

2012

EXPOSURE DRAFT

TAX LAWS AMENDMENT (2013 MEASURES NO. 1) BILL 2013: SELF
MANAGED SUPERANNUATION FUNDS AND RELATED PARTIES

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Minister for Financial Services and Superannuation, the Hon Bill Shorten MP)

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Glossary

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

<i>Abbreviation</i>	<i>Definition</i>
Commissioner	Commissioner of Taxation
RIS	regulation impact statement
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i>
SIS Regulations	Superannuation Industry (Supervision) Regulations 1994
SMSF	self managed superannuation fund
Super System Review	Review

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Chapter 1 ***Self managed superannuation funds – acquisitions and disposals of certain assets to related parties***

Outline of chapter

1.1 Schedule ?? to the Tax Laws Amendment (2013 Measures No. 1) Bill 2013 amends the *Superannuation Industry (Supervision) Act 1993* (SIS Act) to introduce new requirements relating to the acquisition and disposal of certain assets by self managed superannuation funds (SMSFs) and related parties.

1.2 All references in this chapter are to the SIS Act unless otherwise stated.

Context of amendments

1.3 The Super System Review (Review) noted that SMSFs are closely held entities (as all members must also be trustees) which may provide the opportunity for SMSF members to engage in behaviour that is inconsistent with the Government's retirement policy that superannuation savings should be invested for the sole purpose of providing an income in retirement.

1.4 While the Review acknowledged that some related party investments are consistent with Government policy, the Panel were concerned that the current rules still provide avenues for potential abuse.

1.5 The Review was concerned that the off market acquisition and disposal of assets between related parties and SMSFs, where the guiding mind of both buyer and seller can effectively be the same person, lacks transparency, is inherently risky and is open to greater abuse than non-related party transactions.

1.6 The Panel believed that the current provisions regulating related party acquisitions are insufficient to mitigate the risk of transaction date and asset value manipulation to illegally benefit the SMSF or a related

party. The Panel did, however, conclude that SMSFs should retain the ability for SMSFs to conduct certain limited related party transactions.

1.7 The Review recommended that acquisitions and disposals of assets between related parties and SMSFs should be conducted through an underlying market where one exists, or where one does not exist, must be supported by a valuation from a suitably qualified independent valuer.

1.8 Schedule ?? to the Tax Laws Amendment (2013 Measures No. 1) Bill 2013 implements the Government's response to the Review's recommendations in relation to acquisitions and disposals of assets between SMSFs and related parties.

1.9 These amendments will provide greater transparency to related party acquisitions and disposals, enabling SMSF approved auditors and the Commissioner of Taxation (Commissioner), as Regulator, to monitor these transactions more effectively, which will enhance the integrity of the SMSF sector.

Summary of new law

1.10 Schedule ?? to the Tax Laws Amendment (2013 Measures No. 1) Bill 2013:

- amends the existing prohibition on acquiring assets from related parties so that it applies to all regulated superannuation funds other than SMSFs; and
- introduces a new prohibition on SMSF trustees and investment managers of SMSFs on acquiring assets from related parties, subject to certain exceptions; and
- introduces new rules for SMSF trustees and investment managers when disposing of assets to related parties; and
- introduces a new prohibition on schemes which avoid the operation of these new rules regulating SMSF related party transactions; and
- introduces administrative and civil penalties for contravention of these new rules.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
A trustee or an investment manager of a regulated superannuation fund, other than a SMSF, must not acquire an asset from a related party of the fund, subject to certain exceptions.	A trustee or investment manager of a regulated superannuation fund must not intentionally acquire an asset from a related party of the fund, subject to certain exceptions.
Acquisitions of certain assets:	
A trustee or an investment manager of an SMSF must not acquire an asset from a related party of the fund, subject to certain exceptions. This applies only to SMSFs.	A trustee or investment manager of a regulated superannuation fund must not intentionally acquire an asset from a related party of the fund, subject to certain exceptions.
Exceptions:	
The prohibition on acquiring an asset from a related party does not apply if the asset is a listed security acquired in the way prescribed by the regulations.	The prohibition on acquiring an asset from a related party does not apply if the asset is a listed security acquired at market value.
The prohibition on acquiring an asset from a related party does not apply if the asset is business real property of the related party acquired at market value, as determined by a qualified independent valuer.	The prohibition on acquiring an asset from a related party does not apply if the fund is a superannuation fund with fewer than five members and the asset is business real property of the related party acquired at market value.
The prohibition on acquiring an asset from a related party does not apply if the asset is acquired under a merger between regulated superannuation funds and at market value, as determined by a qualified independent valuer.	The prohibition on acquiring an asset from a related party does not apply if the trustee of a regulated superannuation fund acquired the asset under a merger between regulated superannuation funds.
The prohibition on acquiring an asset from a related party does not apply if the acquisition of the asset constitutes an investment that is covered by subparagraph 66(2A)(a), is at market value as determined by a qualified independent valuer, and would not result in the level of in-house assets of the fund exceeding the level	The prohibition on acquiring an asset from a related party does not apply if the acquisition of the asset constitutes an investment that is covered by subparagraph 66(2A)(a), is at market value, and would not result in the level of in-house assets of the fund exceeding the level permitted by Part 8 of the SIS Act.

