Income Tax Assessment Act 1936

No. 27, 1936

Compilation No. 179

Compilation date:	22 February 2022
Includes amendments up to:	Act No. 8, 2022
Registered:	10 March 2022

This compilation is in 7 volumes

Volume 1: sections 1–78A
Volume 2: sections 79A–121L
Volume 3: sections 124ZM–204
Volume 4: sections 251R–468
Volume 5: Schedules
Volume 6: Endnotes 1–4
Volume 7: Endnote 5

Each volume has its own contents

This compilation includes retrospective amendments made by Act No. 8, 2022

Prepared by the Office of Parliamentary Counsel, Canberra

About this compilation

This compilation

This is a compilation of the *Income Tax Assessment Act 1936* that shows the text of the law as amended and in force on 22 February 2022 (the ***compilation date***).

The notes at the end of this compilation (the ***endnotes***) include information about amending laws and the amendment history of provisions of the compiled law.

Uncommenced amendments

The effect of uncommenced amendments is not shown in the text of the compiled law. Any uncommenced amendments affecting the law are accessible on the Legislation Register (www.legislation.gov.au). The details of amendments made up to, but not commenced at, the compilation date are underlined in the endnotes. For more information on any uncommenced amendments, see the series page on the Legislation Register for the compiled law.

Application, saving and transitional provisions for provisions and amendments

If the operation of a provision or amendment of the compiled law is affected by an application, saving or transitional provision that is not included in this compilation, details are included in the endnotes.

Editorial changes

For more information about any editorial changes made in this compilation, see the endnotes.

Modifications

If the compiled law is modified by another law, the compiled law operates as modified but the modification does not amend the text of the law. Accordingly, this compilation does not show the text of the compiled law as modified. For more information on any modifications, see the series page on the Legislation Register for the compiled law.

Self-repealing provisions

If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

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Part III—Liability to taxation

Division 3—Deductions

79A Rebates for residents of isolated areas

(1) For the purpose of granting to residents of the prescribed area an income tax concession in recognition of the disadvantages to which they are subject because of the uncongenial climatic conditions, isolation and high cost of living in Zone A and, to a lesser extent, in Zone B, in comparison with parts of Australia not included in the prescribed area, a taxpayer (not being a company or a taxpayer in the capacity of a trustee) who is a resident of the prescribed area in the year of income is entitled, in the taxpayer's assessment in respect of income of that year of income, to a rebate of tax ascertained in accordance with this section.

(2) Subject to subsections (2A) and 79B(4), the rebate allowable under this section in the assessment of a taxpayer in respect of income of the year of income is:

(a) if the taxpayer is a resident of the special area in Zone A, or of the special area in Zone B, in the year of income—an amount equal to the sum of:

(i) $1,173; and

(ii) an amount equal to 50% of the relevant rebate amount in relation to the taxpayer in relation to the year of income; or

(b) if the taxpayer is a resident of Zone A (but not of the special area in Zone A or of the special area in Zone B) in the year of income—an amount equal to the sum of:

(i) $338; and

(ii) an amount equal to 50% of the relevant rebate amount in relation to the taxpayer in relation to the year of income; or

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(c) if the taxpayer is a resident of Zone B (but not of Zone A or of the special area in Zone B) in the year of income—an amount equal to the sum of:
  (i) $57; and
  (ii) an amount equal to 20% of the relevant rebate amount in relation to the taxpayer in relation to the year of income; or

(f) in any other case—such amount as, in the opinion of the Commissioner, is reasonable in the circumstances, being an amount not greater than the amount of the rebate to which the taxpayer would have been entitled under this section if paragraph (a) had applied to the taxpayer in respect of the year of income and not less than the amount of rebate to which the taxpayer would have been so entitled if paragraph (c) had so applied to the taxpayer.

(2A) The amount of any rebate that would, but for this subsection, be allowable to a taxpayer under this section in the taxpayer's assessment in respect of income of a year of income shall be reduced by the amount of any prescribed allowance paid to the taxpayer in respect of the year of income.

(3) Any alteration of the boundaries of any area referred to in Schedule 2 made (otherwise than by an amendment of this Act) after the commencement of this section shall not affect the operation of this section.

(3A) This section has effect subject to section 23AB.

(3B) For the purposes of this section, a taxpayer is a resident of a particular area, being the prescribed area, Zone A, Zone B, the special area in Zone A or the special area in Zone B (in this subsection referred to as the ***relevant area***) in a year of income if:

(a) the taxpayer had his or her usual place of residence in the relevant area in the year of income for a period of more than one-half of the year of income; or

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(c) the taxpayer died during the year of income and at the date of his or her death had his or her usual place of residence in the relevant area; or

(d) the following conditions are satisfied:

(i) the taxpayer had his or her usual place of residence in the relevant area in the year of income for a period of not more than one-half of the year of income;

(ii) the taxpayer had his or her usual place of residence in the relevant area in the next preceding year of income for a period of not more than one-half of the next preceding year of income;

(iii) for the purposes of this section, the taxpayer was not a resident of the relevant area in the next preceding year of income;

(iv) the sum of:

(A) the number of days in the period mentioned in subparagraph (i); and

(B) the number of days in the period mentioned in subparagraph (ii), other than days included in a period to which subsection 23AB(8) or 79B(3) applied in relation to the taxpayer in relation to the next preceding year of income;

exceeds 182; or

(e) the following conditions are satisfied:

(i) the taxpayer had his or her usual place of residence in the relevant area in the year of income for a period of not more than one-half of the year of income, being a period that included the first day of the year of income;

(ii) the taxpayer had his or her usual place of residence in the relevant area, in a relevant preceding year of income, for a period of not more than one-half of that relevant preceding year of income;

(iii) for the purposes of this section, the taxpayer was not a resident of the relevant area in that relevant preceding year of income;

(iv) the sum of:

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(A) the number of days in the period mentioned in subparagraph (i); and

(B) the number of days in the period mentioned in subparagraph (ii), other than days included in a period to which subsection 23AB(8) or 79B(3) applied in relation to the taxpayer in relation to that relevant preceding year of income;

exceeds 182;

(v) the taxpayer had his or her usual place of residence in the relevant area continuously from the commencement of the period mentioned in subparagraph (ii) until the end of the period mentioned in subparagraph (i).

(3C) In subsection (3B), a reference to a taxpayer having his or her usual place of residence in a particular area in a year of income for a period of more than, or not more than, one-half of the year of income is a reference to the taxpayer:

(a) having his or her usual place of residence in that area in the year of income for one period of more than, or not more than, as the case may be, one-half of the year of income; or

(b) having his or her usual place of residence in that area in the year of income for 2 or more periods the aggregate of the lengths of which is more than, or not more than, as the case may be, one-half of the year of income.

(3D) For the purposes of this section:

(a) the special area within Zone A or Zone B is constituted by:

(i) the points in that Zone that were not, as at 1 November 1981, situated at a distance of 250 kilometres or less by the shortest practicable surface route, from the centre point of the nearest urban centre (whether or not within that Zone) with a census population of not less than 2,500; and

(ii) the points in that Zone that were within the special area in that Zone for the purposes of this section as in force immediately before the commencement of the *Income Tax Assessment Amendment Act (No. 4) 1984*; and

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(b) the distance, by the shortest practicable surface route, between a point in Zone A or Zone B and the centre point of an urban centre is:

(i) where there is only one location within that urban centre from which distances between the urban centre and other places are usually measured—the distance, by the shortest practicable surface route, between that point in Zone A or Zone B and that location; and

(ii) where there are 2 or more locations within that urban centre from which distances between parts of the urban centre and other places are usually measured—the distance, by the shortest practicable surface route, between that point in Zone A or Zone B and the one of those locations that is in the principal one of those parts.

(3E) For the purposes of this section other than this subsection, the Commissioner may, if he or she considers it appropriate having regard to all the circumstances, treat a point in Zone A or Zone B that is not in the special area in that Zone but is adjacent to or in close proximity to the special area in that Zone as being a point in the special area in that Zone.

(3F) For the purposes of this section, the census population of Nhulunbuy is taken to be less than 2,500.

(4) In this section:

census population, in relation to an urban centre, means the population of that urban centre specified in the results of the Census of Population and Housing taken by the Australian Statistician on 30 June 1981, being the results published by the Australian Bureau of Statistics in the documents entitled "Persons and Dwellings in Local Government Areas and Urban Centres".

prescribed allowance means so much of a payment under the *Social Security Act 1991* or the *Veterans' Entitlements Act 1986* as was included in the payment by way of remote area allowance.

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relevant preceding year of income, in relation to a year of income, means any of the next 4 preceding years of income other than the immediately preceding year of income.

relevant rebate amount, in relation to a taxpayer in relation to a year of income, means the sum of the following rebates (if any):

(a) any tax offset to which the taxpayer is entitled under Subdivision 61-A of the *Income Tax Assessment Act 1997*;

(b) any notional tax offset to which the taxpayer is entitled under Subdivision 961-A of the *Income Tax Assessment Act 1997*;

(c) any notional tax offset to which the taxpayer is entitled under Subdivision 961-B of the *Income Tax Assessment Act 1997*.

surface route means a route other than an air route.

the prescribed area means the area comprised in Zone A and Zone B.

urban centre means an area that is described as an urban centre or bounded locality in the results of the Census of Population and Housing taken by the Australian Statistician on 30 June 1981, being the results published by the Australian Bureau of Statistics in the documents entitled "Persons and Dwellings in Local Government Areas and Urban Centres".

