
Exposure draft explanatory memorandum
Refunding excess GST

Chapter 1

Refunding excess GST

Outline of chapter

1.1 Schedule # to this Bill amends the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) and the *Taxation Administration Act 1953* (TAA 1953) to ensure that excess goods and services tax (GST) paid is only refundable in certain circumstances.

1.2 The amendments apply where a taxpayer's assessed net amount for a tax period takes into account an amount of GST exceeding that which is payable as a result of:

- mischaracterising a supply or arrangement;
- miscalculating the GST payable; or
- for any other reason;

if the overpaid GST has been passed on to the recipient of the supply or arrangement that was treated as a supply.

1.3 In most cases, the amendments allow taxpayers to determine if they are entitled to a refund of amounts of excess GST. The Commissioner of Taxation (Commissioner) also has a discretion to refund the excess GST in exceptional circumstances where the application of these provisions to deny a refund would be inappropriate.

1.4 Schedule # also amends the TAA 1953 to allow taxpayers to seek a merits review of the Commissioner's decision under section 105-65 of Schedule 1 to the TAA 1953. This is to address the decision in *Naidoo v Commissioner of Taxation* [2013] AATA 443 where the Administrative Appeals Tribunal (AAT) found that a decision by the Commissioner made under section 105-65 was not part of the assessment process and as such did not qualify for a merits review.

1.5 All references in this Chapter to section 105-65 are to that section in Schedule 1 to the TAA 1953. All other legislative references are to the GST Act unless otherwise specified.

Context of amendments

Scheme of the GST Act

1.6 The scheme of the GST Act is based on the following principles (see Chapter 1 of the Executive Summary in the Explanatory Memorandum to the *A New Tax System (Goods and Services Tax) Bill 1998*):

- GST is remitted by suppliers who make supplies in carrying on their enterprise. Suppliers do not bear the GST because the tax is included in the price of what they supply;
- GST is effectively borne by private consumers when they acquire anything that is subject to GST; and
- to ensure that GST is effectively borne by private consumers, registered entities are generally entitled to an input tax credit for the GST on what they acquire or import for the purpose of their enterprise.

1.7 The GST Act envisages that the supplier ‘passes-on’ the GST to the recipient of the supply. If GST is passed-on but there is a refund of the GST to the supplier, the supplier will have a windfall gain unless it reimburses the recipient of the supply. Accordingly, a provision to restrict refunds of excess GST is appropriate to prevent windfall gains and provide an incentive for the supplier to reimburse their customer.

Overpayments of GST

1.8 A taxpayer may overpay an amount of GST by incorrectly treating a supply (or arrangement) it makes as a taxable supply, where that supply (or arrangement) is not a taxable supply to any extent. This includes incorrectly apportioning the taxable and non-taxable components of a mixed supply.

1.9 In a typical transaction the taxpayer will include an amount of GST in the price of the supply, and then include that amount of GST on the tax invoice issued to the recipient of the supply, after which that amount of GST is remitted to the Commissioner. This may, however, depend on the specific facts and circumstances of each case.

1.10 A taxpayer may also overpay an amount of GST as a result of a miscalculation, for example, errors made in calculating:

- the GST amount under the margin scheme, under Division 75; or
- the ‘global GST amounts’ under Division 126.

Restriction on refunds under section 105-65

1.11 Currently, section 105-65 operates to ensure that taxpayers do not obtain a windfall gain by restricting the circumstances in which the Commissioner may be required to refund an overpaid amount of GST.

1.12 The provision applies to amounts of GST that have been overpaid by a taxpayer in certain circumstances, either as a result of taxpayers remitting more than they are legally required to pay under section 33-3 or 33-5, or because an amount under section 35-5 has not been refunded or applied under Division 3 of Part IIB of the TAA 1953 (subsection 105-65(2)).

1.13 This Schedule proposes to overcome some deficiencies and uncertainties in the operation of section 105-65 by replacing the section with Division 142 in the GST Act.

Commissioner’s discretion to refund

1.14 Section 105-65 provides that the Commissioner is not required to refund an overpayment that would otherwise be refundable if either:

- the taxpayer does not reimburse a corresponding amount to the recipient of the supply (subparagraph 105-65(1)(c)(i)); or
- the recipient of the supply is registered or required to be registered for GST (subparagraph 105-65(1)(c)(ii)).

1.15 The provision states that the Commissioner ‘need not’ pay a refund in particular circumstances. This language has caused some uncertainty about whether this is a discretion to refund, or a discretion not to refund. The Commissioner has maintained the view that the provision provides a residual discretion to refund, rather than a discretion not to refund.

1.16 The uncertainty surrounding the nature of the provision was identified by the Board of Taxation in its *Review of the Legal Framework for the Administration of the Goods and Services Tax*. Accordingly, recommendation 45 of the Board’s report stated that the law should be amended to clarify that the Commissioner has a discretion to refund the GST where appropriate.

Concerns with section 105-65

1.17 Prior to the Federal Court of Australia's decision in *Sportsbet*¹ handed down on 26 July 2011, the Commissioner considered that section 105-65 applied to miscalculations (as well as mischaracterisations) of the GST payable.

1.18 The effect of the *Sportsbet* decision is that the restriction in section 105-65 does not apply where the supply is always correctly characterised and treated by the supplier, but an overpayment of GST arises from a miscalculation of the GST payable. This includes situations where a taxpayer miscalculates the amount of GST in applying the GST margin scheme.

1.19 The decision in *Sportsbet* gives rise to the potential for windfall gains for taxpayers remitting GST if an overpayment arises as a result of a miscalculation and the full amount of GST paid is passed on. This is inconsistent with the policy intent that taxpayers should not obtain a windfall gain from an overpayment irrespective of how the overpayment arises.

1.20 There have been a number of other areas of uncertainty relating to the application of section 105-65 that have been raised in consultation forums. These include:

- whether section 105-65 should be taken into account by the Commissioner in an assessment²;
- what rights of review are available in a court or the AAT where a taxpayer is dissatisfied with a decision about the application of section 105-65, including the Commissioner's approach to the discretion³; and
- whether section 105-65 is capable of applying to GST overpaid in circumstances where the net amount has been understated, for example because input tax credits have been overclaimed.

¹ *International All Sports v Commissioner of Taxation* [2011] FCA 824 (*Sportsbet*)

² It was established in the Administrative Appeals Tribunal case of *Naidoo and Commissioner of Taxation* [2013] AATA 443 (*Naidoo*) that a decision by the Commissioner under section 105-65 is not part of the assessment process.

³ In *Naidoo* the Tribunal found that it did not have jurisdiction to conduct a review of the Commissioner's decisions made under section 105-65.