permitted by Part 8 of the SIS Act.	
The prohibition on acquiring an asset from a related party does not apply if the asset is money.	No equivalent.
The prohibition on acquiring an asset from a related party does not apply if the asset is of a kind that the Regulator, by legislative instrument, determines may be acquired by SMSFs, or a class of SMSFs.	The prohibition on acquiring an asset from a related party does not apply if the asset is an asset of a kind which the Regulator, by legislative instrument, determines may be acquired by any regulated superannuation fund, or a class of regulated superannuation fund in which the fund is included.
The prohibition on acquiring an asset from a related party of a SMSF does not apply if the asset is acquired in accordance with the requirements of subsections 66(2B) and 66(2C), which are about the breakdown of relationships.	The prohibition on acquiring an asset from a related party of a regulated superannuation fund does not apply if the asset is acquired in accordance with the requirements of subsections 66(2B) and 66(2C), which is about the breakdown of relationships.
A trustee or investment manager of an SMSF who acquires an asset from a related party otherwise than in accordance with an exception contravenes a civil penalty provision, to which civil or criminal penalties may be sought by the Regulator.	A trustee or investment manager or a regulated superannuation fund who intentionally acquires an asset from a related party where an exception does not apply is guilty of an offence punishable on conviction by imprisonment for a term not exceeding 1 year.
Disposals of certain assets:	
A trustee or an investment manager of an SMSF must not dispose of an asset to a related party of the fund, subject to certain exceptions. This applies only to SMSFs.	No equivalent.
Exceptions:	No equivalent.
The prohibition on disposing of an asset to a related party does not apply if the asset is a listed security disposed of in the way prescribed by the regulations.	No equivalent.
The prohibition on disposing of an asset to a related party does not apply if the asset is disposed of for market value, as determined by a qualified	No equivalent.

independent valuer.	
The prohibition on disposing of an asset to a related party does not apply if the asset is a kind covered by the regulations in force for the purposes of section 62A (about collectables and personal use assets) of the SIS Act, immediately before 1 July 2013.	No equivalent.
The prohibition on disposing of an asset to a related party does not apply if the asset is money.	No equivalent.
The prohibition on disposing of an asset to a related party does not apply if the asset is of a kind that the Regulator, by legislative instrument, determines may be disposed of by SMSFs, or a class of SMSFs.	No equivalent.
The prohibition on disposing of an asset to a related party of a SMSF does not apply if the asset is disposed of accordance with the requirements of subsections 66(2B) and 66(2C), which are about the breakdown of relationships, in the way that those sections apply to the disposal of an asset.	No equivalent.
A trustee or investment manager of an SMSF who disposes of an asset to a related party otherwise than in accordance with an exception contravenes a civil penalty provision, to which civil or criminal penalties may be sought by the Regulator.	No equivalent.
A person must not enter into, commence to carry out, or carry out a scheme if the scheme results, or is likely to result, in a trustee or an investment manager of an SMSF acquiring or disposing of an asset in a manner that would avoid the application of subsections 66A(2) or 66B(2).	A person must not enter into, commence to carry out, or carry out a scheme if the person entered into, commenced to carry out, or carried out the scheme or any part of the scheme with the intention that the scheme would result, or be likely to result in the acquisition of an asset by a trustee or an investment manager or a regulated superannuation fund which would avoid the application of subsection 66(1).