Zone A means the area described in Part I of Schedule 2.

Zone B means the area described in Part II of Schedule 2.

79B Rebates for members of Defence Force serving overseas

(1) Subject to this section, a taxpayer who, during the year of income, serves as a member of the Defence Force at an overseas locality is entitled, in his or her assessment in respect of income of the year of income, to a rebate of tax ascertained in accordance with this section.

(1A) A taxpayer is not entitled to a rebate under this section in relation to service:

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(a) as or under an attaché at an Australian Embassy or Legation in an overseas locality at a time as at which that locality was, or is deemed to have been, a specified locality for the purposes of this subsection; or

(b) with the South-East Asia Treaty Organization Military Planning Office.

(1B) Where the Chief of the Defence Force or a person authorized by the Chief of the Defence Force to give certificates under this subsection certifies, and the Minister is satisfied, that any service of a taxpayer in any locality was or will be performed in circumstances similar to those in which any service referred to in subsection (1A) is performed, the taxpayer is not entitled to a rebate under this section in relation to that service.

(2) Subject to the succeeding provisions of this section, the rebate allowable under this section in the assessment of a taxpayer in respect of income of the year of income is:

(a) where the total period of service of the taxpayer at overseas localities during the year of income is more than one-half of the year of income, or where the taxpayer dies at an overseas locality during the year of income—an amount equal to the sum of:

(i) $338; and

(ii) an amount equal to 50% of the concessional rebate amount; or

(b) in any other case—such amount as, in the opinion of the Commissioner, is reasonable in the circumstances, being an amount not greater than the amount of the rebate to which the taxpayer would have been entitled under this section if paragraph (a) had applied to him or her in respect of the year of income.

(3) For the purposes of subsection (2), the total periods of service of the taxpayer in any year of income at overseas localities shall be deemed to include any period of service of the taxpayer as a member of the Defence Force in that year of income in the prescribed area.

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(3A) For the purposes of subsection (2), the total periods of service of the taxpayer in any year of income at overseas localities shall be deemed not to include any period of service of the taxpayer in respect of which an exemption from income tax applies under section 23AD or 23AG.

(4) The aggregate of the rebates allowable under this section and section 23AB or under this section and section 79A in the assessment of a taxpayer in respect of income of a year of income shall not exceed an amount equal to the sum of:

(a) $338; and

(b) an amount equal to 50% of the concessional rebate amount.

(4A) Where:

(a) but for subsection (4) and this subsection, a rebate would be allowable under this section and a rebate would be allowable under section 79A in the assessment of a taxpayer in respect of income of a year of income; and

(b) the rebate allowable under section 79A exceeds an amount equal to the sum of:

(i) $338; and

(ii) an amount equal to 50% of the concessional rebate amount;

the taxpayer is not entitled to a rebate under this section in that assessment and subsection (4) does not apply in relation to that assessment.

(5) For the purposes of this section the Minister may, by writing signed by the Minister and deposited with the Commissioner, declare that a locality outside Australia specified in the declaration shall:

(a) by reason of the uncongenial nature of service in that locality and the isolation of the locality, be, or be deemed to have been, as from a date, or during a period, (whether before or after the date of the declaration) specified in the declaration, a locality in relation to which this section applies; or

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(b) as from a date (whether before or after the date of the declaration) specified in the declaration, cease, or be deemed to have ceased, to be such a locality;

and this section shall apply, or be deemed to have applied, and shall cease to apply, or be deemed to have ceased to apply, in relation to any such locality accordingly.

(5A) The Minister may, by writing signed by the Minister and deposited with the Commissioner, declare that an overseas locality specified in the declaration shall become, or be deemed to have become, on a specified date, or shall cease, or be deemed to have ceased, on a specified date, to be, a specified locality for the purposes of subsection (1A).

(5B) Nothing in section 170 prevents the amendment of an assessment at any time for the purpose of allowing a rebate to which the taxpayer has become entitled under this section after the making of the assessment.

(6) For the purpose of this section:

concessional rebate amount, in relation to a taxpayer in relation to a year of income, means the sum of the following rebates (if any):

(a) any tax offset to which the taxpayer is entitled under Subdivision 61-A of the *Income Tax Assessment Act 1997*;

(b) any notional tax offset to which the taxpayer is entitled under Subdivision 961-A of the *Income Tax Assessment Act 1997*;

(c) any notional tax offset to which the taxpayer is entitled under Subdivision 961-B of the *Income Tax Assessment Act 1997*.

locality means an area of land or waters or an area of land and waters.

overseas locality means, in relation to service during any period or death at any time, a locality in relation to which, during that period or at that time, this section applies or is deemed to have applied; and

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the prescribed area has the same meaning as that expression has in section 79A.

82 Double deductions

Where the profit arising from the sale of any property is included in the assessable income of any person, or where the loss arising from the sale is an allowable deduction, and any expenditure incurred by the person in connexion with that property has been allowed or is allowable as a deduction under this Act, that expenditure shall not be deducted in ascertaining the amount of the profit or loss.

82A Deductions for expenses of self-education

(1) Where a deduction is, or but for this section would be, allowable to the taxpayer under section 8-1 of the *Income Tax Assessment Act 1997* in respect of a year of income in respect of expenses of self-education, the deduction, or the aggregate of the deductions, so allowable to the taxpayer in respect of those expenses shall not be greater than the amount by which the net amount of expenses of self-education exceeds $250.

(2) In this section:

educational assistance means amounts (other than amounts in the nature of an allowance for maintenance or accommodation) payable under a scheme for the provision by the Commonwealth of assistance for secondary education, technical or tertiary education or post-graduate study.

expenses of self-education means expenses necessarily incurred by the taxpayer for or in connection with a prescribed course of education but does not include:

(ba) a student contribution amount within the meaning of the *Higher Education Support Act 2003* paid to a higher education provider (within the meaning of that Act); or

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(bb) a payment made in respect of, or in respect of the reduction or discharge of, any indebtedness to the Commonwealth under Chapter 4 of that Act; or

(bba) a payment made in respect of, or in respect of the reduction or discharge of, any indebtedness to the Commonwealth under Part 3A of the *VET Student Loans Act 2016*; or

(bc) a payment made in respect of, or in respect of the reduction or discharge of, any indebtedness to the Commonwealth under Chapter 2AA of the *Social Security Act 1991* or under Part 2 of the *Student Assistance Act 1973*; or

(bd) a payment made in respect of, or in respect of the reduction or discharge of, any indebtedness to the Commonwealth under the *Trade Support Loans Act 2014*; or

(be) a payment made in respect of, or in respect of the reduction or discharge of, any liability to overseas debtors repayment levy under the *Student Loans (Overseas Debtors Repayment Levy) Act 2015*; or

(c) a payment made in respect of, or in respect of the reduction or discharge of, any indebtedness to the Commonwealth or to a participating corporation under Chapter 2B of the *Social Security Act 1991* or Part 4A of the *Student Assistance Act 1973*.

net amount of expenses of self-education means the amount ascertained by subtracting from the total amount of expenses of self-education incurred by the taxpayer in the year of income the sum of:

(a) any payment or payments of educational assistance that were capable of being claimed in the year of income by the taxpayer or by another person in respect of the taxpayer other than:

(i) a payment the amount of which has been, or will be, included in the assessable income of the taxpayer of any year of income; or

(ii) a payment that was capable of being claimed in a preceding year of income; and

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(b) any payment or payments (other than a payment the amount of which has been, or will be, included in the assessable income of the taxpayer of any year of income) received by the taxpayer, or that the taxpayer was entitled to receive, in the year of income, from the taxpayer's employer, or from any other person, in respect of:

(i) expenses of self-education that were incurred by the taxpayer during the year of income; or

(ii) expenses of self-education in respect of which a deduction has been allowed, or is allowable, or in respect of which a rebate of tax has been allowed, or is allowable, in an assessment in respect of income derived by the taxpayer in a preceding year of income.

prescribed course of education means a course of education provided by a school, college, university or other place of education, and undertaken by the taxpayer for the purpose of gaining qualifications for use in the carrying on of a profession, business or trade or in the course of any employment.

