
TREASURY LAWS AMENDMENT (MEASURES FOR CONSULTATION) BILL
2021: MISCELLANEOUS AND TECHNICAL AMENDMENTS

EXPOSURE DRAFT EXPLANATORY MATERIALS

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Chapter 1

Miscellaneous and technical amendments

Outline of chapter

1.1 Schedule # makes a number of miscellaneous and technical amendments to various laws in the Treasury portfolio. The amendments are part of the Government's ongoing commitment to the care and maintenance of Treasury portfolio legislation.

1.2 The amendments make minor and technical changes to correct typographical and number errors, repeal inoperative provisions, remove administrative inefficiencies, address unintended outcomes, and ensure that the law gives effect to the original policy intent.

Context of amendments

1.3 Minor and technical amendments are periodically made to Treasury legislation to remove anomalies, correct unintended outcomes and generally improve the quality of laws. Making such amendments gives priority to the care and maintenance of Treasury portfolio legislation

1.4 The process was first supported by a recommendation of the 2008 Tax Design Review Panel, which was appointed to examine how to reduce delays in the enactment of tax legislation and improve the quality of tax law changes. It has since been expanded to all Treasury portfolio legislation.

Summary of new law

1.5 The minor and technical amendments address technical deficiencies and legislative uncertainties in various Treasury laws by:

- correcting spelling and typographical errors;
- fixing incorrect legislative references;
- reducing unnecessary red tape;
- addressing unintended outcomes;
- enhancing readability and administrative efficiency; and
- repealing redundant and inoperative provisions.

Detailed explanation of new law

Amendments commencing the day after Royal Assent

Australian Prudential Regulation Authority Supervisory Levies Determination 2021

1.6 Section 9-2 of the *Australian Prudential Regulation Authority Supervisory Levies Determination 2021* contains a typographical error for the minimum restricted levy amount relating to superannuation entities that are not pooled superannuation trusts, small APRA funds or single member approved deposit funds. The minimum restricted levy amount included in the table was “\$7,50”, but the intended amount was “\$7,500”. The amendments update the minimum restricted levy to \$7,500. [Schedule #, item 1, section 9-2 of the *Australian Prudential Regulation Authority Supervisory Levies Determination 2021*]

1.7 The amendments apply retrospectively from 1 July 2021. It is not expected that the small number of superannuation entities affected by this typographical error would be adversely affected by the retrospective application of this amendment. This is because the correct amount of \$7,500 was publicly consulted on and was the amount expected to be paid by the entities. Applying the amendment from the beginning of 2021 financial year ensures that levy obligations for affected entities are consistent with what was originally intended. The Australian Prudential Regulation Authority has also contacted affected entities to advise them of the error and of this intended correction. [Schedule #, item 2, section 10-1 of the *Australian Prudential Regulation Authority Supervisory Levies Determination 2021*]

Competition and Consumer Act 2010

1.8 Section 4B of the *Competition and Consumer Act 2010* is amended to reinstate the rebuttable presumption that a person to a proceeding under that Act is a consumer when acquiring particular goods and services. The presumption was inadvertently repealed by the *Treasury Laws Amendment (2020 Measures No. 6) Act 2020*, wherein section 4B was replaced to align with the definition of ‘consumer’ in section 3 of the *Australian Consumer Law*. [Schedule #, items 3 and 4, section 4B of the *Competition and Consumer Act 2010*]

1.9 The amendment also ensures that, by virtue of section 51(2A) of the *Competition and Consumer Act 2010*, a respondent to an action in relation to a contravention of a provision of Part IV can rely on the presumption to allege they are a consumer and have their conduct disregarded.

1.10 The presumption applies to proceedings under the *Competition and Consumer Act 2010* that begin after this Schedule commences.