Detailed explanation of new law

Definitions

1.11 Schedule ?? inserts a definition of **business real property** in subsection 10(1) as having the meaning given by section 21. *[Schedule ??, item 1, subsection 10(1)]*

1.12 Schedule ?? also inserts a definition of **primary production business** in subsection 10(1) as having the same meaning as in the *Income Tax Assessment Act 1997*. *[Schedule ??, item 2, subsection 10(1)]*

1.13 The terms ‘business real property’ and ‘primary production business’ are currently only defined for the purposes of section 66. Schedule ?? repeals the current definitions in subsection 66(5) and inserts definitions of ‘business real property’ and ‘primary production business’ into the definitions section, section 10. These definitions will apply across the SIS Act, unless a contrary intention appears. *[Schedule ??, items 8, 9, 10, subsection 66(5)]*

1.14 Section 21 defines **business real property**, of an entity, as:

- any freehold or leasehold interest of the entity in real property; or
- any interest of the entity in Crown land, other than a leasehold interest, being an interest that is capable of assignment or transfer; or
- if another class of interest relating to real property is prescribed by regulations, any interest of that class held by the entity;

if the real property is used wholly and exclusively in one or more businesses (whether carried on by the entity or not).

[Schedule ??, item 3, subsection 21(1)]

1.15 Business real property does not include any interest held in the capacity of beneficiary of a trust estate. *[Schedule ??, item 3, subsection 21(2)]*

1.16 For the purposes of the definition of **business real property**, real property used in one or more primary production businesses does not cease to be used wholly and exclusively in those businesses only because:

- an area of the real property, not exceeding 2 hectares, contains a dwelling used primarily for domestic or private purposes; and
- the area is also used primarily for domestic or private purposes;

provided that the use for domestic or private purposes is not the predominant use of the real property.

[Schedule ??, items 3 and 12, subsections 21(3) and 66(6)]

1.17 For the purposes of the definition of **business real property**, **business** includes any profession, trade, employment, vocation or calling carried on for the purposes of profit, including the carrying on of primary production and the provision of professional services, but does not include occupation as an employee. *[Schedule ??, item 3, subsection 21(4)]*

Regulations regarding investments by self managed superannuation funds in collectables and personal use assets

1.18 Section 62A provides that regulations may prescribe rules in relation to trustees of SMSFs making, holding and realising investments involving certain collectables and personal use assets. Items 5 and 6 clarify that subsection 62A(1) has effect subject to sections 66A and 66B, relating to acquisitions and disposals of certain assets by SMSFs. *[Schedule ??, items 5 and 6, subsections 62A(1) and 62A(2)]*

Acquisitions of certain assets by self managed superannuation funds

1.19 Section 66 will continue to apply to all regulated superannuation funds, except SMSFs, in respect of acquisitions of certain assets from a related party. *[Schedule ??, item 7, subsection 66(1)]*

1.20 Schedule ?? inserts section 66A – Self managed superannuation funds – certain acquisitions. Section 66A will apply only in relation to SMSFs that are regulated superannuation funds. *[Schedule ??, item 13, subsection 66A(1)]*

1.21 Under subsection 66A(2), trustee or an investment manager of a SMSF must not acquire an asset from a related party of the fund. *[Schedule ??, item 13, subsection 66A(2)]*

1.22 A ‘related party’ of a superannuation fund is defined in subsection 10(1). An ‘asset’ is also defined in subsection 10(1) and includes any form of property.

1.23 Subsection 66A(2) is a civil penalty provision. Part 21 of the SIS Act provides for civil and criminal consequences for contravening or being involved in a contravention of a civil penalty provision. See also paragraphs 1.70 to 1.71 below. ***[Schedule ??, item 13, subsection 66A(5)]***

Exceptions

1.24 Section 66A contains a number of exceptions to the prohibition on a trustee or investment manager acquiring an asset from a related party of the fund.