Subdivision D—Losses and outgoings incurred under certain tax avoidance schemes

82KH Interpretation

(1) In this Subdivision, unless the contrary intention appears:

additional benefit, in relation to an amount of eligible relevant expenditure, means the additional benefit, or the aggregate of the additional benefits, as the case may be, referred to in paragraph (1F)(b) in relation to that eligible relevant expenditure.

agreement means any agreement, arrangement, understanding or scheme, whether formal or informal, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings.

associate, in relation to a taxpayer, means:

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(a) in the case of a taxpayer who is a natural person, other than a taxpayer in the capacity of a trustee:

(i) a relative of the taxpayer;

(ii) a partner of the taxpayer;

(iii) if a person who is an associate of the taxpayer by virtue of subparagraph (ii) is a natural person—the spouse or a child of that person;

(iv) a trustee of a trust estate where the taxpayer or another person who is an associate of the taxpayer by virtue of another subparagraph of this paragraph benefits or is capable (whether by the exercise of a power of appointment or otherwise) of benefiting under the trust, either directly or through any interposed companies, partnerships or trusts; or

(v) a company where:

(A) the company is, or its directors are, accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the taxpayer, of another person who is an associate of the taxpayer by virtue of another subparagraph of this paragraph, of a company that is an associate of the taxpayer by virtue of another application of this subparagraph or of any 2 or more such persons; or

(B) the taxpayer is, the persons who are associates of the taxpayer by virtue of sub-subparagraph (A) and the preceding subparagraphs of this paragraph are, or the taxpayer and the persons who are associates of the taxpayer by virtue of that sub-subparagraph and those subparagraphs are, in a position to cast, or control the casting of, more than 50% of the maximum number of votes that might be cast at a general meeting of the company;

(b) in the case of a taxpayer being a company, other than a taxpayer in the capacity of a trustee:

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(i) a partner of the taxpayer;

(ii) if a person who is an associate of the taxpayer by virtue of subparagraph (i) is a natural person—the spouse or a child of that person;

(iii) a trustee of a trust estate where the taxpayer or another person who is an associate of the taxpayer by virtue of another subparagraph of this paragraph benefits or is capable (whether by the exercise of a power of appointment or otherwise) of benefiting under the trust, either directly or through any interposed companies, partnerships or trusts;

(iv) another person where:

(A) the taxpayer company is, or its directors are, accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of that person, or of that person and another person or other persons, whether those directions, instructions or wishes are communicated directly to the taxpayer company or its directors, or through any interposed companies, partnerships or trusts; or

(B) that person is, or that person and the persons who, if that person were the taxpayer, would be associates of that person by virtue of paragraph (a), by virtue of sub-subparagraph (A), by virtue of another subparagraph of this paragraph or by virtue of paragraph (c) are, in a position to cast, or control the casting of, more than 50% of the maximum number of votes that might be cast at a general meeting of the taxpayer company;

(v) another company where:

(A) the other company is, or its directors are, accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the

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taxpayer company, of a person who is an associate of the taxpayer company by virtue of another subparagraph of this paragraph, of a company that is an associate of the taxpayer company by virtue of another application of this subparagraph or of any 2 or more such persons; or

(B) the taxpayer company is, the persons who are associates of the taxpayer company by virtue of sub-subparagraph (A) and the other subparagraphs of this paragraph are, or the taxpayer company and the persons who are associates of the taxpayer company by virtue of that sub-subparagraph and those subparagraphs are, in a position to cast, or control the casting of, more than 50% of the maximum number of votes that might be cast at a general meeting of the other company; or

(vi) any other person who, if a third person who is an associate of the taxpayer company by virtue of subparagraph (iv) were the taxpayer, would be an associate of that third person by virtue of paragraph (a), by virtue of another subparagraph of this paragraph or by virtue of paragraph (c);

(c) in the case of a taxpayer in the capacity of a trustee of a trust estate:

(i) any person who benefits or is capable (whether by the exercise of a power of appointment or otherwise) of benefiting under the trust estate, either directly or through any interposed companies, partnerships or trusts;

(ii) where a person who is an associate of the taxpayer by virtue of subparagraph (i) is a natural person—any person who, if that natural person were the taxpayer, would be an associate of that natural person by virtue of paragraph (a) or this paragraph; or

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(iii) where a person who is an associate of the taxpayer by virtue of subparagraph (i) or (ii) is a company—any person who, if that company were the taxpayer, would be an associate of that company by virtue of paragraph (b) or this paragraph; or

(d) in the case of a taxpayer being a partnership:

(i) a partner in the partnership;

(ii) where any partner in the partnership is a natural person—any person who, if that natural person were the taxpayer, would be an associate of that natural person by virtue of paragraph (a) or (c); or

(iii) where any partner in the partnership is a company—any person who, if the company were the taxpayer, would be an associate of the company by virtue of paragraph (b) or (c).

consumable supplies means property other than:

(a) trading stock; or

(b) choses in action.

expected tax saving, in relation to an amount of eligible relevant expenditure incurred by a taxpayer, means:

(a) where only one amount is, under subsection (1B), a tax saving amount for the purposes of the application of this definition in relation to the eligible relevant expenditure—that tax saving amount; and

(b) where 2 or more amounts are, under subsection (1B), tax saving amounts for the purposes of the application of this definition in relation to the eligible relevant expenditure—the sum of those tax saving amounts.

film means an aggregate of images, or of images and sounds, embodied in any material.

market research means:

(a) the undertaking of research to ascertain the location, extent, value or other characteristics of the market, or the potential market, for goods or services; and

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(b) the provision of information, advice or assistance in connection with the marketing of particular goods or services or of goods or services generally.

property includes a chose in action and also includes any estate, interest, right or power, whether at law or in equity, in or over property.

relevant expenditure, in relation to a taxpayer, means:

(a) expenditure in respect of which a deduction would, apart from section 82KL, be allowable to the taxpayer under section 25-25 (Borrowing expenses) of the *Income Tax Assessment Act 1997*;

(b) expenditure in respect of which a deduction would, apart from section 82KL, be allowable to the taxpayer under section 25-30 (Expenses of discharging a mortgage) of the *Income Tax Assessment Act 1997*;

(c) a loss or outgoing incurred by the taxpayer in the purchase by the taxpayer of property (not being a chose in action) that, for the purposes of the application of this Act in relation to the taxpayer, is trading stock, to the extent to which a deduction would, apart from section 82KL, be allowable to the taxpayer under section 8-1 of the *Income Tax Assessment Act 1997* in respect of the loss or outgoing;

(d) a loss or outgoing incurred by the taxpayer in respect of interest to the extent to which a deduction would, apart from section 82KL, be allowable to the taxpayer under section 8-1 of the *Income Tax Assessment Act 1997* in respect of the loss or outgoing;

(e) a loss or outgoing incurred by the taxpayer in respect of rent to the extent to which a deduction would, apart from section 82KL, be allowable to the taxpayer under section 8-1 of the *Income Tax Assessment Act 1997* in respect of the loss or outgoing;

(f) a bad debt incurred by the taxpayer in respect of money lent by the taxpayer in the course of carrying on a business to the extent to which a deduction would, apart from section 82KL, be allowable to the taxpayer under section 8-1 or

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section 25-35 of the *Income Tax Assessment Act 1997* in respect of the bad debt;

(g) a loss or outgoing incurred by the taxpayer in respect of:
  (i) the production, marketing or distribution of a film; or
  (ii) the acquisition of a copyright subsisting in a film;
to the extent to which a deduction would, apart from section 82KL, be allowable to the taxpayer under section 8-1 of the *Income Tax Assessment Act 1997* in respect of the loss or outgoing;

(h) expenditure incurred by the taxpayer in respect of a unit of industrial property, being a unit of industrial property that relates to copyright subsisting in a film, to the extent to which the amount of that expenditure is taken into account, or would, apart from former subsections 124R(2) and (3), be taken into account, in calculating the residual value of the unit of industrial property in ascertaining whether, apart from section 82KL, a deduction would be allowable to the taxpayer under former section 124M or 124N in respect of the residual value of the unit of industrial property;

(ka) expenditure incurred by the taxpayer in respect of an item of intellectual property (as defined in of the *Income Tax Assessment Act 1997*) that relates to copyright subsisting in a film, but only to the extent described at the end of this definition;

(k) a loss or outgoing incurred by the taxpayer in the purchase of consumable supplies to the extent to which a deduction would, apart from section 82KL, be allowable to the taxpayer under section 8-1 of the *Income Tax Assessment Act 1997* in respect of the loss or outgoing;

(m) a loss or outgoing incurred by the taxpayer in respect of market research to the extent to which a deduction would, apart from section 82KL, be allowable to the taxpayer under section 8-1 of the *Income Tax Assessment Act 1997* in respect of the loss or outgoing;

(n) expenditure incurred by the taxpayer in respect of the acquisition of a unit of industrial property, being a licence under a copyright subsisting in computer software, to the

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extent to which the amount of that expenditure is taken into account, or would, apart from former subsection 124R(3) be taken into account, in calculating the residual value of the unit of industrial property in ascertaining whether, apart from section 82KL, a deduction would be allowable to the taxpayer under former section 124M or 124N in respect of the residual value of the unit of industrial property;

(oa) expenditure incurred by the taxpayer in respect of acquiring an item of intellectual property (as defined in of the *Income Tax Assessment Act 1997*) that is a licence under a copyright subsisting in computer software, but only to the extent described at the end of this definition;

(o) a loss or outgoing or expenditure incurred by the taxpayer by way of commission for collecting assessable income of the taxpayer to the extent to which a deduction would, apart from section 82KL, be allowable to the taxpayer under section 8-1 of the *Income Tax Assessment Act 1997* in respect of the loss or outgoing or the expenditure;

(p) a loss or outgoing incurred by the taxpayer in respect of the growing, care or supervision of trees on behalf of the taxpayer to the extent to which a deduction would, apart from section 82KL, be allowable to the taxpayer under section 8-1 of the *Income Tax Assessment Act 1997* in respect of the loss or outgoing;

(pa) a loss or outgoing incurred by the taxpayer in respect of the establishment and tending of trees for felling on behalf of the taxpayer to the extent to which a deduction would, apart from section 82KL, be allowable to the taxpayer under section 394-10 of the *Income Tax Assessment Act 1997* in respect of the loss or outgoing;

(q) a loss or outgoing incurred by the taxpayer for the purpose of increasing the value of shares in a company, being shares held or beneficially owned by the taxpayer as trading stock, to the extent to which a deduction would, apart from section 82KL, be allowable to the taxpayer under section 8-1 of the *Income Tax Assessment Act 1997* in respect of the loss or outgoing;