Matters within a proceeding may relate to events that have occurred at any time prior to the start of the proceeding. [*Schedule #, item 5*]

1.11 Sections 76(1A)(cb) and 76(1B)(aab) of the *Competition and Consumer Act 2010* are amended to ensure that any penalties (for contraventions of civil penalty provisions) prescribed by the consumer data rules for a body corporate and persons other than a body corporate do not exceed the maximum pecuniary amounts specified in sections 76(1A)(b)(i) and (1B)(ab) of that Act. [*Schedule #, items 6 and 7, sections 76(1A)(cb) and 76(1B)(aab) of the Competition and Consumer Act 2010*]

1.12 The amendments ensure that, where consumer data rules in Part IVD of the *Competition and Consumer Act 2010* specify a penalty amount, that amount will not exceed \$10,000,000 for a body corporate or \$500,000 for a person other than a body corporate. This was originally intended in the *Treasury Laws Amendment (Consumer Data Right) Act 2019*.

Amendments to the breach reporting provisions in the Corporations Act 2001 and National Consumer Credit Protection Act 2009

1.13 Schedule 11 to the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* introduced a strengthened breach reporting regime into the *Corporations Act 2001* and a new regime into the *National Consumer Credit Protection Act 2009*. Under the regimes, licensees are obligated to report and investigate breaches of the financial services law and credit legislation.

1.14 Section 50A(3)(c) of the *National Consumer Credit Protection Act 2009* provides that breaches of other Commonwealth laws, to the extent that those laws cover conduct relating to credit activities, are reportable.

1.15 Under the equivalent provision in the *Corporations Act 2001*, the breach reporting regime only covers breaches of other Commonwealth laws (to the extent they cover conduct relating to financial services) where those laws are prescribed by the regulations. The scope of the regime under the *Corporations Act 2001* is therefore narrower and provides greater certainty to licensees about the scope of their breach reporting obligations.

1.16 The amendment adds to section 50A(3)(c) of the *National Consumer Credit Protection Act 2009* the requirement that Commonwealth laws be prescribed by the regulations for their breach to be reportable. This aligns with the approach taken in the *Corporations Act 2001* where regulations prescribe which Commonwealth laws are caught within the breach reporting regime. This will provide clarity to licensees of their breach reporting obligations. [*Schedule #, item 22, section 50A(3)(c) of the National Consumer Credit Protection Act 2009*]

1.17 The breach reporting regimes under the *Corporations Act 2001* and the *National Consumer Credit Protection Act 2009* provide that significant breaches of core obligations by representatives of licensees are reportable. However, the provisions which comprise the core obligations pertain to obligations on licensees only. This means that breaches by representatives of the financial services law or credit legislation do not attract a reporting obligation, even if such breaches are significant.

1.18 The amendments add core obligations on representatives of licensees into the breach reporting regime. This will ensure that breaches of these obligations by representatives of licensees are reportable. *[Schedule #, items 8 and 23, section 50A(3) of the National Consumer Credit Protection Act 2009; section 912D(3)(e) of the Corporations Act 2001]*

1.19 These core obligations on representatives of licensees are the same core obligations on licensees, except that licensees' core obligations also include those found in other Commonwealth laws (that fall within the scope defined in each of the *Corporations Act 2001* and *National Consumer Credit Protection Act 2009*).

1.20 The amendments apply in relation to a reportable situation that arises on or after 1 October 2021. To ensure licensees are not disadvantaged by retrospective application requiring them to do a thing within a certain time period in relation to a reportable situation that arose before the commencement of the amendments, the application provision provides that licensees are obliged to do the thing within the certain time period from when the amendments commence. *[Schedule #, item 17, sections 1689 and 1690 of the Corporations Act 2001; Schedule #, item 25, items 1 and 2 of Schedule 20 to the National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009]*

1.21 For example, if a licensee were required to do something within 30 days of becoming aware of a reportable situation, and the time to do that thing was before the commencement of the amendment, the effect of the application provision is that the licensee would be required to do the thing within 30 days after the commencement of the amendments.

1.22 Section 912D(4)(b) of the *Corporations Act 2001* and section 50A(4)(b) of the *National Consumer Credit Protection Act 2009* provide that a breach of a civil penalty provision is significant and reportable to the Australian Securities and Investments Commission unless the civil penalty provision is prescribed in the regulations.