Listed securities

1.25 A trustee or investment manager may acquire an asset from a related party if the asset is a listed security and it is acquired in a way prescribed by the regulations. ***[Schedule ??, item 13, paragraph 66A(3)(a)]***

1.26 The term ‘listed security’ is defined in subsection 10(1) as having the meaning given by subsection 66(5).

1.27 Under the current section 66, SMSF trustees and investment managers have been able to acquire listed securities from related parties provided they are acquired at market value. The method by which these transactions have been effected has been dependent on the rules of the market the securities are traded on. For example, ownership of listed securities traded on the Australian Stock Exchange may be transferred off-market between parties through the use of a Transfer Form for Non-Market Transactions. The Review found that such transactions outside a formal market lack transparency and can be used to manipulate transaction dates and asset values to illegally benefit the SMSF or a related party.

1.28 Trustees and investment managers of SMSFs will not be prohibited from acquiring listed securities from related parties, provided that the appropriate method, as prescribed in the regulations, is used.

Business real property

1.29 A trustee or investment manager of an SMSF may acquire an asset from a related party if the asset is business real property acquired at market value, as determined by a qualified independent valuer. ***[Schedule ??, item 13, paragraph 66A(3)(b)]***

1.30 To satisfy this requirement, trustees and investment managers of SMSFs will be required to obtain a market valuation from a qualified independent valuer. A valuer will be qualified either through holding formal valuation qualifications or by being considered to have specific knowledge, experience and judgment by their particular professional community. This may be demonstrated by being a current member of a relevant professional body or trade association.

1.31 The valuer must also be independent. Therefore, the valuer cannot be a member of the fund or a related party of the fund. They should be impartial, unbiased and not be influenced or appear to be influenced by others.

1.32 This exception is not intended to operate or apply in a different manner than the exception in paragraph 66(2)(b), except for the requirement for market value to be determined by a qualified independent valuer.

1.33 Market value is defined in subsection 10(1).

Mergers between regulated superannuation funds

1.34 A trustee or investment manager of an SMSF may acquire an asset from a related party under a merger between regulated superannuation funds at market value, as determined by a qualified independent valuer. [*Schedule ??, item 13, paragraph 66A(3)(c)*]

1.35 This exception is not intended to operate or apply in a different manner to SMSFs than the exception in the current paragraph 66(2)(c), except that the asset must be acquired at market value as determined by a qualified independent valuer.

1.36 Market value is defined in subsection 10(1). Refer to paragraphs 1.30 and 1.31 above for guidance on obtaining a valuation from a qualified independent valuer.

In-house assets

1.37 A trustee or investment manager may acquire an asset from a related party if the acquisition of the asset constitutes an investment in certain in-house assets (those covered by subparagraph 66(2A)(a)), is at market value as determined by a qualified independent valuer and would not result in the level of in-house assets of the fund (within the meaning of Part 8) exceeding the level permitted by that Part. [*Schedule ??, item 13, paragraph 66A(3)(d)*]

1.38 This exception is not intended to operate or apply in a different manner to SMSFs than the exception in the current subsection 66(2A), except for the requirement for market value to be determined by a qualified independent valuer.

1.39 Market value is defined in subsection 10(1). Refer to paragraphs 1.30 and 1.31 above for guidance on obtaining a valuation from a qualified independent valuer.

Money

1.40 A trustee or investment manager may acquire an asset from a related party if the asset is money. ***[Schedule ??, item 13, paragraph 66A(3)(e)]***

1.41 ‘Asset’ is defined in subsection 10(1) to include money (whether Australian currency or currency of another country). This exception ensures that a trustee or an investment manager of an SMSF may accept money from a related party. This exception is not intended to operate or apply in a different manner to SMSFs than the way that the current section 66 allows a regulated superannuation fund to accept money from a related party.

Determination by the Regulator

1.42 A trustee or investment manager of an SMSF may acquire an asset from a related party if the asset is of a kind that the Regulator, by legislative instrument, determines may be acquired by SMSFs. The Regulator may make a determination that specifies different kinds of assets may be acquired by different classes of SMSFs. ***[Schedule ??, item 13, paragraph 66A(3)(f)]***

1.43 This exception is not intended to operate or apply in a different manner to SMSFs than the current exception in paragraph 66(2)(d) applies to regulated superannuation funds.