Objections to decisions made by the Commissioner under section 105-65

1.21 In the AAT case, *Naidoo and Commissioner of Taxation* [2013] AATA 443 (Naidoo) the Tribunal found that it did not have jurisdiction to conduct a merits review of the Commissioner's decision under section 105-65.

1.22 Prior to the decision in Naidoo the Commissioner considered the application of section 105-65 to be a necessary step in determining a taxpayer's GST liability and should be taken into account in assessing a taxpayer's net amount for each of the relevant tax periods.

1.23 The Tribunal considered ⁴ that, the net amount in subsection 17 5(1) is worked out using the formula 'GST - input tax credits' where, GST is in turn defined as 'the sum of all of the GST for which you are liable on the taxable supplies that are attributable to the tax period'. The net amount calculation does not include amounts of overpaid GST.

1.24 Therefore, having concluded that section 105-65 does not alter the determination of a taxpayer's net amount under the GST Act, and noting that section 105-65 does not contain any express provision allowing a taxpayer to object, the Tribunal found that it did not have jurisdiction to review the Commissioner's decision under section 105-65.

1.25 As a result of this decision, taxpayers are unable to challenge the application of section 105-65 under Pt IVC of the TAA 1953. Where the taxpayer seeks a refund of overpaid GST but the Commissioner refuses to exercise the discretion under section 105-65 to pay a refund, taxpayers are not able to seek a merits review of this decision. The taxpayer's review rights are limited to judicial review in proceedings brought in the Federal Court under section 39B of the *Judiciary Act 1903* or the *Administrative Decisions (Judicial Review) Act 1977*.

Summary of new law

1.26 Schedule # amends the GST law to allow taxpayers to determine whether they are entitled to a refund by reference to objective conditions, rather than having to rely on the Commissioner to exercise the discretion to refund an excess amount of GST.

⁴ Paragraph 92 of AATA 443

1.27 A refund of overpaid GST can be claimed by taxpayers if it has not been passed on to another entity. Alternatively, if the excess GST has been passed on to another entity then a refund can be claimed following reimbursement of that amount.

1.28 However, the Commissioner's discretion is retained for exceptional circumstances where the Commissioner considers that treating GST as payable would be inappropriate, having regard to the principle that excess GST is not to be refunded if it would give an entity a windfall gain.

1.29 The amendments also address the impact of the Federal Court's decision in *Sportsbet* by ensuring that overpayments of GST resulting from a miscalculation of the GST payable are subject to the restriction on refunding excess GST.

1.30 Because the amendments in Schedule # impact on the assessed net amount, taxpayers are able to challenge the application of the amendments as part of an objection to their assessment under Part IVC of the TAA 1953. Specific review rights are introduced where the Commissioner refuses to exercise the discretion in the provision.

1.31 For those decisions made under section 105-65, this Schedule amends the TAA 1953 so that taxpayers who have not previously sought or purported to seek review of that decision can now seek merits review.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<i>Restrictions on refunds</i>	
<p>The restriction applies to excess GST, including as a result of incorrectly:</p> <ul style="list-style-type: none"> • treating a supply as fully or partly taxable; or • calculating the amount of GST payable on a supply. <p>However, the restriction on GST refunds does not apply unless the excess GST is also passed on to another entity. Where the restriction does not apply a refund of the excess GST is available.</p>	<p>The restriction only applies where the overpayment is a result of the taxpayer incorrectly treating a supply or arrangement as taxable to any extent.</p>
<i>GST always payable</i>	
<p>An amount of excess GST is taken to have always been payable and on a taxable supply if it has been passed on to another entity.</p> <p>There is no restriction on refunding excess GST where the overpayment has not been passed on to another entity.</p> <p>If the taxpayer has not passed on that amount to the recipient, excess GST is not taken to have always been payable and is therefore refundable.</p> <p>An amount of excess GST that has been passed on is taken to have always been payable, until the recipient of the supply has been reimbursed.</p> <p>Excess GST does not include an amount that is correctly payable but covered by a decreasing adjustment attributable to a later tax period, or is correctly attributable to a different tax period.</p>	<p>A taxpayer is not entitled to a refund of an overpaid amount of GST if:</p> <ul style="list-style-type: none"> • the taxpayer has not reimbursed the recipient of the supply; or • the recipient is registered or required to be registered for GST.

<i>New law</i>	<i>Current law</i>
<i>Commissioner's discretion</i>	
<p>Taxpayers determine their entitlement to a refund of excess GST under specified conditions. If these conditions are not satisfied, taxpayers are not entitled to a refund of the excess GST.</p> <p>However, the Commissioner retains a discretion to refund an amount if the denial of a refund would be inconsistent with the principle that excess GST should not be refunded if this gives an entity a windfall gain.</p>	<p>The Commissioner may exercise a discretion to refund an amount, even if the conditions under which the Commissioner need not pay a GST refund in section 105-65 are met.</p>
<i>Review of Commissioner's decision</i>	
<p>Taxpayers may seek a merits review of the Commissioner's decisions made under section 105-65. Taxpayers may also seek a merits review under the new provisions of any assessment which includes an amount of excess GST. Merits review is also provided in relation to a decision by the Commissioner not to exercise the discretion to refund the excess GST in circumstances where passing on has occurred but no windfall gain would arise.</p>	<p>Where a taxpayer seeks a refund of overpaid GST but the Commissioner refuses to exercise the discretion under section 105-65 to pay a refund, taxpayers are not able to seek a review of this decision before the AAT. The taxpayer's review rights are limited to judicial review.</p>
<i>Where the recipient is reimbursed</i>	
<p>Where a taxpayer reimburses excess GST to the recipient, the provision stops deeming the excess GST to be payable. This is accounted for as an adjustment event for the supplier. If the recipient is registered, there may also be an adjustment event for the recipient.</p>	<p>Where a taxpayer reimburses overcharged GST to an unregistered recipient, section 105-65 does not prevent a refund.</p>
<i>Adjustment provisions</i>	
<p>The restriction on refunds provision establishes that the adjustment provisions in Division 19 apply without restriction. Although, where the adjustment event effectively cancels a supply, the supplier is only entitled to a decreasing adjustment to the extent that they have reimbursed the corresponding GST to the</p>	<p>No current law.</p>

<i>New law</i>	<i>Current law</i>
recipient. There is a corresponding rule for increasing adjustments for recipients.	

