

EXPOSURE DRAFT

TREASURY LAWS AMENDMENT (COMBATING MULTINATIONAL TAX
AVOIDANCE) BILL 2017: INCREASING PENALTIES FOR SIGNIFICANT
GLOBAL ENTITIES

EXPLANATORY MATERIAL

Glossary

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

<i>Abbreviation</i>	<i>Definition</i>
2015 Act	<i>Tax Laws Amendment (Combating Multinational Tax Avoidance) Act 2015</i>
ASIC	Australian Securities and Investments Commission
Commissioner	Commissioner of Taxation
FTL	failure to lodge on time
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
TAA 1953	<i>Taxation Administration Act 1953</i>

Chapter 1 Increasing penalties for significant global entities

Outline of chapter

1.1 The amendments in Schedule 1 increase the administrative penalties that can be applied by the Commissioner of Taxation (Commissioner) to significant global entities to encourage them to better comply with their taxation obligations, including lodging tax documents on time and taking reasonable care when making statements.

1.2 In addition, the Schedule includes a minor amendment to ensure administrative penalties apply as intended where a significant global entity does not lodge a general purpose financial statement as required under the taxation law. This will encourage timely lodgment of such statements.

1.3 All legislative references in this Chapter are to Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) unless otherwise stated.

Context of amendments

Background

Significant global entities

1.4 The *Tax Laws Amendment (Combating Multinational Tax Avoidance) Act 2015* (the 2015 Act) introduced a package of measures designed to address tax avoidance and profit shifting schemes entered into by large multinationals. Specifically, the measures target entities that are part of a multinational group, earning significant amounts of income worldwide – AUD\$1 billion or more annually. In order to adequately define these types of entities, Schedule 1 to the 2015 Act introduced the concept of a ‘significant global entity’ (refer section 960-555 of the *Income Tax Assessment Act 1997* (ITAA 1997)).

1.5 Schedule 3 to the 2015 Act introduced amendments to double the amount of penalties applying to significant global entities for entering into tax avoidance and profit shifting schemes (see subsection 284-155(3)). The increased penalties were designed to help deter tax avoidance.

1.6 The penalty amounts applying to significant global entities in relation to other administrative penalties were not similarly increased in the 2015 Act. Existing penalties may not be an effective deterrent for non-compliance by these types of large entities given the significant financial resources that large entities have at their disposal.

1.7 Schedule 4 to the 2015 Act also implemented new standards for transfer pricing documentation and Country-by-Country reporting for significant global entities to assist the Commissioner to assess transfer pricing risks. The first set of reports under these reforms is due by the end of 2017.

Operation of existing law

Failure to lodge penalties

1.8 The ‘failure to lodge on time’ (FTL) penalty is an administrative penalty that is applied to entities that do not lodge a return, notice, statement or other approved form with the Commissioner by the required day (refer subsection 286-75(1)). The penalty is intended to encourage the timely lodgment of taxation documents.

1.9 The amount of the penalty is worked out under section 286-80, which provides for a base amount of one penalty unit (currently \$180 under section 4AA of the *Crimes Act 1914*) for each period of 28 days that the document is not lodged up to a maximum of 5 periods, limiting the penalty to \$900.

1.10 The base penalty is multiplied by two if the entity meets certain threshold criteria outlined in subsection 286-80(3) (‘medium entity’) or multiplied by five if the entity meets the threshold criteria outlined in subsection 286-80(4) (‘large entity’). The criteria in subsections 286-80(3) and (4) require assessment of the entity’s assessable income, GST turnover or status as a medium or large withholder for a particular period.

1.11 For example, paragraph 286-80(4)(b) provides that the base penalty amount is multiplied by five if the entity’s assessable income is \$20 million or more. This results in a maximum penalty of \$4,500. This penalty amount applies equally to entities with \$20 million assessable income as well as to those with \$1 billion (or more) of assessable income.

