutions will need to collect the relevant information.

1.20 A Reporting Financial Institution that does not maintain any Reportable Accounts does not need to provide such a statement to the Commissioner.

1.21 Whether a financial institution maintains a Reportable Account is determined by the financial institution applying the due diligence procedures described in the CRS consistently with the CRS Commentary. This means financial institutions need to have completed the relevant due diligence procedures by the time they are required to provide a statement to the Commissioner. ***[Schedule #, item 12, subsections 396-105(3) and 396-120(5)]***

1.22 The concept of a Reporting Financial Institution is defined in Section VIII of the CRS. It generally includes banks and other deposit-taking institutions, custodial institutions, brokers that hold financial assets for the account of others, investment entities and arrangements, and insurance companies that issue or make payments to investment-linked life insurance or annuity contracts.

The due diligence procedures

1.23 In general, the due diligence rules specified in the CRS differ according to:

- whether the account is held by an individual or another type of entity;
- whether the account is a pre-existing account or new account; and
- whether it is classified as a high-value account or a low-value account.

1.24 As noted in paragraph 1.17, Australia is specifying how Reporting Financial Institutions are to apply certain due diligence procedures specified in the CRS and the CRS commentary. These specifications are designed to give effect to particular matters that the CRS allows implementing jurisdictions to specify and to minimise the compliance costs for financial institutions in determining whether they maintain any Reportable Accounts and the information to be reported to the Commissioner. ***[Schedule #, item 12, subsection 396-120(1)]***

Non-reporting financial institutions

1.25 Some government entities, international organisations, Australia's central bank and retirement funds, as set out in Annex II of the FATCA Agreement, will generally be treated as being Non-Reporting Financial Institutions except in relation to some commercial activities. ***[Schedule #, item 12, paragraph 396-115(1)(a) and subsection 396-115(2)]***

1.26 Such entities will not need to identify if they maintain any Reportable Accounts or provide a statement to the Commissioner.

1.27 To provide flexibility in the future, the Minister may prescribe additional entities by legislative instrument as being Non-Reporting Financial Institutions if such entities present a low risk of being used to evade tax and are similar to certain Non-Reporting Financial Institutions specified in the CRS. ***[Schedule #, item 12, paragraph 396-115(1)(b)]***

Excluded Accounts

1.28 Retirement and pension accounts and some non-retirement savings accounts, as set out in Annex II of the FATCA Agreement, will generally be treated as being Excluded Accounts (and therefore excluded under the CRS from being Reportable Accounts). ***[Schedule #, item 12, paragraph 396-115(3)(a)]***

1.29 To provide ongoing flexibility, the Minister may also prescribe additional Excluded Accounts by legislative instrument if such accounts present a low risk of being used to evade tax and are similar to certain Excluded Accounts specified in the CRS. ***[Schedule #, item 12, paragraph 396-115(3)(b)]***

Pre-existing Accounts

1.30 All accounts opened by financial institutions on or after 1 January 2017 will be treated as New Accounts; all other accounts (that is, those accounts maintained by financial institutions on 31 December 2016) will be treated as Pre-existing Accounts. ***[Schedule #, item 12, subsections 396-120(6) and (7)]***

1.31 As noted in paragraph 1.23 the CRS specifies different due diligence procedures for Pre-existing Accounts and New Accounts.

1.32 One consequence of this approach is that financial institutions can assume that where the CRS Commentary envisages that particular dates will be same as that selected for Pre-Existing or New Accounts those dates will be 31 December 2016 and 1 January 2017 respectively. This means, for example, the date for initially determining whether a Pre-Existing Account is a High Value Account would be 31 December 2016.

Elections by financial institutions

1.33 In general, a financial institution may make any of the elections permitted in the CRS in determining its obligations under the CRS. This includes:

- using third party service providers to fulfil their obligations;
- applying the due diligence procedures for New Accounts to Pre-existing Accounts;
- applying the due diligence procedures for High Value Accounts to Lower Value Accounts;
- applying the residence address test for Lower Value Accounts;
- excluding Pre-existing Entity Accounts with an aggregate value or balance of $250,000 or less from its due diligence procedures;
- making use of existing standardised industry coding systems for the due diligence process; and
- using a single currency translation rule.