Detailed explanation of new law

1.32 Schedule # replaces existing section 105-65 with a new Division in the GST Act to ensure that where the taxpayer's assessed net amount for a tax period takes into account an amount of GST exceeding that which is payable, the excess GST is only refundable in certain circumstances. *[Schedule #, item 10, section 142-1 of the GST Act, item 27, section 105-65 in Schedule 1 to the TAA 1953]*

Excess GST

1.33 Excess GST is an amount of GST that has been taken into account in an assessed net amount, but is not in fact payable. *[Schedule #, item 10, subsection 142-5(1) of the GST Act]*

1.34 It does not matter how the excess arose – whether, for example, by a mischaracterisation of a transaction as a taxable supply, a miscalculation of the amount of GST payable, an accounting or reporting error.

1.35 In practice, excess GST can arise as a result of a range of circumstances including:

- incorrectly treating a GST-free or input taxed supply as a taxable supply (including incorrectly apportioning the taxable and non-taxable components of a mixed supply);
- incorrectly treating something which is not a supply as a taxable supply;
- miscalculating a GST liability under the GST law, for example, under the margin scheme or on gambling supplies;
or
- incorrectly reporting an amount of GST on a GST return.

1.36 Overpaid GST can be refunded without restriction under the amendments if it has not been passed-on to another entity. It can also be refunded if passing on has occurred, but the other entity has been reimbursed for the overpayment. If, for example, the overpayment simply

occurs as a result of an error in preparation of a GST return, it will be clear that the excess GST has not been passed on. In these circumstances, refunding excess GST would not result in a windfall gain. [*Schedule #, item 10, section 142-10 of the GST Act*]

1.37 The provisions ensure that the excess GST is treated as always payable and in relation to a taxable supply where that excess has been passed on to another entity. Because an amount is considered as always payable no refund arises as the GST is taken to have been correctly payable. If an amount of excess GST has not been passed on then no restriction on refunding the excess GST applies and a refund can be claimed. [*Schedule #, item 10, section 142-10 of the GST Act*]

1.38 If an amount of excess GST that has been passed on is reimbursed, the excess amount stops being treated as payable on a taxable supply. The reimbursement is an adjustment event because it has the effect of changing the consideration for a supply and in some cases because the supply is no longer treated as a taxable supply. [*Schedule #, item 10, section 142-10 of the GST Act*]

Example 1.1: Amount paid under Division 33

James is registered for GST. On 28 April 2015, James lodged his quarterly GST return for the tax period ending 31 March 2015. His assessed net amount for that tax period is \$3,500. James pays this amount to the Commissioner under section 33-3.

On 16 September 2015, James realises that because of a transcription error he incorrectly included an additional amount of GST of \$100 in his net amount for the tax period ending 31 March 2015. As his assessed net amount for that tax period has taken into account the \$100, the additional GST of \$100 exceeds what is payable. Therefore, the \$100 is an amount of excess GST. However, the amendments do not apply because the amount has not been passed on. Therefore, James is entitled to a refund.

Example 1.2: Amount applied under running balance account

Retro Robynne is registered for GST. On 21 October 2015, Retro Robynne lodges its monthly GST return for the tax period ending 30 September 2015. Retro Robynne's assessed net amount for that tax period is a refund of \$4,000. The Commissioner applies this amount against an outstanding tax debt of \$1,500 on Retro Robynne's running balance account and refunds the balance of \$2,500 to Retro Robynne.

On 2 July 2016 Retro Robynne realises that it incorrectly included an amount of \$2,000 as GST payable on its GST return (as a result of double counting in a particular taxable supply). Had it correctly reported the GST payable on its return, its assessed net amount would

have been a refund of \$6,000. As Retro Robynne's assessed net amount for that tax period takes into account the \$2,000, the additional GST of \$2,000 exceeds what is payable. The \$2,000 is an amount of excess GST.

The excess amount has not been passed on because only one amount of GST was passed on for the particular taxable supply, not two. Therefore Retro Robynne is entitled to a refund of the excess GST.

1.39 Excess GST may also arise where the excess is included in an amendment to an assessed net amount. Section 155-80 in Schedule 1 to the TAA 1953 provides that an amended assessment of a net amount is an assessment for the purposes of any taxation law.

1.40 The application of these amendments does not depend on whether a taxpayer has paid (under Division 33), or been refunded (under Division 35), the assessed net amount. Rather, it depends on whether the taxpayer has included an amount of excess GST in their assessed net amount. For instance, if an amount of excess GST has been included in the taxpayer's assessed net amount but that amount was not passed on to another entity then that amount is considered to have never been payable under the amendments. Therefore the taxpayer can lodge an amendment to remove the excess GST from their assessed net amount where this excess has been discovered before, or after, it has been paid to the Commissioner.

Excess GST unrelated to adjustments

1.41 In working out the amount of excess GST, the following amounts are disregarded:

- an amount of GST that is correctly payable and attributable to the tax period, but which later becomes the subject of a decreasing adjustment; or
- an amount of GST that is payable, but is correctly attributable to a different tax period.

[Schedule #, item 10, subsection 142-5(2) of the GST Act]

Excess GST related to decreasing adjustments

1.42 The concept of 'excess GST' is intended to apply to amounts that were treated as GST in a GST return, but were never payable. Where an amount was correctly payable as GST, but the liability for GST was later changed because of an adjustment event, the change in GST payable is accounted for by way of an adjustment to the net amount. Adjustments

can arise because of adjustment events such as cancelling a supply, changing the consideration for a supply or causing a supply to stop being a taxable supply.

1.43 An adjustment that arises due to a change in consideration does not generally give rise to a windfall gain as the change in GST payable would be proportionate to the change in consideration.

1.44 Where an adjustment event in a later tax period results in a decreasing adjustment for the supplier that is attributable to that later tax period, the amount of the decreasing adjustment is disregarded. Thus, the amendments do not prevent the claiming of a decreasing adjustment. *[Schedule #, item 10, paragraph 142-5(2)(a) of the GST Act]*

Example 1.3: Decreasing adjustment, not excess GST

In June 2015, GCorp pays \$330,000 to JCorp for services provided in that quarter.

On 28 July 2015, JCorp lodges its quarterly GST return for the tax period ending 30 June 2015. JCorp's assessed net amount for that tax period takes into account the \$30,000 GST payable on the services supplied to GCorp.

In August 2015, GCorp complains to JCorp about the cost of the services and gets a refund of \$44,000 from JCorp. The change in consideration for the supply is an adjustment event. JCorp has a decreasing adjustment of \$4,000 (that is, 1/11th of \$44,000). JCorp issues an adjustment note to reflect the change to the consideration for the supply.

The excess GST for the June 2015 tax period is zero (the \$4,000 which is subject to a decreasing adjustment, is disregarded when working out whether there is any excess GST). JCorp instead attributes the decreasing adjustment of \$4,000 to the September 2015 quarterly tax period.