1.12 The penalty amounts applicable under the current law are as follows:

Table 1.1: FTL penalty amounts

<i>Days late</i>	<i>28 or less</i>	<i>29 to 56</i>	<i>57 to 84</i>	<i>85 to 112</i>	<i>More than 112</i>
General case (Multiplier 1)	\$180	\$360	\$540	\$720	\$900
Medium entity meeting threshold criteria in subsection 286-80(3) (Multiplier 2)	\$360	\$720	\$1,080	\$1,440	\$1,800
Large entity meeting threshold criteria in subsection 286-80(4) (Multiplier 5)	\$900	\$1,800	\$2,700	\$3,600	\$4,500

Penalties relating to statements and failing to give documents necessary to determine tax related liabilities

1.13 The administrative penalties in section 284-75 include penalties for:

- making a false or misleading statement (refer subsections 284-75(1) and (4));
- making a statement which treats a law as applying in a way that was not reasonably arguable (refer subsection 284-75(2)); and
- failing to give the Commissioner a document on time, where the document is necessary for the Commissioner to determine a tax-related liability accurately (refer subsection 284-75(3)).

1.14 The amount of the penalty is worked out under section 284-85. This section provides that the penalty is equal to the base penalty amount (refer the paragraph below), which may be increased under section 284-220 (for additional culpability factors) or reduced under section 284-225 (for voluntary disclosure).

1.15 The base penalty amount is worked out using the table in subsection 284-90(1) but may also be reduced if section 284-224 is applicable (where the law was applied in an accepted way). The applicable table item in subsection 284-90(1) depends on whether there is a shortfall amount (refer to section 284-80 for circumstances when there is a shortfall amount) and culpable behaviour (for example, intentional disregard or recklessness). Where two or more items in the table in subsection 284-90(1) apply, the item that produces the greater base penalty amount applies to the exclusion of the other items (refer subsection 284-90(2)).

1.16 The base penalty amounts applicable under the current law are calculated as follows:

Table 1.2: Base penalty amount

<i>Culpable behaviour</i>	<i>Base penalty amount</i>
<i>Statement results in shortfall amount - base penalty amount calculated as % of shortfall</i>	
Intentional disregard	75%
Recklessness	50%
No reasonable care	25%
No reasonably arguable position	25%
<i>Statement does not result in shortfall amount - base penalty amount in penalty units and dollars</i>	
Intentional disregard	60 penalty units currently \$10,800
Recklessness	40 penalty units currently \$7,200
No reasonable care	20 penalty units currently \$3,600
<i>Document necessary to determine a tax-related liability - base penalty amount calculated as % of tax-related liability concerned</i>	
Failure to lodge document on time, where document necessary for Commissioner to determine a tax-related liability accurately	75%

General purpose financial statements

1.17 Subsection 3CA(2) of the TAA 1953 requires certain entities (that must be significant global entities) to give the Commissioner a general purpose financial statement (where one has not already been provided to the Australian Securities and Investments Commission (ASIC)). It was intended that penalties would apply for late or non-lodgment, however the reporting obligation, contained in section 3CA

of the TAA 1953, did not stipulate that these financial statements must be given in the approved form, with the unintended result that the FTL penalty provisions in section 286-75 in Schedule 1 of the TAA 1953 would not apply. This is because, subsection 286-75(1) which imposes the penalty, only applies where the document has to be given to the Commissioner in the approved form.

Summary of new law

1.18 This Schedule amends Schedule 1 to the TAA 1953 to increase the administrative penalties imposed on significant global entities to encourage them to better comply with their taxation obligations, including lodging tax documents on time and taking reasonable care when making statements.