[Schedule #, item 12, subsection 396-115(4)]

Reportable Jurisdictions

1.34 All jurisdictions (other than Australia) are to be treated as being Reportable Jurisdictions. This requires Australian financial institutions to apply the due diligence rules to all of its customers that are foreign residents. ***[Schedule #, item 12, subsection 396-120(3)]***

Dollar thresholds

1.35 Financial institutions may apply the dollar thresholds specified in the CRS in Australian dollars (rather than as US dollars). This means

financial institutions do not need to undertake currency conversion procedures to determine the balance or value of accounts in US dollars.
[Schedule #, item 12, subsection 396-120(8)]

1.36 For example, an account will be a Higher Value Account if it has a balance exceeding AUD1,000,000 or USD1,00,000 as of 31 December 2016.

Other modifications

1.37 In determining its reporting obligations under these amendments, a financial institution will need to:

- treat Australia as being a Participating Jurisdiction;
- disregard the requirements in Paragraph F of Section 1 of the CRS; and
- apply the inclusion in paragraph 13 of the CRS Commentary on Section VII (special due diligence requirements) and apply the two replacements mentioned in paragraph 18 of the CRS Commentary (defined terms).

[Schedule #, item 12, subsections 396-115(5), 396-120(2) and 396-120(4)]

1.38 Subparagraph D(5)(ii) of Section VIII of the CRS requires the Commissioner to publish a list that identifies Participating Jurisdictions for the purposes of the CRS's 'look through' provisions in respect of Controlling Persons of Investment Entities (as described in subparagraph A(6)(b) of Section VIII) that are not Participating Jurisdiction Financial Institutions.

1.39 Over 90 jurisdictions have committed to implement the CRS and it is expected that 2016 and 2017 will be transitional years for operationalising all of these commitments and putting in place information exchanges between such jurisdictions. This presents operational challenges for financial institutions that will need to determine whether they need to 'look through' Investment Entities on the basis of whether the Investment Entity's jurisdiction is a Participating Jurisdiction identified in the list published by the Commissioner.

1.40 The Commissioner may address these transitional issues by treating certain jurisdictions with which Australia has not yet put in place an exchange agreement as Participating Jurisdictions and including such jurisdictions on the published list for an appropriate period of time.

- This treatment is expected to be reserved for jurisdictions that are publicly and at a government level committed to implement the

CRS by 2018 and that reasonably display that such commitment is being acted upon (for example, through the signature of the MCAA or a similar exchange instrument).

- This treatment would suspend the application of the look through provisions in respect of such jurisdictions for the duration of the appropriate period determined by the Commissioner.

- For example, the Commissioner could then re-assess the list of Participating Jurisdictions included on the published list in this manner by 1 July 2017 based on whether relevant jurisdictions' commitments are being delivered. A removal of a jurisdiction from the published list would trigger an obligation on Reporting Financial Institutions to apply the relevant due diligence procedures in respect of an Investment Entity's Controlling Persons.

Reportable accounts — statements to the Commissioner

1.41 The statement to the Commissioner must be given in the 'approved form'. The concept of approved forms is used in the taxation laws to provide the Commissioner with administrative flexibility to specify the precise form of information required and the manner of providing it. ***[Schedule #, item 12, subsections 396-105(4) and (5)]***

1.42 Section 388-50 of Schedule 1 to the TAA 1953 provides the legislative basis for the use of approved forms. Subsection 388-50(2) allows the Commissioner to combine more than one statement in the one approved form and paragraph 388-50(1)(c) allows the Commissioner to require any necessary additional information.

1.43 Each statement is due to the Commissioner by 31 July of the year following the year to which the information relates.

- However, section 388-55 of Schedule 1 to the TAA 1953 allows the Commissioner to defer the time that entities must lodge a statement in the approved form.

- This means Reporting Financial Institutions may lodge these statements by a later date where that has been approved by the Commissioner.

[Schedule #, item 12, subsection 396-105(6)]

Consequences of not complying

1.44 Australia's domestic tax laws contain a range of sanctions for entities that do not comply with their reporting obligations. Specifically:

- Division 284 of Schedule 1 to the TAA 1953 sets out the penalties that apply to entities that make false or misleading statements about tax-related matters; and

- Division 286 of Schedule 1 to the TAA 1953 sets out the penalties that apply to entities that fail to lodge statements on tax-related matters in time.