Excess GST attributable to another tax period

1.45 An amount of GST that is correctly payable but has been attributed to an incorrect tax period does not give rise to any excess GST in that incorrect tax period. This could occur in an audit situation where the taxpayer has attributed an amount in a particular tax period but the Commissioner assesses the amount as being correctly attributable to a different tax period. *[Schedule #, item 10, paragraph 142-5(2)(b) of the GST Act]*

Example 1.4: Amount attributable to another tax period

Pete Enterprises is registered for GST. On 1 April 2015, Pete Enterprises makes a taxable supply to Alan for \$66,000 and issues him with a tax invoice that includes an amount of GST of \$6,000.

On 21 April 2015 Pete Enterprises lodges its monthly GST return for the tax period ending 31 March 2015, which incorrectly includes the GST of \$6,000 relating to the taxable supply made to Alan.

On 3 September 2015 the Commissioner conducts an audit and determines that Pete Enterprises has incorrectly attributed the GST of \$6,000 to the March tax period instead of the April tax period. The Commissioner amends the assessments for the monthly tax periods ending March 2015 and April 2015. The overpaid GST in the March tax period does not give rise to an amount of excess GST as it is correctly attributable to a different tax period (that is, April).

Refunding excess GST

1.46 So much of the ‘excess GST’ which has been passed-on to another entity is taken to have always been payable and always on a taxable supply, until such time as the taxpayer reimburses the other entity for the passed-on GST. *[Schedule #, item 10, section 142-10 of the GST Act]*

1.47 Only in exceptional circumstances do taxpayers need to ask the Commissioner to exercise the discretion to refund an amount that has been overpaid. Instead, taxpayers determine their entitlement to a refund of excess GST by reference to the following conditions, where all or part of the excess GST:

- has not been passed on, the taxpayer is entitled to a refund of the excess GST not passed on; and
- has been passed on by the taxpayer, the taxpayer is entitled to a refund to the extent that they have reimbursed the other entity for the amount of the excess GST.

[Schedule #, item 10, section 142-10 of the GST Act]

1.48 If the taxpayer can establish that either of the above conditions are satisfied, they are entitled to a refund of the excess GST. If this is because the GST has not been passed-on, the taxpayer may seek a refund from the Commissioner by applying for an amendment of the relevant assessment or objecting to the relevant assessment (subject to applicable time limits).

1.49 If the taxpayer reimburses the passed-on GST, generally this means that they have a decreasing adjustment and the other entity may have an increasing adjustment. *[Schedule #, item 10, note 1 in section 142-10 of the GST Act]*

1.50 Where GST has been paid in respect of a supply and then reimbursed, there is an adjustment event under one or more of the paragraphs in subsection 19-10(1). The reimbursement has the effect of changing the consideration for a supply. In some cases there is an adjustment event because upon reimbursement, the amendments cease to treat the supply as a taxable supply. *[Schedule #, item 10, section 142-10 of the GST Act]*

1.51 In determining the amount of the adjustment, the previously attributed GST amount includes an amount of GST that was treated as payable by operation of these amendments. This is compared to the 'corrected GST amount', which is the correct GST payable once these amendments cease to apply.

1.52 In some cases a taxpayer may treat an arrangement as giving rise to a taxable supply, where there is no actual supply. In such cases, if the taxpayer subsequently discovers their mistake and reimburses the excess GST to the other entity, then that amount is treated as never having been payable or made in relation to a taxable supply. The taxpayer may seek a refund from the Commissioner by applying for an amendment of the relevant assessment or objecting to the relevant assessment. There is no adjustment event in these circumstances, because there is no supply to which Division 19 can apply. *[Schedule #, item 10, subsection 142-15 (3) of the GST Act]*

Example 1.5: Excess GST not passed on

Melissa leases an office tower to Bank Ezy. The lease requires \$120,000 rent including GST to be paid monthly. Bank Ezy pays the correct amount but Melissa incorrectly records the transaction as \$220,000 in her records and pays GST on \$220,000.

Six months later Melissa realises her accounting error. As the excess GST (on the additional \$100,000) has not been passed on Melissa can apply to the Commissioner to amend her assessment for the period in which she included the excess GST.

Example 1.6: Excess GST reimbursed

John buys a set of spectacles from Joe's Optics and pays GST on the total price of the spectacles. Joe's Optics had passed on the GST to John. The proprietor of Joe's Optics is advised by the Commissioner following an audit that the lenses are GST-free and that Joe's Optics had overpaid GST.

The excess GST is taken to have always been payable under the amendments until Joe's Optics reimburses John for the passed-on GST.

When John returned for his annual sight check-up he was advised of the error and was reimbursed for the excess GST. As John has been reimbursed for the passed-on GST, the amendments do not apply and the excess GST is no longer taken to be payable.

Joe's Optics would account for the reimbursement to John as a decreasing adjustment, attributable to the tax period in which the reimbursement was made.

Joe's Optics would not be entitled to amend the assessments for the original tax period to remove the excess GST from its net amount. This is because these amendments treat the excess GST as payable until the time it is reimbursed.

Example 1.7: Excess GST reimbursed — business to business transaction

In the quarter ending 30 September 2015, Bron Co provides debt collection services to Rob Co at a GST-inclusive price of \$22,000. Rob Co uses those services in its business of making financial supplies, and is entitled to claim a reduced input tax credit of 75 per cent in relation to those acquisitions.

Due to a systems error, Bron Co inadvertently charges \$3,000 GST when it invoices Rob Co for the supply. Rob Co pays a total of \$23,000 to Bron Co and calculates its entitlement to an input tax credit as 75 per cent of \$3,000. Bron Co's assessed net amount for the tax period takes into account the \$3,000 GST it charged to Rob Co.

Bron Co later discovers the error and advises Rob Co. Rob Co wishes to obtain a refund of the overcharged amount and Bron Co duly reimburses the sum of \$1,000 to Rob Co. Accordingly, the amendments cease to apply and the excess GST is no longer taken to be payable.

Bron Co would account for the reimbursement to Rob Co as a decreasing adjustment, and Rob Co would account for its receipt of the reimbursed amount as an increasing adjustment. Rob Co and Bron Co would not amend their GST returns for the period in which the GST and input tax credits were originally attributable. This is because these amendments treat the GST as payable until the time of reimbursement.

Example 1.8: Excess GST partially reimbursed

Croft Enterprises is registered for GST. On 25 May 2015, Croft Enterprises makes a supply to Christine which they believe to be taxable. They charge Christine the amount of \$2,200, including GST

of \$200. Christine pays the amount of \$2,200 to Croft Enterprises. Christine is neither registered nor required to be registered.