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(r) a loss or outgoing incurred by the taxpayer in respect of:
  (i) the production by another person of a master sound recording; or
  (ii) the procuration of the production by another person of a master sound recording;

to the extent to which a deduction would, apart from section 82KL, be allowable to the taxpayer under section 8-1 of the *Income Tax Assessment Act 1997* in respect of the loss or outgoing;

(s) calls paid by the taxpayer on shares owned by the taxpayer in respect of which a deduction would, apart from section 82KL, be allowable to the taxpayer under Division 30 (which is about gifts) of the *Income Tax Assessment Act 1997*;

(v) expenditure (other than expenditure to which a preceding paragraph of this definition applies) incurred by the taxpayer in respect of a unit of industrial property to the extent to which the amount of that expenditure is taken into account, or would, apart from former subsections 124R(2) and (3), be taken into account, in calculating the residual value of the unit of industrial property in ascertaining whether, apart from section 82KL, a deduction would be allowable to the taxpayer under former section 124M or 124N in respect of the residual value of the unit of industrial property; or

(wa) expenditure (unless covered by an earlier paragraph of this definition) incurred by the taxpayer in respect of an item of intellectual property (as defined in of the *Income Tax Assessment Act 1997*), but only to the extent described at the end of this definition;

(w) a loss or outgoing (other than a loss or outgoing referred to in subsection 52A(1) or to which a preceding paragraph of this definition applies) incurred by the taxpayer to the extent to which a deduction would, apart from section 82KL, be allowable to the taxpayer under section 8-1 of the *Income Tax Assessment Act 1997* in respect of the loss or outgoing.

However, paragraph (ka), (oa) or (wa) only covers expenditure to the extent that:

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(x) it is taken into account in working out under Division 40 of the *Income Tax Assessment Act 1997* the adjustable value of the item to the taxpayer in determining whether, apart from section 82KL of this Act, the taxpayer could deduct an amount under that Division for the item for a year of income; or

(y) it would be so taken into account apart from item 8 in the table in subsection 40-180(2), or item 1 in the table in subsection 40-190(3) (both about non-arm's length transactions).

rent means rent in respect of land or premises.

tax avoidance agreement means an agreement that was entered into or carried out for the purpose, or for purposes that included the purpose, of securing that a person who, if the agreement had not been entered into or carried out, would have been liable to pay income tax in respect of a year of income would not be liable to pay income tax in respect of that year of income or would be liable to pay less income tax in respect of that year of income than that person would have been liable to pay if the agreement had not been entered into or carried out.

unit of industrial property has the same meaning as in former Division 10B.

(1A) In determining for the purposes of this Subdivision whether an agreement is a tax avoidance agreement, no regard shall be had to a purpose that is a merely incidental purpose.

(1AA) A reference in this Subdivision to the incurring by a taxpayer of a bad debt shall be read as a reference to a debt, or a part of a debt, owed to the taxpayer becoming a bad debt.

(1AB) A reference in:

(a) subsection 82KL(2); or

(b) former section 80 in relation to this Subdivision;

to the incurring by a taxpayer of a loss or outgoing shall be read as including a reference to the incurring by a taxpayer of a bad debt.

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(1ABA) This section has the same effect in relation to an allowable deduction under section 63E in respect of the extinguishing of the whole or part of a debt as it has in respect of an allowable deduction under section 8-1 or 25-35 of the *Income Tax Assessment Act 1997* in respect of the writing off of the whole or part of a debt as bad.

(1AC) In this Subdivision:

(a) a reference to a copyright subsisting in a film shall be read as including a reference to:

(i) a licence under a copyright subsisting in a film; and

(ii) an interest, whether at law or in equity, in respect of a copyright, or in respect of a licence under a copyright, subsisting in a film; and

(b) a reference to a licence under a copyright subsisting in computer software shall be read as including a reference to an interest, whether at law or in equity, in a licence under a copyright subsisting in computer software.

(1AD) A reference in this Subdivision to a tax benefit being allowed or allowable or not being allowed or allowable in respect of relevant expenditure incurred by a taxpayer shall be read as a reference to:

(a) in a case where the relevant expenditure is relevant expenditure to which paragraph (h), (n) or (v) of the definition of ***relevant expenditure*** in subsection (1) applies—a deduction being allowed or allowable or not being allowed or allowable, as the case may be, to the taxpayer under former section 124M or 124N in respect of the residual value of a unit of industrial property where that residual value would be calculated by reference to the relevant expenditure; and

(b) if paragraph (ka), (oa) or (wa) of the definition of ***relevant expenditure*** in subsection (1) covers the expenditure—the taxpayer deducting or being able to deduct, or not deducting or not being able to deduct, as appropriate, an amount under Division 40 of the *Income Tax Assessment Act 1997* for an item of intellectual property for a year of income because the taxpayer's adjustable value of the item would be calculated

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under that Division by reference to the relevant expenditure; and

(d) in any other case—a deduction being allowed or allowable or not being allowed or allowable, as the case may be, to the taxpayer in respect of the relevant expenditure.

(1B) For the purposes of the application of the definition of ***expected tax saving*** in subsection (1) in relation to an amount of eligible relevant expenditure incurred by a taxpayer:

(a) where:

(i) if a tax benefit were not allowable in respect of any part of that eligible relevant expenditure, a person (whether the taxpayer or another person and whether in the capacity of a trustee of a trust estate or otherwise) would be liable to pay income tax in respect of a year of income; and

(ii) if a tax benefit or tax benefits were allowable under this Act in respect of that eligible relevant expenditure, that person would be liable to pay a lesser amount of income tax in respect of that year of income;

the amount by which the amount of the tax referred to in subparagraph (i) exceeds the amount of the tax referred to in subparagraph (ii) is a tax saving amount; and

(b) where:

(i) if a tax benefit were not allowable in respect of any part of that eligible relevant expenditure, a person (whether the taxpayer or another person and whether in the capacity of a trustee of a trust estate or otherwise) would be liable to pay income tax in respect of a year of income; and

(ii) if a tax benefit or tax benefits were allowable under this Act in respect of that eligible relevant expenditure, that person would not be liable to pay income tax in respect of that year of income;

the amount of the tax referred to in subparagraph (i) is a tax saving amount.

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(1BA) In the application of subsection (1B) in determining whether there is a tax saving amount in relation to an amount of eligible relevant expenditure incurred by a taxpayer in a case where, if a tax benefit or tax benefits were allowable in respect of that eligible relevant expenditure, a person (whether the taxpayer or another person and whether in the capacity of a trustee of a trust estate or otherwise) would:

(a) have a tax loss for a year of income that the person would not have; or

(b) have a greater tax loss for a year of income than the person would have;

if a tax benefit were not allowable in respect of any part of that eligible relevant expenditure, apply Division 36 and former Subdivision 375-G of the *Income Tax Assessment Act 1997* as if the amount were relevant expenditure but not eligible relevant expenditure.

(1D) Subject to subsection (1E), where, in respect of any 2 or more amounts of eligible relevant expenditure (whether incurred by one taxpayer or by 2 or more taxpayers and whether incurred in one year of income or in 2 or more years of income), the following conditions are satisfied, namely:

(a) if subsection (1B) were applied in relation to one of those amounts of eligible relevant expenditure in relation to a person (whether or not that person is the person or one of the persons who incurred the eligible relevant expenditure) in relation to a year of income on the assumption that no tax benefit is or was allowable in respect of any part of the other amount of eligible relevant expenditure, or in respect of any part of any of the other amounts of eligible relevant expenditure, as the case may be, the tax saving amount determined in accordance with that subsection would be greater than the tax saving amount that would be determined in accordance with that subsection in relation to that amount of eligible relevant expenditure in relation to that person in relation to that year of income if that subsection were applied on the assumption that a tax benefit or tax benefits were allowable under this Act in respect of the other amount of

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eligible relevant expenditure, or in respect of each of the other amounts of eligible relevant expenditure, as the case may be; and

(b) if paragraph (a) of this subsection were applied in relation to that person in relation to that year of income in relation to the other amount of eligible relevant expenditure, or in relation to each of the other amounts of eligible relevant expenditure, as the case may be, the condition specified in that paragraph would be satisfied in relation to that other amount or in relation to each of those other amounts, as the case may be;

then, in the application of subsection (1B) in calculating the tax saving amount in relation to that person in relation to the year of income in relation to any one of the amounts of eligible relevant expenditure first referred to in this subsection, it shall be assumed that no tax benefit is or was allowable in respect of any part of the other of those amounts or in respect of any part of any of the other of those amounts, as the case may be.

(1E) Where:

(a) but for this subsection, subsection (1D) would apply to require it to be assumed, for the purposes of the application of subsection (1B) in relation to an amount of eligible relevant expenditure, that no tax benefit is or was allowable in respect of any part of another amount of eligible relevant expenditure (in this subsection referred to as the ***allowable relevant expenditure***); and

(b) section 82KL does not and will not operate to deem a tax benefit not to be allowable and never to have been allowable in respect of any part of the allowable relevant expenditure;

subsection (1D) shall not apply and shall be taken never to have applied so as to require it to be assumed, in the application of subsection (1B) in relation to an amount of eligible relevant expenditure other than the allowable relevant expenditure, that no tax benefit is or was allowable in respect of any part of the allowable relevant expenditure.