1.23 Under both Acts, a breach of a civil penalty provision may be triggered by the breach of one of a number of different provisions, or in relation to one of a number of different matters. Prescribing a civil penalty provision would therefore have the effect of making a breach in relation to multiple provisions or matters exempt from reporting. This limits the

ability to make breaches in relation to some matters reportable while exempting others.

1.24 The amendments provide that a civil penalty provision may be prescribed to the extent that it relates to the contravention of a specific provision or class of provisions, or a matter or class of matters. This allows particular matters or contraventions of provisions (or classes of the same) to be specified for exemption from reporting, without exempting the whole civil penalty provision and each provision or matter to which the penalty provision relates. [*Schedule #, items 9 and 24, section 912D(6) of the Corporations Act 2001 and section 50A(5A) of the National Consumer Credit Protection Act 2009*]

1.25 The amendment applies to reportable situations that arise on or after the commencement of the amendment. [*Schedule #, item 17, sections 1689 and 1691 of the Corporations Act 2001; Schedule #, item 25, items 1 and 3 of Schedule 20 to the National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*]

Other amendments to the Corporations Act 2001

1.26 Section 916B of the *Corporations Act 2001* is amended to expand the group of authorised representatives who can appoint individual persons to act on the licensee's behalf. Currently under that provision, only body corporate authorised representatives can appoint individual persons to act on the licensee's behalf.

1.27 Since 2005, the *Corporations Regulations 2001* have modified the operation of section 916B of the *Corporations Act 2001*. The effect of these modifications is any authorised representative can appoint an individual person to act on behalf of the licensee, so long as:

- the licensee consents in writing to this occurring; and
- the representative making the appointments was not themselves appointed in this manner.

1.28 The effect of items 10 and 11 is to incorporate the modifications made by the *Corporations Regulations 2001* directly into section 916B of the *Corporations Act 2001*. [*Schedule #, items 10 and 11, section 916B of the Corporations Act 2001*]

1.29 For consistency throughout the provision consequential amendments have been made to the remainder of section 916B of the *Corporations Act 2001* which amends the terminology to 'authoriser'. [*Schedule #, items 12, 13 and 14, section 916B of Corporations Act 2011*]

1.30 Section 946C of the *Corporations Act 2001* explains that under certain circumstances, a Statement of Advice(s) must be issued to the client when financial advice is provided. Item 15 amends section 946C(3)(c) of the *Corporations Act 2001* so that in time critical cases, providers have five business days (rather than five calendar days) to give

the Statement of Advice to clients. Previously, this section was modified in this way by regulation 7.7.10AH of the *Corporations Regulations 2001*. As this amendment is now being incorporated in primary law, regulation 7.7.10AH of the *Corporations Regulations 2001* is repealed. [*Schedule #, item 15, section 946C(3)(c) of the Corporations Act 2001*]

1.31 Section 1019B of the *Corporations Act 2001* details the client's right to return a financial product in certain circumstances. Item 16 amends section 1019B(3)(b) of the *Corporations Act 2001* such that this right commences no later than the end of five business days (rather than five calendar days) after the product was issued or sold to the client. Formerly, this section was modified in this way by regulation 7.9.15G of the *Corporations Regulations 2001*. As this amendment is now being incorporated into primary law, regulation 7.9.15G of the *Corporations Regulations 2001* is repealed. [*Schedule #, item 16, section 1019B(3)(b) of the Corporations Act 2001*]

Foreign Acquisitions and Takeovers Act 1975

1.32 Section 62A of the *Foreign Acquisitions and Takeovers Act 1975* allows the Treasurer to provide a notice which contemplates the variation or revocation of an exemption certificate if the holder of that certificate provides false or misleading information prior to seeking the exemption. The power to give this notice is in section 62A(2). However, section 62A(3)(b) incorrectly references the power as being in section 62A(1). The amendment fixes this error and ensures the reference is correct. [*Schedule #, item 18, section 62A of Foreign Acquisitions and Takeovers Act 1975*]

1.33 Section 76 of the same Act sets out the content requirements in relation to a no objection certificate that is issued under sections 74 or 75 of the Act. Section 76(4) incorrectly references section 76(1)(c) when referring to the time period requirement which is in section 76(1)(b)(i). The proposed amendment will fix this error and ensure the reference is correct. [*Schedule #, item 19, section 76 Foreign Acquisitions and Takeovers Act 1975*]

Income Tax Rates Act 1976

1.34 The amendments ensure the Working Holiday Maker tax regime functions properly despite disruptions caused by COVID-19.