In its quarterly GST return lodged on 28 July 2015, Croft Enterprises includes GST payable of \$200 for the supply to Christine. The \$200 is taken into account in Croft Enterprises' net amount for the tax period ending 30 June 2015.

On 20 September 2015, Croft Enterprises realises that the supply was not a taxable supply and therefore the \$200 is excess GST. The \$200 is taken to have always been payable until Croft Enterprises reimburses Christine. However, Croft Enterprises only reimburses \$150 of the GST paid to Christine. Therefore, the remaining \$50 (being the difference between the excess GST and what has been reimbursed) is taken to have been always payable under the amendments. Croft Enterprises is entitled to a decreasing adjustment of \$150 in the tax period ending 30 September 2015.

Example 1.9: Treating excess GST as GST payable

Shawn is registered for GST and has monthly tax periods. During the tax period ending 31 July 2015, Shawn makes a number of supplies. He treats these as taxable supplies and includes GST on these supplies in his GST return lodged on 21 August 2015. His assessed net amount is \$4,000.

On 9 December 2016, Shawn discovers that some of the supplies he treated as being taxable supplies are not taxable supplies, and as a result, he has overpaid \$1,000 of GST to the Commissioner. The \$1,000 is excess GST.

If Shawn has passed on the excess GST and not reimbursed the recipient/s, the excess GST is taken to have always been payable and no refund entitlement arises.

Amended assessments

1.53 Circumstances may arise where an assessed net amount is amended (whether by application from the taxpayer, or following audit by the Commissioner) to include an amount of GST not originally treated as payable. If this amendment is incorrect, but the taxpayer has not passed on the excess GST, then the amendments allow the taxpayer to claim a refund of the excess. This means that if it is later determined that GST was not payable on that supply, the taxpayer's assessed net amount could be further amended to reflect this outcome.

Example 1.10: Amended assessment and GST not passed on

Jenny treats a particular supply as GST-free and this is reflected in the price she charges customers. Her assessed net amount for the tax

period reflects the GST-free treatment of that supply (she does not report any GST for that supply).

Later, she is audited by the Commissioner, who determines that the supply she treated as GST-free was a taxable supply. The Commissioner amends her assessment for that tax period (first amended assessment).

Jenny objects to the amended assessment on the basis that she considers that the supply is not taxable and enters into an arrangement with the Commissioner to pay half of the assessed net amount in dispute.

Subsequently, the Commissioner allows her objection in full. However, in giving effect to the favourable decision, the Commissioner must consider the application of these amendments.

The amendments apply as Jenny's assessed net amount for the tax period (the first amended assessment) takes into account an amount of GST exceeding that which is payable. In applying the amendments, it does not matter how much, if any, of the assessed net amount Jenny has actually paid.

As Jenny is able to demonstrate that the price she charged does not include GST, the Commissioner accepts that she has not passed on the GST and that the amendments do not apply. Accordingly the Commissioner further amends Jenny's assessed net amount (second amended assessment) to reflect the favourable objection decision.

1.54 If an amendment of the assessment results in the taxpayer's liability being reduced, the amount by which the liability is reduced is treated as though it was never payable and the Commissioner must apply that amount in accordance with the running balance account rules under Divisions 3 and 3A of Part IIB of the TAA 1953.

Exceptions to refunding excess GST

Commissioner's discretion

1.55 The Commissioner has a discretion to allow a refund of excess GST despite passing-on having occurred and no reimbursement having been made. The discretion can only be exercised on application by the supplier in an approved form. The discretion should only be exercised where the Commissioner is satisfied that a refund of the excess GST would not provide an entity with a windfall gain. [*Schedule #, item 10, subsections 142-15(1) and (2) of the GST Act*]

1.56 Ordinarily, where GST has been passed-on by a supplier to a recipient, a refund to the supplier would result in the supplier having a

windfall gain. Although less common, there could also be cases where a refund could lead to a windfall gain for another entity — for example, a recipient that has claimed input tax credits is effectively compensated for the GST they overpaid, and for whatever reason is able to retain the input tax credits they claimed.

1.57 In most cases the provisions are self-executing and there is no need for taxpayers to make an application to the Commissioner. If GST has not been passed on, the amendments do not apply and a refund of excess GST can be claimed. If a taxpayer and the Commissioner disagree about whether GST has been passed on, this is a matter that can be included in an objection to the relevant assessment. The discretion is not intended to apply in these circumstances. If GST has been passed on, and not reimbursed, then ordinarily a refund of the GST would lead to a windfall to the supplier. In these cases, the application of the amendments is consistent with the principle that excess GST is not to be refunded if this would give an entity a windfall gain and hence there is no cause for the exercise of the discretion.

1.58 However, there are more unusual cases where the application of the amendments may result in unintended consequences. One of these is illustrated in Example 1.11 below where strictly the entity has passed on and overpaid GST, but nevertheless the relevant individuals concerned would be out-of-pocket if the entity were not entitled to a refund of the GST overpaid. The discretion is intended to provide the Commissioner with the flexibility to deal with these sorts of circumstances.

Merits review of Commissioner's decision

1.59 The Commissioner decision to refuse to exercise the discretion to allow a refund of excess GST despite passing-on having occurred and no reimbursement having been made is a reviewable GST decision under section 110-50. Accordingly, a merits review is available under Part IVC of the TAA 1953.

Example 1.11: Commissioner's discretion and wrong entity

Entities Lintoned and Benwell own a commercial property as tenants in common. Each carries on a separate enterprise and is registered for GST.

Entities Lintoned and Benwell each sell their 50 per cent interest in the property (with vacant possession) to Neville Co for a price of \$50,000 plus \$5,000 GST each. Entities Lintoned and Benwell each remit GST of \$5,000.

Neville Co is registered for GST and claims two input tax credits of \$5,000 each.

The Commissioner reviews the transaction and decides that Entities Lintoned and Benwell are operating an enterprise as a tax law partnership. The tax law partnership is a separate entity for GST purposes. The Commissioner therefore assesses the partnership for underpaid GST of \$10,000. The partnership duly pays the \$10,000.

Entities Lintoned and Benwell have each overpaid GST of \$5,000 and they have each passed on that excess GST to Neville Co. However, in effect, Lintoned and Benwell have remitted the passed-on GST twice, once through remitting the GST in their own names, and once through remitting it in the name of the tax law partnership.

In these circumstances it is appropriate for the Commissioner to exercise the discretion where the Commissioner is satisfied that the refund of excess GST to Lintoned and Benwell will not result in a windfall gain for either entity.