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(1F) For the purposes of this Subdivision, an amount of relevant expenditure incurred by a taxpayer shall be taken to be an amount of eligible relevant expenditure if:

(a) that amount of relevant expenditure was incurred after 24 September 1978 by reason of, as a result of or as part of a tax avoidance agreement entered into after that date;

(b) by reason of, as a result of or as part of the tax avoidance agreement the taxpayer has obtained, in relation to that relevant expenditure being incurred, a benefit or benefits in addition to:

(i) in a case to which subparagraph (ii) does not apply:

(A) the benefit in respect of which the relevant expenditure was incurred; and

(B) any benefit that resulted directly or indirectly from the benefit in respect of which the relevant expenditure was incurred and is a benefit that, in the opinion of the Commissioner, might reasonably be expected to have resulted if the benefit in respect of which the relevant expenditure was incurred had been obtained otherwise than by reason of, as a result of or as part of a tax avoidance agreement; or

(ii) in a case where the relevant expenditure is relevant expenditure to which paragraph (w) of the definition of ***relevant expenditure*** in subsection (1) applies—any benefit that resulted directly or indirectly from the incurring of the relevant expenditure and is a benefit that, in the opinion of the Commissioner, might reasonably be expected to have resulted if the relevant expenditure had been incurred otherwise than by reason of, as a result of or as part of a tax avoidance agreement; and

(c) in a case where the relevant expenditure is relevant expenditure to which paragraph (s), (v) or (w) of the definition of ***relevant expenditure*** in subsection (1) applies—that amount of relevant expenditure was incurred by reason

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of, as a result of or as part of a tax avoidance agreement entered into before 28 May 1981.

(1FA) For the purposes of the application of subsection (1F) in relation to an amount of relevant expenditure to which paragraph (f) of the definition of ***relevant expenditure*** in subsection (1) applies, any benefit obtained by the taxpayer in relation to the making of the loan in respect of which the bad debt is incurred shall be taken to be a benefit obtained by the taxpayer in relation to that relevant expenditure being incurred.

(1G) The reference in subsection (1F) to the benefit in respect of which relevant expenditure was incurred by a taxpayer shall be read as a reference to:

(a) in a case where the relevant expenditure is expenditure incurred by the taxpayer in borrowing money, being expenditure in respect of which a deduction would, apart from section 82KL, be allowable to the taxpayer under section 25-25 (Borrowing expenses) of the *Income Tax Assessment Act 1997*—the making available to the taxpayer of the money borrowed by the taxpayer;

(b) in a case where the relevant expenditure is expenditure incurred by the taxpayer in connection with the discharge of a mortgage, being expenditure in respect of which a deduction would, apart from section 82KL, be allowable to the taxpayer under section 25-30 (Expenses of discharging a mortgage) of the *Income Tax Assessment Act 1997*—the discharge of the mortgage;

(c) in a case where the relevant expenditure was incurred by the taxpayer in the purchase of property that, for the purposes of the application of this Act in relation to the taxpayer, is or was trading stock—the acquisition of that property by the taxpayer;

(d) in a case where the relevant expenditure was incurred by the taxpayer in respect of interest—the availability to the taxpayer of the money borrowed by the taxpayer;

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(e) in a case where the relevant expenditure was incurred by the taxpayer in respect of rent—the use of the property in respect of which the rent was paid;

(f) in a case where the relevant expenditure incurred by the taxpayer was in respect of a bad debt—any interest received or receivable by the taxpayer in respect of the loan in respect of which the bad debt was incurred;

(g) in a case where the relevant expenditure was incurred by the taxpayer in respect of the production, marketing or distribution of a film or the acquisition of a copyright subsisting in a film and is relevant expenditure to which paragraph (g) of the definition of ***relevant expenditure*** in subsection (1) applies—the production, marketing or distribution of the film, or the acquisition of the copyright by the taxpayer, as the case may be;

(h) in a case where the relevant expenditure was incurred by the taxpayer in respect of a unit of industrial property, being a unit of industrial property that relates to copyright subsisting in a film, and is relevant expenditure to which paragraph (h) of the definition of ***relevant expenditure*** in subsection (1) applies—the ownership by the taxpayer of the unit of industrial property;

(k) in a case where the relevant expenditure was incurred by the taxpayer in the purchase of consumable supplies—the acquisition of those consumable supplies by the taxpayer;

(m) in a case where the relevant expenditure was incurred by the taxpayer in respect of market research—the undertaking of the research, or the provision of the information, advice or assistance, in respect of which the relevant expenditure was incurred;

(n) in a case where the relevant expenditure was incurred by the taxpayer in respect of the acquisition of a unit of industrial property, being a licence under a copyright subsisting in computer software—the acquisition by the taxpayer of the unit of industrial property;

(o) in a case where the relevant expenditure was incurred by the taxpayer by way of commission for collecting assessable

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income of the taxpayer—the collection on behalf of the taxpayer of assessable income of the taxpayer;

(p) in a case where the relevant expenditure was incurred by the taxpayer in respect of the growing, care or supervision of trees on behalf of the taxpayer—the growing, care or supervision of the trees on behalf of the taxpayer;

(pa) in a case where the relevant expenditure was incurred by the taxpayer in respect of the establishment and tending of trees for felling on behalf of the taxpayer—the establishment and tending of trees for felling on behalf of the taxpayer;

(q) in a case where the relevant expenditure was incurred by the taxpayer for the purpose of increasing the value of shares in a company, being shares held or beneficially owned by the taxpayer as trading stock—the increase in the value of those shares;

(r) in a case where the relevant expenditure was incurred by the taxpayer in respect of the production of, or the procuration of the production of, a master sound recording—any amount payable to the taxpayer in respect of the master sound recording, being an amount that, in the opinion of the Commissioner, would be payable to the taxpayer as a result of the incurring by the taxpayer of the relevant expenditure if that expenditure had been incurred by reason of, as a result of or as part of an agreement other than a tax avoidance agreement;

(s) in a case where the relevant expenditure consists of calls paid by the taxpayer on shares owned by the taxpayer and is relevant expenditure to which paragraph (s) of the definition of ***relevant expenditure*** in subsection (1) applies—the satisfaction of any liability of the taxpayer to pay the calls and the taxpayer's continuing ownership of the shares; and

(u) in a case where the relevant expenditure was incurred by the taxpayer in respect of a unit of industrial property and is relevant expenditure to which paragraph (v) of the definition of ***relevant expenditure*** in subsection (1) applies—the ownership by the taxpayer of the unit of industrial property.

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(1H) For the purposes of paragraph (1F)(b), but without limiting the generality of that paragraph, where:

(a) an amount of relevant expenditure is incurred by a taxpayer by reason of, as a result of or as part of a tax avoidance agreement;

(b) in relation to that relevant expenditure being incurred and by reason of, as a result of or as part of the tax avoidance agreement or by reason of an act, transaction or circumstance occurring as part of, in connection with or as a result of the tax avoidance agreement, the taxpayer or an associate of the taxpayer acquires from another person the right to recover the amount of a debt that was owed to that other person; and

(c) by reason of, as a result of or as part of the tax avoidance agreement or by reason of an act, transaction or circumstance occurring as part of, in connection with or as a result of the tax avoidance agreement, no consideration was paid or given by the taxpayer or the associate of the taxpayer, as the case may be, in respect of the acquisition of that right or the amount or value of the consideration paid or given by the taxpayer or the associate of the taxpayer, as the case may be, in respect of the acquisition of that right was less than the amount of the debt;

the taxpayer shall be deemed to have obtained, by reason of the tax avoidance agreement and in relation to the relevant expenditure being incurred by the taxpayer, a benefit having a value equal to:

(d) in a case where no consideration was paid or given by the taxpayer or the associate of the taxpayer, as the case may be, in respect of the acquisition of the right to recover the amount of the debt—the amount of the debt; and

(e) in any other case—the amount by which the amount of the debt exceeds the amount or value of the consideration paid or given by the taxpayer or the associate of the taxpayer, as the case may be, in respect of the acquisition of the right to recover the amount of the debt.

(1J) For the purposes of paragraph (1F)(b), but without limiting the generality of that paragraph, where:

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(a) an amount of relevant expenditure is incurred by a taxpayer by reason of, as a result of or as part of a tax avoidance agreement;

(b) in relation to that relevant expenditure being incurred and by reason of, as a result of or as part of the tax avoidance agreement or by reason of an act, transaction or circumstance occurring as part of, in connection with or as a result of the tax avoidance agreement:

(i) a debt becomes owing by the taxpayer or an associate of the taxpayer; or

(ii) a debt became owing, before or at the time of the incurring of the relevant expenditure, by the taxpayer or an associate of the taxpayer; and

(c) it may reasonably be expected that, by reason of, as a result of or as part of the tax avoidance agreement or by reason of an act, transaction or circumstance occurring as part of, in connection with or as a result of the tax avoidance agreement, the person to whom the debt is owed will release, abandon or fail to demand repayment of the debt or of a part of the debt;

the taxpayer shall be deemed to have obtained, by reason of the tax avoidance agreement and in relation to the relevant expenditure being incurred by the taxpayer, a benefit of an amount equal to the amount of the debt or that part of the debt, as the case may be.

(1JA) For the purposes of the application of subsection (1H) in relation to an amount of relevant expenditure incurred by a taxpayer, being relevant expenditure to which paragraph (f) of the definition of ***relevant expenditure*** in subsection (1) applies, a reference in paragraph (1H)(b) to the acquisition by the taxpayer or an associate of the taxpayer, in relation to that relevant expenditure being incurred, of the right to recover a debt shall be read as including a reference to the acquisition by the taxpayer or an associate of the taxpayer, in relation to the making by the taxpayer of the loan in respect of which the relevant expenditure was incurred, of such a right.