1.19 The Schedule includes a minor technical amendment to the TAA 1953 to ensure administrative penalties apply where a significant global entity does not lodge a general purpose financial statement as required under the taxation law to encourage timely lodgment.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<i>Failure to lodge penalties - application to significant global entities</i>	
<p>The amount of administrative penalty that applies for significant global entities that do not lodge a return, notice, statement or other approved form with the Commissioner on time is increased.</p> <p>The base penalty amount is multiplied by 500 if the entity concerned is a significant global entity at the relevant time. This results in a maximum penalty of \$450,000, which applies where the lodgment is more than 16 weeks late.</p>	<p>Administrative penalties are imposed on taxpayers that do not lodge a return, notice, statement or other approved form with the Commissioner on time.</p> <p>The base penalty amount is multiplied by five if the entity concerned is a large withholder, or has assessable income of \$20 million or more, or has GST turnover of \$20 million or more. This results in a maximum penalty of \$4,500, which applies where the lodgment is more than 16 weeks late.</p>
<i>Penalties relating to statements and failing to give documents necessary to determine tax-related liabilities - application to significant global entities</i>	
<p>The administrative penalty amount is doubled if the entity concerned is a significant global entity.</p>	<p>There are a range of administrative penalties that may be imposed on taxpayers in relation to statements and failing to give documents necessary to</p>

<i>New law</i>	<i>Current law</i>
	<p>determine tax-related liabilities on time.</p> <p>The amount of the penalty applicable depends on various factors, including any culpable behaviour involved (for example, intentional disregard, recklessness etc) and the quantum of any resulting shortfall amount.</p>
<i>General purpose financial statements</i>	
<p>Significant global entities that have not already provided a general purpose financial statement to the ASIC must give a general purpose financial statement to the Commissioner in the approved form.</p> <p>An entity that fails to provide such a statement to the Commissioner by the due date or in the manner specified by the Commissioner is liable for an administrative penalty.</p>	<p>Significant global entities that have not already provided a general purpose financial statement to the ASIC must give a general purpose financial statement to the Commissioner.</p>

Detailed explanation of new law

Increasing failure to lodge penalties

1.20 These amendments increase the amount of the administrative penalty imposed on significant global entities that do not lodge a return, notice, statement or other approved form with the Commissioner on time. The increased penalties apply to all lodgments required in the approved form which includes income tax returns, activity statements, Country-by-Country reports and general purpose financial statements (refer paragraphs 1.38 to 1.39 below).

1.21 Where an entity is liable for a FTL penalty under subsection 286-75(1), the base penalty amount is multiplied by 500 if the entity is a significant global entity (within the meaning of the ITAA 1997) at the relevant time. *[Items 4 and 5, paragraph 286-80(1)(b) and subsection 286-80(4A) of Schedule 1 to the TAA 1953]*

1.22 Generally, a significant global entity for a period is an entity with annual global income of AUD\$1 billion or more, or an entity which is part of a group with annual global income of AUD\$1 billion or more. An entity’s status as a significant global entity for the purposes of these provisions is determined on the basis of the most recent income year, for

which the Commissioner has made an income tax assessment for the entity. This determination is to be made by reference to the day on which the relevant approved form is due to be provided to the Commissioner. The Commissioner makes an assessment following lodgment of the entity's income tax return or if the entity has not lodged a tax return, the Commissioner may have issued a default assessment under section 167 of the *Income Tax Assessment Act 1936*. [Item 5, paragraphs 286-80(4A)(b) and (c) of Schedule 1 to the TAA 1953]

1.23 However, if the Commissioner is satisfied that the entity is not, or will not be, a significant global entity for the income year during which the relevant approved form is due to be provided to the Commissioner, then the Commissioner may remit the higher penalty amount. These amendments do not limit in any way the Commissioner's broad discretion to remit penalties under section 298-20. [Items 5 and 6, subsections 286-80(4B) and (4C) and note to subsection 298-20(1) of Schedule 1 to the TAA 1953]

1.24 In most cases, an entity that is a significant global entity according to its most recent income tax assessment will continue to be a significant global entity in subsequent years. While the starting point for the Commissioner will be to assume this is so, the entity may present evidence, as part of an application for the remission of the higher penalty amount, to satisfy the Commissioner that it is not, or will not be, a significant global entity for that income year. If no evidence is provided, the Commissioner is entitled to assume the entity will continue to be a significant global entity.

1.25 If the entity is dissatisfied with the remission decision and the amount of penalty payable after the refusal to remit is more than two penalty units, then the entity may object against the decision in the manner set out in Part IVC (refer subsection 298-20(3)).