1.35 Under section 3A of the *Income Tax Rates Act 1986*, an individual who holds a subclass 417 (Working Holiday) visa, subclass 462 (Work and Holiday) visa or certain bridging visas is considered a working holiday maker. Relative to non-resident taxpayers, working holiday makers are effectively subject to concessional tax rates under Part III of Schedule 7 to the *Income Tax Rates Act 1986*.

1.36 Eligible working holiday makers may apply to the Department of Home Affairs to extend their stay in Australia under a COVID-19 Pandemic Event visa (subclass 408 visa).

1.37 Section 3A of the *Income Tax Rates Act 1986* is amended so that the definition of a working holiday maker includes holders of a subclass 408 visa if that visa was granted to allow holder to remain in Australia following the expiry of a subclass 417 visa, subclass 462 visa, or certain bridging visas. [*Schedule #, item 20, section 3A of the Income Tax Rates Act 1986*]

1.38 The amendments apply retrospectively from 1 July 2019 to taxpayers who are non-residents and prospectively from the first 1 July to occur after the Part commences to taxpayers who are residents. The retrospective application does not adversely impact individuals and ensures non-resident taxpayers are subject to the concessional rates. [*Schedule #, item 21*]

Payment Times Reporting Act 2020

1.39 Section 14(1) of the *Payment Times Reporting Act 2020* sets out the content that must be included in payment times reports. Section 14(1)(h) requires reporting on the proportion of all procurement during the reporting period, determined by total value, that was procurement from small business suppliers.

1.40 The amendments repeal section 14(1)(h) of the *Payment Times Reporting Act 2020* and substitutes a new paragraph. The new paragraph refers to the proportion, by total value, of “all invoices paid” rather than the proportion, determined by total value, of “procurement”. [*Schedule #, item 31, section 14 of the Payment Times Reporting Act 2020*]

1.41 The amendments are intended to ensure that the reporting content requirement captures the proportion, by total value, of all invoices paid by the entity during the reporting period that were small business invoices rather than the total value of procurement which may differ from invoices paid.

1.42 Section 14(2) of the *Payment Times Reporting Act 2020* provides that the rules may prescribe the method for working out any of the matters mentioned in section 14(1)(g) of that Act, including in relation to the issue or payment of small business invoices for the purposes of that section.

1.43 Section 14(2) of the *Payment Times Reporting Act 2020* is amended to provide that the rules may prescribe a method for working out any of the matters mentioned in sections 14(1)(e), 14(1)(f), 14(1)(g) and 14(1)(h) of that Act. [*Schedule #, item 47, section 14 of the Payment Times Reporting Act 2020*]

1.44 The amendment allows additional rules to be prescribed about the method of working out for those sections. Section 14(1)(e) of the

Payment Times Reporting Act 2020 requires the inclusion of a statement on the entity's shortest and longest standard payment periods. Section 14(1)(f) that Act requires details and an explanation of changes to standard payment periods, if any, during the reporting period. Section 14(1)(h) of that Act as amended relates to the proportion of all invoices paid in a reporting period that were paid to a small business supplier.

1.45 The amendments to section 14(1) of the *Payment Times Reporting Act 2020* made by this Part apply in relation to a payment times report given on or after the commencement of this Part (including a payment times report for a reporting period that began before the commencement time). *[Schedule #, item 32]*

1.46 Rules made under section 14(2) of the *Payment Times Reporting Act 2020*, in force immediately before the commencement time, have effect, at and after the commencement time, as if the rules had been made for the purposes of section 14(2) of that Act as inserted by this Part. *[Schedule #, item 48]*

1.47 Section 27 of the *Payment Times Reporting Act 2020* allows for the delegation of any or all of the Regulators' powers and functions under the Act (except for those specified in section 27(2) of that Act).