Example 1.12: Commissioner's discretion

Supermarket A introduces a new product which it classifies as subject to GST, but which is correctly GST-free. It includes GST from the outset in the price of the product, which it sells to a large number of customers. The product is also marketed by other supermarkets who are correctly classifying the product as GST-free, so, after a few months, Supermarket A finds that it needs to reduce the price it charges for the product compared to its competitors.

Shortly afterwards, Supermarket A is advised that the product is GST-free, but it is not cost-effective to try to locate customers to provide a reimbursement of the overcharged GST.

Supermarket A considers that it has passed on the excess GST. It makes a request in the approved form for the Commissioner to exercise the discretion under the amendments to pay a refund of the excess GST, on the grounds that it was disadvantaged in the market place by its mistake, and has lost sales and profitability as a result.

In order to exercise the discretion, the Commissioner needs to be satisfied that applying the amendments would be inconsistent with the principle that a refund of excess GST should not give an entity a windfall gain.

The Commissioner forms the view that as the GST has been passed on, a windfall gain would arise to Supermarket A. Accordingly, the Commissioner decides not to exercise the discretion under the amendments. If Supermarket A is in doubt whether it has passed on the excess GST, it could ask the Commissioner for a private ruling about the matter.

GST relating to cancelled supplies

1.60 Where there is an adjustment event as a result of a supply being cancelled and this results in a decreasing adjustment for the supplier, the adjustment is reduced to the extent that GST has been passed on to the recipient of the supply but not reimbursed. [*Schedule #, item 10, section 142-20 of the GST Act*]

1.61 Having regard to the decision in *Qantas*⁵, in many cases there is still a supply where money is paid for goods and services that are ultimately not provided. However, there might be cases where money is paid with a mere expectation of a future supply, which does not eventuate. If this is the case, there could be a decreasing adjustment even if there is no reimbursement of the consideration paid for the supply that was cancelled. If the intending supplier had passed on GST to its customer and not reimbursed the customer, such a decreasing adjustment would provide it with a windfall gain. This provision prevents such an outcome by reducing the decreasing adjustment of the supplier to the extent the GST has been passed on and not reimbursed. The amendments also limit increasing adjustments for registered recipients.

Example 1.13: Decreasing adjustment, cancelled supply

In September 2015 Bams Co makes a taxable supply of goods to FT Co for \$55,000 and issues a tax invoice, which includes GST of \$5,000.

On 21 October 2015, Bams Co lodges its monthly GST return for the September 2015 tax period. Its assessed net amount takes into account the GST payable of \$5,000 for the supply made to FT Co.

In November 2015, FT Co returns all of the goods because they are defective and seeks a refund. Bams Co refunds \$55,000. The return of goods and associated refund cancels the supply. This is an adjustment event. Bams Co has a decreasing adjustment of \$5,000 attributable to the November 2015 tax period as a result of cancelling the supply, while FT Co has an increasing adjustment of \$5,000.

Since Bams Co has reimbursed all of the passed-on GST of \$5,000 its decreasing adjustment is not reduced to any extent. Similarly, FT Co's increasing adjustment is not reduced by any extent.

⁵ *Commissioner of Taxation v Qantas Airways Ltd* [2012] HCA 41 (Qantas)

Input tax credits

1.62 A recipient who is registered for GST would ordinarily have claimed input tax credits on the acquisition of the thing supplied (subject to the normal GST rules).

1.63 Such a recipient can continue to treat the excess GST in the same way that they treat the GST payable on the transaction for the purpose of working out the amount of its input tax credits under Division 11. This is achieved by treating the excess GST as having always been payable and always on a taxable supply. This is designed to preserve the GST outcomes of the original treatment, despite including excess GST and to clarify that the recipient can claim an input tax credit in relation to the acquisition. However, the recipient may have an increasing adjustment where the excess GST is reimbursed to it. *[Schedule #, item 10, section 142-10 of the GST Act]*

Supplier's creditable purpose

1.64 The amendments guard against the potential for parties to contrive arrangements that may enable additional input tax credits to be claimed where there would otherwise be no entitlement. For instance, where the corresponding GST is not paid to the Commissioner. This is achieved by providing that the amendments do not apply where the other entity knows or could reasonably be expected to have known that the supplier has not paid the excess GST to the Commissioner. *[Schedule #, item 10, subsection 142-15(5) of the GST Act]*

1.65 A supplier who makes input taxed supplies cannot treat those supplies as taxable supplies in order to claim input tax credits on their business inputs. Whilst the amendments treat excess GST that has been passed on as GST payable on a taxable supply, this deeming approach does not affect the supplier's creditable purpose. Accordingly, acquisitions by a supplier making input taxed supplies remain acquisitions that are not made for a creditable purpose under subsection 11-15(2). *[Schedule #, item 10, subsection 142-15(4) of the GST Act]*

Working out whether and when excess GST has been passed-on

1.66 Whether GST has been passed-on is a question of fact and must be determined on a case by case basis taking into account the particular circumstances of each case. *[Schedule #, item 11, section 195-1 of the GST Act]*

1.67 A tax invoice issued to or by another entity, that contains enough information to allow the amount of GST payable in relation to the supply to be clearly ascertained, is prima facie evidence of the excess GST having been passed on (although in cases where the taxpayer must

pay an assessed net amount, the invoice is only prima facie evidence if the amount has been paid). This reflects that tax invoices are issued for taxable supplies recognising that suppliers will have a liability for GST and would in most circumstances pass the cost of GST onto their customers. *[Schedule #, item 10, section 142-25(2) of the GST Act]*

1.68 GST may have been passed-on even though a tax invoice has not been issued, or does not specifically or separately identify the GST component or is not a valid tax invoice for the purposes of the GST Act. *[Schedule #, item 10, subsection 142-25(1) of the GST Act]*

1.69 For example, information contained in a document purporting to be a tax invoice, but that does not satisfy the requirements under subsection 29-70(1), or that does not result in the Commissioner treating the document as a tax invoice under subsection 29-70(1B), may be sufficient to demonstrate that the excess GST has been included in the price of a supply and therefore passed on.

1.70 The presumption that GST has been passed on may be rebutted in a number of ways. For example, despite the supplier having issued a tax invoice to the recipient, and having paid the excess GST to the Commissioner, they may be able to demonstrate that the recipient of the supply has not yet paid the amount shown on the invoice. This is sufficient to show that the excess GST has not yet been passed on, such that the amendments would not apply.

1.71 Whether the recipient has actually paid the supplier for the supply (whether or not an invoice has been issued) is therefore an important consideration in deciding whether GST has been passed on. *[Schedule #, item 10, paragraph 142-25(2)(c) of the GST Act]*

1.72 Some further guidance on the question of ‘passing-on’ can be obtained from the decision of the High Court in *Avon*⁶, which concerned the former sales tax regime. In *Avon*, the High Court noted that a central feature of the sales tax regime was that ‘the economic burden of the impost is generally not intended to be borne by the person liable to remit it; it is passed-on’.