1.26 The Commissioner may remit the higher penalty amounts relating to significant global entity status, if the Commissioner becomes aware that an entity was not a significant global entity during the year in which the relevant approved form is due to be provided to the Commissioner.

1.27 Other than in this situation, it is expected that the Commissioner will apply the same approach for remission of FTL penalties for significant global entities as it does for other taxpayers. In particular, the increased amount of FTL penalties will not by itself be a relevant factor in considering whether or not a penalty should be remitted. Law Administration Practice Statement PS LA 2011/19 (Administration of the penalty for failure to lodge) provides guidance on the Commissioner's administration of the FTL penalty provisions and on how the discretion to remit the FTL penalty is exercised.

1.28 Remission of FTL penalties is generally considered appropriate where circumstances beyond the control of the entity are present, where it is fair and reasonable or where imposition of the FTL penalty does not provide a just result. The amount of the FTL penalty that would be payable is not, by itself, a basis for remission.

1.29 The amendments ensure that a multiplier of 500 applies in priority to (and to the exclusion of) any multipliers that may also apply to an entity that is both a significant global entity at the relevant time and an entity meeting criteria in subsections 286-80(3) or (4) as a medium or large entity (see paragraphs 1.10 to 1.11 above). In other words, the increased FTL penalties will apply uniformly to all entities that are significant global entities, regardless of their size. *[Item 5, subsection 286-80(4A) of Schedule 1 to the TAA 1953]*

1.30 The minimum FTL penalty for any entity that is a significant global entity, where a document is up to 4 weeks late, will become \$90,000. The maximum penalty, where a document is late by more than 16 weeks, will be \$450,000. For large entities, this means that FTL penalties will increase by a factor of 100, compared to the original maximum penalty applicable of \$4,500.

1.31 The following table sets out the FTL penalties that will apply to various entities under the amendments introduced by this Schedule (the penalty amounts in the first three rows in the table for general application and medium and large entities are the same as those that apply under the law prior to these amendments):

Table 1.3: FTL penalties

<i>Days late</i>	<i>28 or less</i>	<i>29 to 56</i>	<i>57 to 84</i>	<i>85 to 112</i>	<i>More than 112</i>
General case (provided entity is not a significant global entity at the relevant time) (Multiplier 1)	\$180	\$360	\$540	\$720	\$900
Medium entity meeting threshold criteria in subsection 286-80(3) (provided entity is not a significant global entity at the relevant time) (Multiplier 2)	\$360	\$720	\$1,080	\$1,440	\$1,800

<i>Days late</i>	<i>28 or less</i>	<i>29 to 56</i>	<i>57 to 84</i>	<i>85 to 112</i>	<i>More than 112</i>
Large entity meeting threshold criteria in subsection 286-80(4) (provided entity is not a significant global entity at the relevant time) (Multiplier 5)	\$900	\$1,800	\$2,700	\$3,600	\$4,500
Significant global entity (Multiplier 500)	\$90,000	\$180,000	\$270,000	\$360,000	\$450,000

Increasing penalties relating to statements and failing to give documents necessary to determine tax-related liabilities

1.32 These amendments double the amount of certain penalties applying to an entity, if the entity is a significant global entity (within the meaning of the ITAA 1997) at the relevant time. This is achieved by doubling the base penalty amount for penalties imposed under section 284-75 (penalties relating to statements and failing to give documents necessary to determine tax-related liabilities to the Commissioner on time). *[Items 2 and 3, subsections 284-90(1) and (1A) in Schedule 1 to the TAA 1953]*

1.33 An entity's status as a significant global entity for the purposes of these provisions is determined on the basis of the most recent income year, for which the Commissioner has made an income tax assessment for the entity. This determination is to be made by reference to the day on which the conduct giving rise to liability for such a penalty occurred. The Commissioner makes an assessment following lodgment of the entity's income tax return or if the entity has not lodged a tax return, the Commissioner may have issued a default assessment under section 167 of the *Income Tax Assessment Act 1936*. For penalties imposed under section 284-75, the relevant conduct will either be the making of a statement (refer subsections 284-75(1), (2) and (4)) or the failure to give the Commissioner a document by the due date (refer subsection 284-75(3)). *[Item 3, subsection 284-90(1A) in Schedule 1 to the TAA 1953]*