(1JB) For the purposes of the application of subsection (1J) in relation to an amount of relevant expenditure incurred by a taxpayer, being

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relevant expenditure to which paragraph (f) of the definition of ***relevant expenditure*** in subsection (1) applies, a reference in paragraph (1J)(b) to a debt becoming owing, or having become owing, by the taxpayer or an associate of the taxpayer in relation to that relevant expenditure being incurred, shall be read as including a reference to a debt becoming owing, or having become owing, by the taxpayer or an associate of the taxpayer, in relation to the making by the taxpayer of the loan in respect of which the relevant expenditure was incurred.

(1JE) For the purposes of paragraph (1F)(b), but without limiting the generality of that paragraph, where:

(a) an amount of relevant expenditure is incurred by a taxpayer by reason of, as a result of or as part of a tax avoidance agreement;

(b) that relevant expenditure consists of calls paid by the taxpayer on shares owned by the taxpayer and is relevant expenditure to which paragraph (s) of the definition of ***relevant expenditure*** in subsection (1) applies; and

(c) in relation to that relevant expenditure being incurred and by reason of, as a result of or as part of the tax avoidance agreement or by reason of an act, transaction or circumstance occurring as part of, in connection with or as a result of the tax avoidance agreement, consideration (in this subsection referred to as the ***relevant consideration***) is paid or given to the taxpayer or an associate of the taxpayer in respect of the acquisition by any person from the taxpayer of:

(i) all or any of those shares;

(ii) the right to purchase all or any of those shares; or

(iii) the right to require a person to vote, in a meeting of shareholders of the company, in favour of a resolution to vary the rights attached to all or any of those shares;

the taxpayer shall be deemed to have obtained, by reason of the tax avoidance agreement and in relation to the relevant expenditure being incurred by the taxpayer, a benefit in addition to the benefits referred to in subparagraphs (1F)(b)(i) and (ii) having a value equal to the amount or value of the relevant consideration reduced by the

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amount or value of the part (if any) of that relevant consideration that, in the opinion of the Commissioner, is attributable to expenditure (other than the relevant expenditure) incurred by the taxpayer in respect of the shares.

(1K) Where:

(a) 2 or more amounts of relevant expenditure are incurred by a taxpayer (whether in the same year of income or in different years of income) by reason of, as a result of or as part of the same tax avoidance agreement;

(b) the same paragraph of the definition of ***relevant expenditure*** in subsection (1) applies in relation to each of those amounts; and

(c) those amounts were incurred in respect of the same benefit;

those amounts shall, for the purposes of this Subdivision, be treated as together constituting one amount of relevant expenditure.

(1L) For the purposes of subsection (1K), 2 or more amounts of relevant expenditure shall be taken to have been incurred in respect of the same benefit if:

(a) in a case where paragraph (a) of the definition of ***relevant expenditure*** in subsection (1) applies in relation to each of those amounts—those amounts were incurred in respect of the same loan;

(b) in a case where paragraph (b) of the definition of ***relevant expenditure*** in subsection (1) applies in relation to each of those amounts—those amounts were incurred in respect of the discharge of the same mortgage;

(c) in a case where paragraph (c) of the definition of ***relevant expenditure*** in subsection (1) applies in relation to each of those amounts—those amounts were incurred in the purchase of the same property;

(d) in a case where paragraph (d) of the definition of ***relevant expenditure*** in subsection (1) applies in relation to each of those amounts—those amounts were incurred in respect of the same loan;

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(e) in a case where paragraph (e) of the definition of ***relevant expenditure*** in subsection (1) applies in relation to each of those amounts—those amounts were incurred in respect of the same property;

(f) in a case where paragraph (f) of the definition of ***relevant expenditure*** in subsection (1) applies in relation to each of those amounts—those amounts were incurred in respect of the same loan;

(g) in a case where paragraph (g) of the definition of ***relevant expenditure*** in subsection (1) applies in relation to each of those amounts—those amounts were incurred in respect of the same film;

(h) in a case where paragraph (h) of the definition of ***relevant expenditure*** in subsection (1) applies in relation to each of those amounts—those amounts were incurred in respect of the same film;

(k) in a case where paragraph (k) of the definition of ***relevant expenditure*** in subsection (1) applies in relation to each of those amounts—those amounts were incurred in the purchase of the same property;

(m) in a case where paragraph (m) of the definition of ***relevant expenditure*** in subsection (1) applies in relation to each of those amounts—those amounts were incurred in respect of the same market research;

(n) in a case where paragraph (n) of the definition of ***relevant expenditure*** in subsection (1) applies in relation to each of those amounts—those amounts were incurred in respect of the same unit of industrial property;

(o) in a case where paragraph (o) of the definition of ***relevant expenditure*** in subsection (1) applies in relation to each of those amounts—those amounts were incurred in respect of the same source of assessable income;

(p) in a case where paragraph (p) or paragraph (pa) of the definition of ***relevant expenditure*** in subsection (1) applies in relation to each of those amounts—those amounts were incurred in respect of trees on the same parcel of land;

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(q) in a case where paragraph (q) of the definition of ***relevant expenditure*** in subsection (1) applies in relation to each of those amounts—those amounts were incurred in respect of the same shares;

(r) in a case where paragraph (r) of the definition of ***relevant expenditure*** in subsection (1) applies in relation to each of those amounts—those amounts were payable to the same person;

(s) in a case where paragraph (s) of the definition of ***relevant expenditure*** in subsection (1) applies in relation to each of those amounts—those amounts were calls paid on shares in the same company;

(v) in a case where paragraph (v) of the definition of ***relevant expenditure*** in subsection (1) applies in relation to each of those amounts—those amounts were incurred in respect of the same unit of industrial property; and

(w) in a case where paragraph (w) of the definition of ***relevant expenditure*** in subsection (1) applies in relation to each of those amounts—those amounts were incurred in respect of the same source of assessable income or in carrying on the same business.

(1M) For the purposes of this Subdivision, a person who obtains a benefit by reason of an act, transaction or circumstance that occurs as part of, in connection with or as a result of a tax avoidance agreement shall be deemed to have obtained that benefit by reason of the tax avoidance agreement.

(1N) Where, for the purposes of the application of any provision of this Subdivision, it is required to be assumed that a tax benefit is not or was not allowable in respect of any part of an amount of eligible relevant expenditure and that expenditure is expenditure that was incurred in the acquisition of property that, for the purposes of the application of this Act in relation to the person who incurred the expenditure, is or was trading stock, it shall also be assumed, for the purposes of the application of that provision, that, for the purposes of the application of Division 70 (Trading stock) or 385 (Primary production) of the *Income Tax Assessment Act 1997* in

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relation to that property in relation to the person who incurred the expenditure, that the cost of that property is, and at all times was, nil.

(1P) For the purposes of this Subdivision, any benefit that has been obtained by an associate of a taxpayer by reason of, as a result of or as part of a tax avoidance agreement, being a benefit that was obtained in relation to the incurring by the taxpayer, by reason of, as a result of or as part of that tax avoidance agreement, of relevant expenditure, not being relevant expenditure to which subsection (1Q) applies, shall be taken to be a benefit that was obtained by the taxpayer by reason of that tax avoidance agreement and in relation to that relevant expenditure being incurred by the taxpayer.

(1Q) For the purposes of this Subdivision, any benefit that has been obtained by an associate of a taxpayer by reason of, as a result of or as part of a tax avoidance agreement, being a benefit that was obtained in relation to:

(a) the incurring by the taxpayer, by reason of, as a result of or as part of that tax avoidance agreement, of relevant expenditure to which paragraph (f) of the definition of ***relevant expenditure*** in subsection (1) applies; or

(b) the making by the taxpayer, by reason of, as a result of or as part of that tax avoidance agreement, of the loan in respect of which relevant expenditure to which that paragraph applies was incurred;

shall be taken to be a benefit that was obtained by the taxpayer by reason of that tax avoidance agreement and in relation to the relevant expenditure being incurred by the taxpayer or that loan being made by the taxpayer, as the case may be.

(1S) For the purposes of the application of this section in determining the amount of any additional benefit obtained by a taxpayer in relation to an amount of relevant expenditure to which paragraph (h) of the definition of ***relevant expenditure*** in subsection (1) applies being incurred, being expenditure that, by virtue of the expenditure of moneys (in this subsection referred to

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as the ***partnership moneys***) by a partnership, is deemed by former section 124KA to have been incurred by the taxpayer:

(a) the partnership shall be taken to be an associate of the taxpayer;

(b) a reference to the relevant expenditure being incurred by the taxpayer shall be read as including a reference to the partnership moneys being expended by the partnership; and

(c) any benefit obtained by the partnership in relation to the partnership moneys being expended by the partnership shall be taken to have been obtained by the taxpayer in relation to the relevant expenditure being incurred by the taxpayer to such extent only as the Commissioner considers fair and reasonable.

(1T) Where:

(a) a taxpayer expends moneys (in this subsection referred to as the ***film moneys***) in producing, or by way of contribution to the cost of producing, a film; and

(b) by virtue of the operation of former subsection 124K(2), a part only of the film moneys is taken to be an amount of relevant expenditure to which paragraph (h) of the definition of ***relevant expenditure*** in subsection (1) applies;

for the purposes of the application of this section in determining the amount of any additional benefit obtained by the taxpayer in relation to the relevant expenditure being incurred:

(c) a reference to the relevant expenditure being incurred by the taxpayer shall read as including a reference to the film moneys being expended by the taxpayer; and

(d) any benefit obtained by the taxpayer in relation to the film moneys being expended by the taxpayer shall be taken to have been obtained by the taxpayer in relation to the relevant expenditure being incurred by the taxpayer to such extent only as the Commissioner considers fair and reasonable.