1.48 Section 27(3) of the *Payment Times Reporting Act 2020* limits the delegation of certain functions or powers to the level of Senior Executive Service (SES) employee, or acting SES employee in the department.

1.49 The amendments repeal sections 27(3)(a) and (b) of the *Payment Times Reporting Act 2020* to reduce the number of decisions that must be made at the level of SES employee. These section relate to functions or powers under sections 7(3) (ceasing to be a reporting entity) and 13(4) (further time to give a payment times report) of that Act. This will mean that these functions can also be exercised by Executive Level 2 (EL2) officers or acting EL2 officers in the department. *[Schedule #, item 33, section 27 of the Payment Times Reporting Act 2020]*

1.50 During the implementation of the Scheme, it has become apparent that decisions about ceasing to be a reporting entity and to allow further time to give a payment times report are generally high volume and also routine. The routine nature of these decisions means that it is not necessary for them to be exclusively considered by an SES employee.

1.51 In addition, the legislation prescribes the circumstances in which an entity can be considered to cease to be a reporting entity and the circumstances where an extension of time may be allowed so the decision making is subject to clear guidance supporting the view that it can appropriately be delegated to an EL2 employee. If there is particular

complexity in the circumstances relevant to the decision, an SES employee may make the decision.

1.52 Importantly, the decision to cease to be a reporting entity, under section 7(3) of the *Payment Times Reporting Act 2020*, and extension of time for submission of a Payment Times Report, under section 13(4) of that Act, are reviewable decisions under section 51 of that Act. Section 53(1) of that Act requires that reviewable decisions are either considered by the Regulator personally or considered by another individual who was not involved in the original decision and is at the same level as the original decision maker.

1.53 Under section 7(1)(b) of the *Payment Times Reporting Act 2020* a constitutionally covered entity which does not meet the criteria for a reporting entity in section 7(2) of that Act may volunteer to provide Payment Times Reports by writing to the Regulator prior to the beginning of an income year. A reporting entity which elects under section 7(1)(b) of that Act to report is referred to as a “volunteering entity”.

1.54 The amendments relate to when a volunteering entity becomes a reporting entity. The amendments will mean that a volunteering entity will become a reporting entity at the time at which they give notice of their election to become a reporting entity. Reporting entities, who are not volunteering entities, do not commence reporting until the start of an income year in the first reporting period for that income year. This had also been the case for volunteering entities, however, these amendments will mean that volunteering entities will report in the next reporting period regardless of whether it is the first or the second reporting period of an income year. [*Schedule #, items 26 and 27, sections 5 and 7 of the Payment Times Reporting Act 2020*]

1.55 The amendment to section 8 of the *Payment Times Reporting Act 2020* clarifies the meaning of reporting period for new volunteering entities. It provides that if a volunteering entity becomes a reporting entity within the first 6 months of an income year, the first 6 months of that income year is not a reporting period for the entity. In addition, if they become a reporting entity within the last 6 months of an income year for the entity, no period in that income year is a reporting period for the entity. [*Schedule #, items 28 and 29, section 8 of the Payment Times Reporting Act 2020*]

1.56 The application provision provides that the amendments will apply to those volunteering entities giving notice on or after the commencement of these changes. Volunteering entities that have already given notice will need to continue to wait to the start of the relevant income year to commence reporting. [*Schedule #, item 30*]

Amendments commencing first day of next quarter

Income Tax Assessment Act 1997 and Tax Administration Act 1953

1.57 The amendments ensure the Seasonal Labour Mobility Program tax regime functions properly despite disruptions caused by COVID-19.

1.58 Under subdivision 840-S of the *Income Tax Assessment Act 1997*, foreign residents who are employed under the Seasonal Labour Mobility Program may be liable to pay income tax on the salary, wages and other types of payments paid to them under that program.