1.34 However, if the Commissioner is satisfied that the entity is not, or will not be, a significant global entity for the income year during which the conduct giving rise to liability for such a penalty occurred, then the Commissioner may remit the higher penalty amount. These amendments do not limit in any way the Commissioner's broad discretion to remit penalties under section 298-20. *[Items 3 and 6, subsections 284-90(1B) and (1C) and note to subsection 298-20(1) in Schedule 1 to the TAA 1953]*

1.35 If the entity is dissatisfied with the remission decision and the amount of penalty payable after the refusal to remit is more than two penalty units, then the entity may object against the decision in the manner set out in Part IVC (refer subsection 298-20(3)).

1.36 The Commissioner may remit the higher penalty amounts relating to significant global entity status, if the Commissioner becomes aware that an entity was not a significant global entity during the year in which the conduct giving rise to liability for such a penalty occurred.

1.37 The following table sets out the new penalty amounts imposed under section 284-75 that apply to significant global entities:

Table 1.4: Base penalty amount applying for significant global entities

<i>Culpable behaviour</i>	<i>Base penalty amount</i>
<i>Statement results in shortfall amount - base penalty amount calculated as % of shortfall</i>	
Intentional disregard	150%
Recklessness	100%
No reasonable care	50%
No reasonably arguable position	50%
<i>Statement does not result in shortfall amount - base penalty amount in penalty units and dollars</i>	
Intentional disregard	120 penalty units currently \$21,600
Recklessness	80 penalty units currently \$14,400
No reasonable care	40 penalty units currently \$7,200
<i>Document necessary to determine a tax-related liability - base penalty amount calculated as % of tax-related liability concerned</i>	
Failure to lodge document on time, where document necessary for Commissioner to determine a tax-related liability accurately	150%

General purpose financial statements must be in the approved form

1.38 To encourage timely lodgment of general purpose financial statements, the amendments enable the Commissioner to impose FTL penalties where an entity, that has not already provided a statement to the ASIC, lodges a statement late or fails to lodge a statement with the Commissioner. This is achieved by requiring such statements to be provided to the Commissioner in the approved form. This aligns the operation of the lodgment obligation with the intent of the original amendments inserting the obligation. *[Item 1, subsection 3CA(2) of the TAA 1953]*

1.39 As entities that are required to lodge general purpose financial statements to the Commissioner are significant global entities, the higher FTL penalty amounts introduced by this Schedule apply (ranging from \$90,000 to \$450,000 depending on the number of days the lodgment is late - refer the last row of table 1.3 above).

Application and transitional provisions

1.40 The amendments which increase FTL penalties for significant global entities apply in relation to an entity's failure to give a return, notice, statement, information, notification or other document to the Commissioner on time if the day the return, notice, statement, information, notification or other document is required to be given is on or after the later of 1 July 2017 and the day after this Act receives Royal Assent. *[Clause 2 and subitem 7(3)]*

1.41 The amendments which increase penalties relating to statements (imposed under subsections 284-75(1), (2) and (4)) apply in relation to statements made on or after the later of 1 July 2017 and the day after this Act receives Royal Assent. *[Clause 2 and paragraph 7(2)(a)]*

1.42 The amendments which increase penalties relating to a failure to give the Commissioner a return, notice or other document by the due date, where the document is necessary to determine a tax-related liability (imposed under subsection 284-75(3)) apply in relation to documents required to be given on or after the later of 1 July 2017 and the day after this Act receives Royal Assent. *[Clause 2 and paragraph 7(2)(b)]*

1.43 The amendments which require an entity to give the Commissioner a general purpose financial statement in the approved form apply from the later of 1 July 2017 and the day after this Act receives Royal Assent. *[Clause 2 and subitem 7(1)]*