(2) A reference in this Subdivision to the supply of goods or the provision of services shall be read as not including a reference to the making available of money by way of loan.

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(3) For the purposes of this Subdivision, an agreement shall be taken to have been entered into or carried out for a particular purpose, or for purposes that included a particular purpose, if any of the parties to the agreement entered into or carried out the agreement for that purpose, or for the purposes that included that purpose, as the case may be.

(4) A reference in this Subdivision to a person shall be read as including a reference to a person in the capacity of a trustee.

(5) A reference in this Subdivision to a provision of the *Income Tax Assessment Act 1997* includes a reference to the corresponding provision of the *Income Tax Assessment Act 1936.*

82KJ Deduction not allowable in respect of certain pre-paid outgoings

Where:

(a) a loss or outgoing in respect of which a deduction would, but for this Subdivision, be allowable, was incurred by a taxpayer after 19 April 1978 by reason of, as a result of or as part of a tax avoidance agreement;

(b) having regard to the benefit in respect of which the loss or outgoing was incurred (but without regard to any benefit relating to the acquisition or possible acquisition of the property referred to in paragraph (c)), the amount of the loss or outgoing was greater than the amount (if any) that might reasonably be expected to have been incurred, at the time when the loss or outgoing was incurred, in respect of that benefit if the loss or outgoing had not been incurred by reason of, as a result of or as part of a tax avoidance agreement;

(c) property has been, will be, or may reasonably be expected to be, acquired by the taxpayer or by an associate of the taxpayer as a result of, by reason of, or as part of the tax avoidance agreement; and

(d) the consideration (if any) that was payable in respect of the acquisition of that property was less, or the consideration that

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may reasonably be expected to be payable in respect of the acquisition of that property is less, than the consideration that might reasonably be expected to have been payable, or to be payable, as the case may be, in respect of the acquisition of that property if the loss or outgoing had not been incurred;

notwithstanding any other provision of this Act, a deduction is not allowable to the taxpayer in respect of the loss or outgoing.

82KK Schemes designed to postpone tax liability

(1) This section applies to a loss or outgoing incurred by a taxpayer if:

(a) the loss or outgoing was incurred after 19 April 1978 and was incurred to an associate of the taxpayer;

(b) a deduction is allowable to the taxpayer in respect of that loss or outgoing; and

(c) the deduction allowable in respect of that loss or outgoing would, but for this section, be allowable to the taxpayer in the year of income in which the loss or outgoing was incurred and:

(i) in a case where the loss or outgoing is in respect of interest that, if it had actually been paid, would be subject to withholding tax under Division 11A—the withholding tax payable in respect of the whole or a part of the interest is not payable until a time occurring in a subsequent year of income; and

(ii) in any other case—the whole or a part of the amount incurred to the associate will not be included in the assessable income of the associate until a subsequent year of income.

(2) Notwithstanding any other provision of this Act, where:

(a) a taxpayer incurs in a year of income (in this subsection referred to as the ***relevant year of income***) a loss or outgoing (not being a loss or outgoing in respect of the supply of goods or the provision of services at a time that occurs after, or during a period that occurs after or extends beyond, the

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end of the relevant year of income) and the loss or outgoing is a loss or outgoing to which this section applies; and

(b) the loss or outgoing was incurred by reason of, as a result of, as part of or in connection with an agreement, course of conduct or course of business that was entered into or carried out for the purpose, or for purposes that included the purpose, of securing that:

(i) in a case where the loss or outgoing is in respect of interest that, if it had actually been paid, would be subject to withholding tax under Division 11A—the withholding tax payable in respect of the whole or a part of the interest will not be payable until a time occurring in a subsequent year of income; and

(ii) in any other case—the whole or a part of the amount incurred to the associate would not be included in the assessable income of the associate until a subsequent year of income;

the loss or outgoing shall, for the purposes of this Act, be deemed to have been incurred by the taxpayer in the relevant year of income and in any subsequent year of income only to the extent to which the loss or outgoing represents an amount actually paid during the relevant year of income or that subsequent year of income by the taxpayer to the person to whom the loss or outgoing is incurred.

(3) Notwithstanding any other provision of this Act but subject to subsection (4), where:

(a) a taxpayer incurs in a year of income a loss or outgoing in respect of the supply of goods or the provision of services at a time that occurs after, or during a period that occurs after or extends beyond, the end of the year of income and the loss or outgoing is a loss or outgoing to which this section applies; and

(b) the loss or outgoing was incurred by reason of, as a result of or as part of an agreement that was entered into or carried out for the purpose, or for purposes that included the purpose, of securing that:

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(i) a deduction would be allowable to the taxpayer in a year of income in respect of the loss or outgoing; and

(ii) the whole or a part of the amount of the loss or outgoing would not be included in the assessable income of the person to whom the loss or outgoing was incurred until a subsequent year of income;

that loss or outgoing shall, for the purposes of this Act, be deemed to have been incurred by the taxpayer in the year of income in which, or in the years of income in which, goods to which the loss or outgoing relates are supplied or services to which the loss or outgoing relates are provided.

(4) Where, by virtue of subsection (3), a loss or outgoing incurred by a taxpayer in respect of the supply of goods or the provision of services is deemed to have been incurred by the taxpayer in each of 2 or more years of income, there shall be allowable as a deduction to the taxpayer in each such year of income so much only of the amount that, apart from this section, would be allowable as a deduction in respect of the loss or outgoing as the Commissioner considers reasonable having regard to the extent to which the goods in respect of which the loss or outgoing was incurred were supplied or the services in respect of which the loss or outgoing was incurred were provided, in each of those years of income.

(5) In determining whether paragraph (2)(b) or (3)(b) applies in relation to a loss or outgoing, no regard shall be had to a purpose that is a merely incidental purpose.

82KL Tax benefit not allowable in respect of certain recouped expenditure

(1) Where the sum of the amount or value of the additional benefit in relation to an amount of eligible relevant expenditure incurred by a taxpayer and the expected tax saving in relation to that amount of eligible relevant expenditure is equal to or greater than the amount of the eligible relevant expenditure, notwithstanding any other provision of this Act but subject to this section, a tax benefit is not

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and shall be deemed never to have been, allowable in respect of any part of that amount of eligible relevant expenditure.

(2) Where, at any time, the Commissioner is of the opinion that, apart from this subsection, subsection (1) might reasonably be expected, at a later time, to operate to deem a tax benefit not to be allowable and never to have been allowable in respect of expenditure or a loss or outgoing incurred by a taxpayer then, notwithstanding any other provision of this Act but subject to this section, a tax benefit is not allowable and shall be deemed never to have been allowable in respect of that expenditure or that loss or outgoing, as the case may be.

(3) Where, in the making of an assessment, subsection (2) has been applied by reason that the Commissioner was of the opinion that a particular circumstance would exist and the Commissioner later becomes satisfied that that circumstance will not exist, then, notwithstanding anything contained in section 170, the Commissioner may amend the assessment at any time for the purposes of ensuring that this Subdivision shall be taken always to have applied on the basis that that circumstance did not, and would not, exist.

(4) Where:
   (a) an amount of eligible relevant expenditure is incurred by a partnership;
   (b) apart from this subsection, this section would not operate to deem a tax benefit not to be allowable and never to have been allowable in respect of any part of that amount of eligible relevant expenditure; and
   (c) the Commissioner is satisfied that any partner in the partnership became a partner in the partnership by reason of or as a result of an agreement (whether or not that agreement was the agreement by virtue of which the partner became a partner in the partnership) that was entered into by any of the parties to the agreement for the purpose, or primarily for the purpose, of ensuring that this section would not operate to deem a tax benefit not to be allowable and never to have been

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allowable in respect of any part of the amount of the eligible relevant expenditure;

then, notwithstanding any other provision of this Act, a tax benefit is not allowable and shall be deemed never to have been allowable in respect of any part of that amount of eligible relevant expenditure.

(5) Where:

(a) in the making of an assessment, this section has been applied on the basis that a taxpayer was to be taken to have obtained a benefit by reason that it was reasonable to expect that a person to whom a debt was owed by the taxpayer or an associate of the taxpayer would release, abandon or fail to demand repayment of the debt or of a part of the debt; and

(b) the whole or a part of that debt or of that part of the debt is repaid;

then, notwithstanding anything contained in section 170, the Commissioner may amend the assessment at any time for the purposes of ensuring that this Subdivision shall be taken never to have applied on the basis that it was reasonable to expect that the person to whom the debt was owed would release, abandon or fail to demand repayment of the amount that was repaid.

(6) Where subsection (1), (2) or (4) deems a tax benefit not to be and never to have been allowable in respect of a loss or outgoing incurred by a taxpayer in the purchase of property that, for the purposes of the application of this Act and the *Income Tax Assessment Act 1997* in relation to the taxpayer is or was trading stock, then, notwithstanding any other provision of this Act or that Act, the cost or cost price of that property, for the purposes of the application of (Primary production) of the *Income Tax Assessment Act 1997* Subdivision B of Division 2 of Part III of this Act or Division 70 (Trading stock) or 385 in relation to that property in relation to the taxpayer, shall be taken to be, and at all times to have been, nil.