Breakdown of relationships

1.44 A trustee or investment manager of an SMSF may acquire an asset from a related party if certain requirements relating to the breakdown of relationships listed in subsections 66(2B) and (2C) are satisfied. ***[Schedule ??, item 13, subsection 66A(4)]***

1.45 This exception is intended to apply to acquisitions involving SMSFs and related parties, as it currently applies to acquisitions involving

other regulated superannuation funds. Referring to subsections 66(2B) and 66(2C) in subsection 66A(4) avoids unnecessary repetition.

Disposals of certain assets by self managed superannuation funds

1.46 Schedule ?? inserts section 66B – Self managed superannuation funds – certain disposals. Section 66B will apply only in relation to SMSFs that are regulated superannuation funds. [*Schedule ??, item 13, subsection 66B(1)*]

1.47 A trustee or an investment manager of a SMSF must not dispose of an asset to a related party of the fund, unless an exception applies. [*Schedule ??, item 13, subsection 66B(2)*]

1.48 A ‘related party’ of a superannuation fund is defined in subsection 10(1). An ‘asset’ is also defined in subsection 10(1) and includes any form of property.

1.49 Subsection 66B(2) is a civil penalty provision. Part 21 of the SIS Act provides for civil and criminal consequences of contravening or being involved in a contravention of a civil penalty provision. See also paragraphs 1.70 to 1.71 below. [*Schedule ??, item 13, subsection 66B(5)*]

Exceptions

1.50 A trustee or investment manager of an SMSF may dispose of an asset to a related party if the requirements of an exception are met.

Listed securities

1.51 A trustee or investment manager may dispose of an asset to a related party if the asset is a listed security, and the disposal is in a way prescribed by the regulations. [*Schedule ??, item 13, paragraph 66A(3)(a)B*]

1.52 The term ‘listed security’ is defined in subsection 10(1) as having the meaning given by subsection 66(5).

1.53 The regulations will prescribe the way in which SMSFs may dispose of listed securities to related parties of an SMSF.

Disposal for market value, as determined by a qualified independent valuer

1.54 If another exception in subsection 66B(3) does not apply, a trustee or investment manager may dispose of an asset to a related party if the asset is disposed of for market value, as determined by a qualified independent valuer. **[Schedule ??, item 13, paragraph 66B(3)(b)]**

1.55 Market value is defined in subsection 10(1). Refer to paragraphs 1.30 and 1.31 above for guidance on obtaining a valuation from a qualified independent valuer.

Collectables and personal use assets

1.56 A trustee or investment manager may dispose of an asset that is of a kind specified in the regulations in force for the purposes of s 62A (about collectables and personal use assets) immediately before 1 July 2013. **[Schedule ??, item 13, paragraph 66B(3)(c)]**

1.57 This exception ensures that the rules contained in subregulation 13.18AA(7) of the Superannuation Industry (Supervision) Regulations 1994 apply when a trustee of an SMSF disposes of certain collectable and personal use assets to related parties.

Money

1.58 A trustee or investment manager may dispose of an asset to a related party if the asset is money. **[Schedule ??, item 13, paragraph 66B(3)(d)]**

1.59 'Asset' is defined in subsection 10(1) to include money (whether Australian currency or currency of another country). This exception ensures that a trustee or an investment manager of an SMSF may make payments of money to a related party. This exception is not intended to operate or apply in a different manner to SMSFs than the way that the current section 66 allows a regulated superannuation fund to make payments of money to a related party.

Determination by the Regulator

1.60 A trustee or investment manager of an SMSF may dispose of an asset to a related party if the asset is of a kind that the Regulator, by legislative instrument, determines may be disposed of by SMSFs. The Regulator may make a determination that specifies different kinds of assets may be disposed of by different classes of SMSFs. **[Schedule ??, item 13, paragraph 66B(3)(e)]**

Breakdown of relationships

1.61 A trustee or investment manager of an SMSF may dispose of an asset to a related party if certain requirements relating to the breakdown of relationships listed in subsections 66(2B) and (2C) are satisfied in relation to the disposal of an asset. *[Schedule ??, item 13, subsection 66B(4)]*

1.62 This exception is intended to apply to disposals of assets in the corresponding way that subsections 66(2B) and 66(2C) apply to acquisitions of assets. Referring to subsections 66(2B) and 66(2C) in subsection 66B(4) avoids unnecessary repetition of the legislation.