1.73 The GST regime is similar to the former sales tax regime in that the entity liable to remit the tax is not intended to be the entity that actually bears the cost of the tax. As such, a number of judicial observations can be readily adapted to a GST context:

⁶ *Avon Products Pty Ltd v Commissioner of Taxation* [2006] HCA 29 (Avon)

- in an economy geared to making a profit, GST is expected to be passed on;
- businesses set prices to cover foreseeable costs;
- GST will be passed on in the usual course of doing business;
- it is inherent in an indirect system that GST will be passed on; and
- it is for the taxpayer to establish a circumstance out of the ordinary, namely that the amount of the overpayment has not been passed on.

1.74 Whether an indirect tax has been passed-on can be a relatively complex inquiry. This is because prices may be set with reference to a wide range of factors (including considerations of cost of production, competitive advantage, operational cash flow and customer goodwill). However, the seller's pricing policy and practice are the starting point of that inquiry.

1.75 The seller's pricing policy and practice is based upon its actual knowledge at the relevant time. That knowledge includes the belief that the component of tax which later proves to have been an overcharge is a real cost of doing business.

Margin scheme

1.76 The margin scheme represents another method by which GST can be calculated for certain supplies of real property. The GST, as calculated either under the general rules or under the margin scheme, is a foreseeable cost that would normally be taken into consideration in the costing and pricing structures of a business. In this regard, margin scheme cases need to be considered in the same way as other cases where the recipient is overcharged. Each case must be considered on its own facts based on whether the excess GST has been passed on.

1.77 An assertion that GST was not a factor in setting the price is not, of itself, sufficient to establish that the excess GST has not been passed on. Instead, a wide range of factors may be relevant to the question of passing-on in any particular case. In the case of taxable sales of real property, some of those factors may include the market in which the taxpayer operates and the contracts under which sales are made.

1.78 However, it is also necessary to consider the seller's pricing policy and practice, with reference to the actual conduct of the seller in setting prices based upon its actual knowledge at the relevant time. As

such, that knowledge includes the belief that the component of tax which later proves to have been an overcharge is a real cost of doing business.

Example 1.14: Where GST has been passed on

Leslie's Developments Co (LD) is a property development company and is registered for GST. LD makes a taxable supply of real property to Phe Co (Phe), another developer.

LD and Phe agree in writing on a GST-exclusive price and that an amount for GST can be charged using the margin scheme in calculating the GST liability on the supply.

LD provides Phe with a contract of sale that confirms the GST-exclusive price and that the margin scheme is to apply to the sale. This indicates that some amount of GST is included in the total purchase price, which is subsequently paid by Phe to LD. Notwithstanding that no tax invoice is issued in respect of the supply, the contract of sale is sufficient to show that an amount of GST has been passed-on to Phe.

Example 1.15: Where GST may have been passed on

State Co is a State Government entity which supplies both commercial and new residential premises. It conducts a detailed feasibility study on a new development project, and this includes estimates of its GST liability as part of its overall cost recovery and pricing structure. State Co owned the land before 1 July 2000 and, in calculating its likely GST liability under the margin scheme, uses a valuation day of 1 July 2000. State Co proceeds with the development of the project in 2015 and pays GST under the margin scheme.

Two years later, State Co discovers that it was entitled to use Item 4 in the table in subsection 75-10(3) — that is, it was entitled to make a valuation as at the day the taxable supply took place (a higher figure than the valuation as at 1 July 2000). State Co's margin on each sale is therefore lower and, as a result, it has overpaid GST.

In considering whether State Co is entitled to a refund, it is necessary to consider whether State Co had passed on the excess GST. Under its detailed feasibility study, State Co had estimated its GST liability before the sales using the lower valuation (and thus higher GST) which it took into account in determining its cost recovery and pricing structure. The GST component was eventually paid by its customers. These circumstances tend to indicate that State Co has passed on the excess GST.

Example 1.16: Where GST may not have been passed on

Toni's Development Co (TD) is a property development company and is registered for GST. TD undertook a development of 10 residential apartments.

Each apartment is marketed at a price of \$500,000 on the understanding the purchaser agrees in writing to the vendor's use of the margin scheme. In working out its pricing structure, TD calculated a GST component of \$11,000 on each apartment.

Within 3 months of the completion of the development, TD sold 9 of the apartments at the marketed price. In the ensuing months, TD had difficulty selling the last apartment. In order to sell it and move on to another development, TD dropped the price of the last apartment to \$450,000 and sold it at that price.

In completing its GST return for the tax period in which the sale was made, TD included in its net amount \$11,000 of GST in relation to the last apartment. TD has overpaid GST. A range of factors including TD's approach to pricing, the reduction in price and the application of the margin scheme indicate that TD has passed-on an amount of GST of less than \$11,000 on the sale of the last apartment and has not passed on the excess GST.

Example 1.17: Seeking the Commissioner's discretion

Developer AB carries out multi-staged residential developments supplying new residential housing in sub-divisions. It acquires land from another entity under the margin scheme and, as part of its detailed budget for a new project, considers the pricing structure for the supply of new houses on that land. AB estimates that the GST component under the margin scheme would be \$11,000 on each of the residences.

AB builds and sells the residences to unregistered individuals who acquire the property solely for private purposes. AB then remits GST calculated under the margin scheme.

Due to an audit by the Commissioner, AB is required to change the basis on which the costs of its original purchase of the land are allocated between sales of completed sub-divisions (the margin scheme cost base is changed). This has the effect that AB has underpaid its GST liability on the sale of some residences and overpaid GST on other sales.

In this case, Developer AB had factored approximately \$11,000 GST into its cost recovery and pricing structure for each residence. The total amount of GST payable on the whole development has not changed – it is the total sales prices less the total margin scheme cost base – but the amount of GST payable on individual sales and, in turn,

the timing of when the GST is payable may change — more GST may be payable in one tax period and less in another.

Developer AB considers that the amendments apply to restrict the refund of the excess GST and that its circumstances warrant seeking the Commissioner's discretion to refund the excess GST.

Having regard to the facts and circumstances of Developer AB's situation, and given that there are corresponding overpayments and underpayments arising from the change to the margin scheme cost base, the Commissioner considers that it would be inappropriate to prevent refunds of GST in those tax periods where the GST liability was overpaid because such refunds would not result in a windfall gain to any entity. AB needs to remit the additional GST liability in tax periods where more GST was payable.