1.59 Individuals who are employed under the Seasonal Labour Mobility Program typically hold a subclass 403 visa. Holders of a subclass 403 visa may apply to the Department of Home Affairs to extend their stay in Australia under a COVID-19 Pandemic Event visa (subclass 408 visa). However, under the subclass 408 visa they will not be subject to the concessional Seasonal Labour Mobility Program tax regime. Currently, this issue is addressed by the instrument CRP 2020/3, made by the Commissioner of Taxation under section 370-5 of Schedule 1 to the *Taxation Administration Act 1953*.

1.60 Section 840-905(b)(ii) of the *Income Tax Assessment Act 1997* and section 12-319A of Schedule 1 to the *Taxation Administration Act 1953* are amended to expand the scope of both provisions to holders of a subclass 408 visa who were previously holders of a subclass 403 visa. *Schedule #, items 34 and 36, section 840-905 of the Income Tax Assessment Act 1997 and section 12-319A of Schedule 1 to the Taxation Administration Act 1953]*

1.61 The amendments apply retrospectively from the 1 July 2019. The retrospective application does not adversely impact individuals and ensures the operation of the law is apparent. *[Schedule #, items 35 and 37]*

Amendments with other commencements

Income Tax Assessment Act 1936

1.62 Section 160ZZZA of the *Income Tax Assessment Act 1936* provides a ceiling rate of interest in relation to intra-bank loans by a foreign bank to an Australian branch. The ceiling rate is currently the London inter-bank offer rate (LIBOR). From 31 December 2021 the LIBOR will no longer be published.

1.63 The amendments replace the LIBOR with a qualified rate. Section 160ZZZA(4) provides that the Commissioner may determine the qualified rate, that is, a rate of interest or the manner of working out a rate of interest, for a particular currency by legislative instrument made under the section. *[Schedule #, items 38, 39, 40, 41, 42, 43, 44 and 45, section 160ZZZA of the Income Tax Assessment Act 1936]*

1.64 Section 160ZZZA(5) authorises the Commissioner to apply, adopt or incorporate any matter contained in an instrument or other writing as in force or existing from time to time in a determination made under section 160ZZZA(4) (overriding section 14(2) of the *Legislation Act 2003*). This means the Commissioner may incorporate by reference a market recognised, publicly available interest benchmark rate in a legislative instrument determining a rate of interest or the manner of working out a rate of interest to be applied to a particular currency. [*Schedule #, item 46, section 160ZZZA of the Income Tax Assessment Act 1936*]

1.65 The intent is the Commissioner will include in a determination made under section 160ZZZA(4), details of the website address of the internet page where the incorporated document or benchmark rate is published and available for access by interested parties at no cost. Market recognised benchmark rates (including the Bank Bill Swap Rate for the Australian dollar, Secured Overnight Financing Rate Data for the US dollar) are published online for public access, by international business information services such as the Australian Securities Exchange¹, the Federal Reserve Bank of New York², and are subject to change frequently.

1.66 For this reason, it would not be practical for the Commissioner to make a determination every time a benchmark rate is updated. Further, the ability to incorporate market recognised benchmark rates “from time to time” gives the Australian branch continuity of their obligations by ensuring the qualified rate is up to date, and so the Australian branch can be certain about their obligations and rights under the Act.

1.67 The amendments will commence on the seventh day after the Bill receives the Royal Assent, to allow the Commissioner time to make and register the determination before the amendments commence.

National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009

1.68 Amendments made by the *National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Act 2021* (the Amending Act) that insert transitional provisions into the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* will commence on 1 July 2022. The Amending Act contains a numbering error where item 23 of Schedule 2 to the Amending Act was meant to be a continuation of item 22. Item 23 should have been numbered as item 1 of Schedule 9 under amending item 22. The amendment corrects this error by renumbering the provision to the correct item number. [*Schedule #, item 49, item 23 of Schedule 9 to the National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*].

¹ <https://www2.asx.com.au/connectivity-and-data/information-services/benchmarks/benchmark-data/bbsw>

² <https://www.newyorkfed.org/markets/reference-rates/sofr>