Prohibition on avoidance schemes

1.63 A person must not enter into, commence to carry out, or carry out a scheme (within the meaning of section 66) if:

- (i) the scheme results, or is likely to result, in a trustee or an investment manager of an SMSF:
 - a. acquiring an asset from an entity; or
 - b. disposing of an asset to an entity; and
- (ii) the scheme avoids subsection 66A(2) from applying to the acquisition, or subsection 66B(2) from applying to the disposal, (as appropriate) because the entity is not a related party of the fund; and
- (iii) that subsection would so apply were the entity a related party of the fund; and
- (iv) the entity has a connection, directly or indirectly through one or more interposed entities, with a related party of the fund. *[Schedule ??, item 13, subsection 66C(1)]*

1.64 Scheme is defined in section 66 as:

- (i) any agreement, arrangement, understanding, promise or undertaking:
 - a. whether expressed or implied; or
 - b. whether or not enforceable, or intended to be enforceable by legal proceedings; and

- (ii) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

1.65 This prohibition on avoidance schemes is intended to apply in relation to acquisitions and disposals of assets by SMSFs in a similar manner as subsection 66(3) applies to acquisitions by other regulated superannuation funds.

1.66 This prohibition makes it clear that trustees and investment managers of SMSFs must not enter into schemes to circumvent the application of sections 66A and 66B.

1.67 Subsection 66C(1) is a civil penalty provision. Part 21 of the SIS Act provides for civil and criminal consequences for contravening or being involved in a contravention of a civil penalty provision. See also paragraphs 1.70 and 1.71 below. *[Schedule ??, item 13, subsection 66C(2)]*

Penalties

Administrative penalties

1.68 Under section 166, a trustee or an investment manager who contravenes subsections 66A(2) or 66B(2) will be liable to an administrative penalty of 60 penalty units for each contravention. *[Schedule ??, items 19 and 20, subsections 166(1) and 166(2)]*

1.69 Items 15 to 18 include notes to the relevant subsections to provide clarity over the imposition of an administrative penalty under section 166. *[Schedule ??, items 15 to 18, subsections 66A(2) and 66B(2)]*

Civil penalties

1.70 Subsections 66A(2), 66B(2) and 66C(1) are civil penalty provisions as defined by section 193. Part 21 of the SIS Act provides for civil and criminal consequences of contravening, or being involved in a contravention of these subsections.

1.71 The Regulator may seek a civil penalty order of up to 2,000 penalty units for contravention of a civil penalty provision. If a trustee or investment manager contravenes a civil penalty provision either dishonestly and intending to gain an advantage for a person, or intending to deceive or defraud a person, the trustee or investment manager is guilty of an offence punishable on conviction by imprisonment for not longer

than five years. [*Schedule ??, item 13, subsections 66A(2), 66B(2) and 66C(1)*]

Transitional provision – in-house assets

1.72 Item 3 of Schedule ?? inserts a new definition of business real property into the definitions section of the SIS Act, section 10, applying from the commencement date of 1 July 2013.

1.73 Item 4 of Schedule ?? provides for a transitional provision in relation to the current definition of business real property in subsection 66(5). Item 9 of the *Superannuation Industry (Supervision) Amendment Act 2010* deleted the words ‘(within the meaning of subsection 66(5))’ following the reference to ‘business real property’ in paragraph 71(1)(g), which relates to the meaning of an in-house asset. Omitting this reference to the meaning of ‘business real property’ as it appears in paragraph 71(1)(g) may have created uncertainty as to the meaning of ‘business real property’ for the purposes of paragraph 71(1)(g). The transitional provision at item 4 re-instates the words ‘(within the meaning of subsection 66(5))’ after the reference to ‘business real property’ in paragraph 71(1)(g) from the date of enactment of the *Superannuation Industry (Supervision) Amendment Act 2010* to the date before the commencement of Part 1 of Schedule ?? (30 June 2013), to remove any uncertainty.

Minor amendment

1.74 Item 7 makes a minor amendment to subparagraph 66(2A)(a)(iv) to remove a reference to a paragraph which has been repealed. [*Schedule ??, item 7, subparagraph 66(2A)(a)(iv)*]

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