1.45 This means, for example, that:

- a Reporting Financial Institution that makes a false or misleading statement because of an intentional disregard of the taxation laws may be liable to an administrative penalty of 60 penalty units — per table item 3A of subsection 284-90(1) of Schedule 1 to the TAA 1953;

- a Reporting Financial Institution that makes a false or misleading statement through recklessness as to the operation of the taxation laws may be liable to an administrative penalty of 40 penalty units — per table item 3B of subsection 284-90(1); or

- a Reporting Financial Institution that makes a false or misleading statement because of a failure to take reasonable care to comply with the taxation laws may be liable to a penalty of 20 penalty units — per table item 3C of subsection 284-90(1).

1.46 Similarly, a Reporting Financial Institution that fails to provide a statement on time, or in the approved form, may be liable under subsection 286-80(2) of Schedule 1 to the TAA 1953 to a base administrative penalty of one penalty unit for each period of up to 28 days from when the document was due, up to a maximum of five penalty units (subsections 286-80(3) and (4) of Schedule 1 to the TAA 1953 increase these penalty amounts for some entities).

1.47 Section 4AA of the Crimes Act 1914 provides the value of a penalty unit. The current value is $180.

The requirement to keep records of relevant procedures

1.48 Similar to Australia‘s income tax regime and FATCA-related reporting obligations on financial institutions, the reporting obligations on Reporting Financial Institutions will operate on a self-assessment basis. Under self-assessment, taxpayers typically perform certain functions and exercise some responsibilities that might otherwise be undertaken by the revenue authority. One consequence of a self-assessment approach is that whilst the Commissioner may initially accept an entity‘s statement at face

value, the Commissioner may subsequently seek to verify the accuracy of that statement, particularly if there are potential compliance risks.

1.49 Accordingly, reporting entities will need to keep adequate records about the procedures they used in preparing the relevant statement to ensure the Commissioner can properly assess whether they have, in fact, complied with their reporting obligations. This record-keeping obligation is similar to other record keeping provisions in Australia's domestic taxation laws.

1.50 Specifically, a Reporting Financial Institution that provides a statement to the Commissioner will need to keep records for five years (from the date of providing that statement to the Commissioner) that:

- correctly record the procedures by which it determined what information to include in the statement; and
- are in English, or are readily accessible and easily convertible into English.

[Schedule #, item 12, subsection 396-125(1) and paragraph 286-125(2)(a)]

1.51 A Reporting Financial Institution that does not provide a statement to the Commissioner in a particular year will need to keep records until 31 July of the sixth year after that year that correctly record the procedures by which it determined that it did not need to provide a statement to the Commissioner. ***[Schedule #, item 12, paragraph 396-125(2)(b)]***

1.52 Section 288-25 of Schedule 1 to the TAA 1953 provides that an entity that fails to keep or retain records as required by the taxation laws is liable to an administrative penalty of 20 penalty units.

Statements by customers

1.53 Customers that provide a Self-Certification (as permitted by the CRS) to a Reporting Financial Institution that is false or misleading in a material particular may be subject to an administrative penalty under subsection 284-75(4) of Schedule 1 to the TAA 1953. ***[Schedule #, item 12, section 396-130]***

Consequential amendments

1.54 This Schedule makes consequential amendments to define the 'CRS' and 'CRS Commentary' in section 995-1 of the *Income Tax Assessment Act 1997*. ***[Schedule #, item 1]***

1.55 These amendments include guide material for Subdivision 396-C. ***[Schedule #, item 12, section 396-100]***

1.56 In addition, minor amendments have been made to Subdivision 396-A of Schedule 1 to the TAA 1953 to ensure consistency between the FATCA provisions and these amendments. ***[Schedule #, items 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11]***

Application and transitional provisions

1.57 These amendments apply to 2017 and later calendar years. ***[Schedule #, item 13]***

1.58 However, to minimise the regulatory burden for Australian financial institutions, these amendments allow Reporting Financial Institutions to elect to defer their reporting obligations by 12 months. A Reporting Financial Institution that wishes to defer their reporting obligations must inform the Commissioner of that choice by written notice in the approved form.

1.59 A Reporting Financial Institution that elects a start date of 1 January 2018 will be required to have completed the due diligence procedures by 31 July 2019 for information relating to the 2018 calendar year. The Reporting Financial Institution will be required to provide a statement to the Commissioner by 31 July 2019. All other financial institutions will need to have completed the due diligence procedures and provide a statement to the Commissioner for information for calendar year 2017 for all accounts except low-value pre-existing individual accounts and for entity accounts, which need to be reported by 31 July 2019. ***[Schedule #, item 14]***