Review rights

1.79 These amendments impact on the net amount for taxpayers and therefore the assessment of that net amount. Accordingly, taxpayers may challenge a decision by the Commissioner not to refund excess GST by objecting to the relevant assessment and if dissatisfied with the objection decision, through review or appeal in the Administrative Appeals Tribunal or Courts.

1.80 A separate review right has also been introduced for taxpayers dissatisfied with a decision by the Commissioner to refuse to exercise the discretion under these amendments. [*Schedule #, item 15, subsection 110-50(2) in Schedule 1 of the TAA 1953*]

Review of Commissioner's decisions made under section 105-65

1.81 This Schedule also amends the TAA 1953 to ensure taxpayers can seek merits review of the Commissioner's decisions made under section 105-65. This follows the decision in Naidoo, see paragraph 1.21 above. [*Schedule #, item 20, subsection 105-65(3) in Schedule 1 of the TAA 1953*]

1.82 An objection to a section 105-65 decision must be lodged within 60 days after the taxpayer is notified of the decision, or 4 years after the end of the tax period to which the decision relates. This is consistent with the time period available to object to other decisions made by the Commissioner. [*Schedule #, items 17, paragraph 14ZW(1)(bh) of the TAA 1953*].

1.83 This time limit to object is repealed from 1 July 2018 in line with the repeal of section 105-65 from this date. The repeal from this date reflects that section 105-65 will cease to apply to tax periods starting the day following Royal Assent and accordingly all rights to object to a decision under section 105-65 will in most cases have expired by 1 July

2018. *[Schedule #, items 18 and 25 to 27, paragraph 14ZW(1)(bh) and the note in subsection 14ZW(1) of the TAA 1953]*

1.84 There are, however limited circumstances in which the Commissioner may need to make decisions under section 105-65 after 1 July 2018 (usually where a taxpayer has lodged a valid section 105-55 (Schedule 1 to the TAA 1953) notice and because of the circumstances it takes some time to determine if a refund should be made). Accordingly, a transitional provision has been included to ensure that section 105-65 and the time period for objecting to decisions continues to apply after 1 July 2018. *[Schedule #, item 28]*

Validating objections, decisions of the Commissioner and AAT

1.85 This Schedule also validates:

- any objections made by taxpayers before the decision in Naidoo on 28 June 2013 to a decision of the Commissioner made under section 105-65;
- a decision of the Commissioner or the AAT made before Royal Assent of this Bill concerning such an objection; or
- other actions undertaken under or in connection with the legislative framework for reviews and appeals of taxation decisions concerning such an objection or decision of the Commissioner in relation to such an objection.

to the extent that objection, decision or action would otherwise be invalid. *[Schedule #, item 21 and subitem 22(1) and (2)]*

1.86 No additional right to object against a decision of the Commissioner under section 105-65 is created if an objection to a section 105-65 decision was made before the decision in the Naidoo on 28 June 2013. *[Schedule #, subitem 22(3)]*

1.87 The amendments also ensure that taxpayers that did not lodge an objection to a decision of the Commissioner under section 105-65 are able to lodge a valid objection despite the decision in Naidoo.

1.88 Taxpayers that had not lodged an objection and were not out of time to lodge an objection under section 14ZW of the TAA 1953 on 28 June 2013 (the date of the Naidoo decision) can object to the Commissioner's decision under section 105-65 until the later of the following times:

- sixty days after receiving notice of the Commissioner's decision under section 105-65;
- four years after the end of the tax period to which the Commissioner's decision under section 105-65 relates; or
- sixty days after Royal Assent of this Bill.

[Schedule #, item 23]

1.89 This ensures that taxpayers that decided not to object to the Commissioner's decision under section 105-65 because of the finding of the AAT in Naidoo that section 105-65 decisions are not reviewable decisions, have at least sixty days after Royal Assent of the Bill to object.

1.90 Taxpayers:

- that lodged an objection to the Commissioner's decision under section 105-65 before 28 June 2013 (date of Naidoo AAT decision);
- that could on or after 28 June 2013 take further action under the legislative framework for reviews and appeals of taxation decisions, but decided not to pursue the action; and
- for which the time available to pursue the action has already expired on Royal Assent of this Bill;

can apply the legislative framework for reviews and appeals of taxation decisions and the *Administrative Appeals Tribunal Act 1975* on the basis that the time available to pursue the action does not expire until 60 days from Royal Assent of the Bill.

[Schedule #, item 24]

Application and transitional provisions

1.91 The amendments in Parts 1 and 2 of the Schedule # that include a new framework for determining if excess GST should be refunded apply in working out the net amount for tax periods starting on or after the day following Royal Assent. *[Schedule #, item 16]*

1.92 It is important that the amendments to the law do not adversely affect taxpayers who, prior to the application of the amendments, had already taken steps under the current law to seek a refund. The amendments accordingly provide an appropriate balance between

providing certainty, whilst not adversely affecting taxpayer's entitlements prior to the application of the amendments.

1.93 Section 105-65 continues to apply in relation to net amounts for tax periods commencing on or prior to Royal Assent of the Bill. This approach seeks to reduce compliance costs by ensuring that taxpayers are not required to apply section 105-65 for part of a tax period and also the provisions inserted by this Schedule for the balance of that tax period. *[Schedule #, item 19, subsection 105-65(2)]*

Example 1.18: Tax period commencing on or prior to Royal Assent

Harry Enterprises is registered for GST. On 1 September 2013, Harry Enterprises makes a supply to Christopher for \$5,500 and issues him with a tax invoice that includes an amount of GST of \$500. Christopher is not registered for GST.

On 3 October 2013, Harry Enterprises treats the supply as a taxable supply in its GST return for the tax period ending 30 September 2013. On 17 December 2015 (after Royal Assent), Harry Enterprises discovers that the supply is a GST-free supply, and as a result, it has incorrectly included GST of \$500 in his net amount for the tax period ending 30 September 2013. In determining whether Harry Enterprises is entitled to a refund of the overpaid amount, section 105-65 applies, because the refund claim relates to the net amount for a tax period starting on or prior to Royal Assent.

1.94 Section 105-65 is repealed from 1 July 2018, however this section may still apply after this date concerning tax periods commencing on or prior to Royal Assent of the Bill in certain circumstances. For instance, this will allow the Commissioner to make decisions where a taxpayer has lodged a valid section 105-55⁷ notice and it has taken some time to determine the refund claim. *[Schedule #, items 27 and 28]*

Consequential amendments

1.95 There are a number of consequential amendments to headings, notes and other things that need to be repealed or revised due to the repeal of section 105-65 and the inclusion of the refunding excess GST framework. *[Schedule #, items 1 to 9, 12, 13 and 14]*

⁷ Schedule 1 of the TAA 1953.