(7) Where, at any time after the making of an assessment in relation to a taxpayer, the taxpayer considers that the Commissioner ought to

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amend the assessment in accordance with subsection (3) or (5), the taxpayer may post to or lodge with the Commissioner a request in writing for an amendment of the assessment in accordance with subsection (3) or (5) or in accordance with subsections (3) and (5).

(8) The Commissioner shall consider the request and shall serve on the taxpayer, by post or otherwise, a written notice of the Commissioner's decision on the request.

(9) If the taxpayer is dissatisfied with the Commissioner's decision on the request, the taxpayer may object against it in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

Subdivision H—Period of deductibility of certain advance expenditure

82KZL Interpretation

(1) In this Subdivision, unless the contrary intention appears:

agreement means any agreement, arrangement, understanding or scheme, whether formal or informal, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings.

associate has the meaning given by section 318.

eligible service period, in relation to an amount of expenditure incurred under an agreement, means the period from the beginning of:

(a) the day, or the first day, on which the thing to be done under the agreement in return for the amount of expenditure is required, or permitted, as the case may be, to commence being done; or

(b) if the expenditure is incurred on a later day—the day on which the expenditure is incurred;

until the end of:

(c) the day, or the last day, on which the thing to be done under the agreement in return for the amount of expenditure is

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required, or permitted, as the case may be, to cease being done; or

(d) if that day or last day ends more than 10 years after the beginning of the period—10 years after the beginning of the period.

excluded expenditure means an amount of expenditure:

(a) less than $1,000; or

(b) required to be incurred by a law, or by an order of a court, of the Commonwealth, a State or a Territory; or

(c) under a contract of service; or

(d) to the extent that it is of a capital nature and cannot be deducted under:

(i) section 355-205 (R&D expenditure); or

(ii) section 355-480 (earlier year associate R&D expenditure);

of the *Income Tax Assessment Act 1997*; or

(da) to the extent that it is of a private or domestic nature; or

(e) that has been or is incurred after 21 September 1999 by a general insurance company in connection with the issue of a general insurance policy and was related or relates to the gross premiums derived by the company in respect of the policy; or

(f) that has been or is incurred after 21 September 1999 by a general insurance company in payment of reinsurance premiums in respect of the reinsurance of risks covered by general insurance policies, other than reinsurance premiums that were or are paid in respect of a particular class of insurance business where, under the contract of reinsurance, the reinsurer agrees, in respect of a loss incurred by the company that is covered by the relevant policy, to pay only some or all of the excess over an agreed amount.

pre-RBT obligation means a contractual obligation that:

(a) exists under an agreement at or before 11.45 am (by legal time in the Australian Capital Territory) on 21 September 1999; and

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(b) requires the payment of an amount for the doing of a thing under the agreement; and

(c) requires the payment to be made before the doing of the thing; and

(d) cannot be escaped by unilateral action by the party bound by the obligation to make the payment.

R&D activities has the same meaning as in the *Income Tax Assessment Act 1997*.

transfer includes assign.

(2) Without otherwise limiting the generality of references in this Subdivision to expenditure being incurred under an agreement in return for the doing of a thing under the agreement:

(a) where expenditure incurred under an agreement consists of a payment of loan interest or a payment of a similar kind, the expenditure shall, for the purposes of this Subdivision, be taken to be incurred in return for the making available or continued making available, as the case requires, of the loan principal, or other amount of a similar kind, under the agreement during the period to which the payment relates; and

(b) where expenditure incurred under an agreement consists of a payment of rent, a lease payment or a payment of a similar kind, the expenditure shall, for the purposes of this Subdivision, be taken to be incurred in return for the making available or continued making available, as the case requires, of the thing rented or leased, or other thing of a similar kind, under the agreement during the period to which the payment relates; and

(c) where expenditure incurred under an agreement consists of a payment of an insurance premium or a payment of a similar kind, the expenditure shall, for the purposes of this Subdivision, be taken to be incurred in return for the provision or continued provision, as the case requires, of insurance against the risk concerned, or of a thing of a similar

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kind, under the agreement during the period to which the payment relates.

(3) This Subdivision has effect as if conducting R&D activities were carrying on a business.

82KZLA Subdivision does not apply to financial arrangements to which Subdivision 250-E applies

To avoid doubt, this Subdivision does not apply to:

(a) a Division 230 financial arrangement (within the meaning of the *Income Tax Assessment Act 1997*); or

(b) a financial benefit (within the meaning of that Act) that is provided or received in relation to such an arrangement.

Note: See section 250-210 of the *Income Tax Assessment Act 1997*.

82KZLB How this Subdivision applies to deductible R&D expenditure incurred to associates in earlier income years

In addition to its application apart from this section, this Subdivision applies to expenditure deductible under section 355-480 of the *Income Tax Assessment Act 1997* as if:

(a) references in this Subdivision to incurring the expenditure were references to paying the expenditure; and

(b) references in this Subdivision to the expenditure year were references to the payment year.

82KZM Expenditure by small and medium business entities and individuals incurring non-business expenditure

(1) Where:

(a) a taxpayer incurs expenditure under an agreement entered into after 25 May 1988; and

(aa) at least one of the following applies:

(i) the taxpayer is a small business entity, or is covered by subsection (1A), for the year of income and has not chosen to apply section 82KZMD to the expenditure;

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(ii) the taxpayer is an individual and the expenditure is not incurred in carrying on a business;

(iii) the expenditure meets a pre-RBT obligation (see subsection 82KZL(1)); and

(b) the expenditure is not excluded expenditure; and

(ba) either:

(i) the eligible service period for the expenditure is longer than 12 months; or

(ii) the eligible service period for the expenditure is 12 months or shorter but ends after the last day of the year of income after the one in which the expenditure was incurred; and

(c) apart from this section, a deduction under:

(i) section 8-1; or

(ii) section 355-205 (R&D expenditure) or 355-480 (earlier year associate R&D expenditure);

of the *Income Tax Assessment Act 1997*, in respect of the expenditure, would be allowable from the taxpayer's assessable income for the year of income in which the expenditure is incurred;

then, for the purposes of this Act, instead of the deduction being allowable as mentioned in paragraph (c), a proportion of the deduction is allowable from the assessable income of the taxpayer of each year of income during which the whole or part of the eligible service period in relation to the expenditure occurs, being a proportion ascertained in accordance with the formula:

$$\frac{\text{Period in year}}{\text{Eligible service period}}$$

where:

Period in year is the number of days in the whole or the part of the eligible service period that occurs in the year of income.

Eligible service period is the number of days in the eligible service period.

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(1A) A taxpayer is covered by this subsection for a year of income if:

(a) the taxpayer is not a small business entity for the year of income; and

(b) the taxpayer would be a small business entity for the year of income if:

(i) each reference in Subdivision 328-C (about what is a small business entity) of the *Income Tax Assessment Act 1997* to $10 million were instead a reference to $50 million; and

(ii) the reference in paragraph 328-110(5)(b) of that Act to a small business entity were instead a reference to a taxpayer covered by this subsection.

(2) Subsection (1) has effect subject to Division 245 of the *Income Tax Assessment Act 1997*.

82KZMA Application of section 82KZMD

Overview

(1) Section 82KZMD sets the amount and timing of deductions for expenditure that a taxpayer incurs in a year of income (the ***expenditure year***), if:

(a) apart from that section, the taxpayer could deduct the expenditure for the expenditure year under:

(i) section 8-1; or

(ii) section 355-205 (R&D expenditure) or 355-480 (earlier year associate R&D expenditure);

of the *Income Tax Assessment Act 1997*; and

(b) the requirements in subsections (2), (3), (4) and (5) are met.

Requirements for taxpayer

(2) The taxpayer:

(a) must:

(i) carry on a business; or

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(ii) be a taxpayer that is not an individual and that does not carry on a business; and

(b) if the taxpayer is a small business entity, or is covered by subsection (2A), for the expenditure year—must, before lodging its return of income for that year or within such further time as the Commissioner allows, choose to apply section 82KZMD to the expenditure.

(2A) A taxpayer is covered by this subsection for the expenditure year if:

(a) the taxpayer is not a small business entity for the expenditure year; and

(b) the taxpayer would be a small business entity for the expenditure year if:

(i) each reference in Subdivision 328-C (about what is a small business entity) of the *Income Tax Assessment Act 1997* to $10 million were instead a reference to $50 million; and

(ii) the reference in paragraph 328-110(5)(b) of that Act to a small business entity were instead a reference to a taxpayer covered by this subsection.

(3) The expenditure must be:

(a) either:

(i) incurred in carrying on a business; or

(ii) incurred otherwise than in carrying on a business by a taxpayer that is not an individual; and

(b) incurred under an agreement (see subsection 82KZL(1); and

(c) incurred in return for the doing of a thing under the agreement that is not to be wholly done within the expenditure year.

Requirement for expenditure not to be excluded expenditure

(4) The expenditure must not be excluded expenditure (see subsection 82KZL(1)).

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Requirement for expenditure not to meet pre-RBT obligation

(5) The expenditure must not meet a pre-RBT obligation (see subsection 82KZL(1)).

Relationship with other provisions

(6) Section 82KZMD has effect:
  (a) despite section 8-1 of the *Income Tax Assessment Act 1997*; and
  (b) subject to Division 245 of that Act.

82KZMD Business expenditure and non-business expenditure by non-individual

(2) For each year of income containing all or part of the eligible service period for the expenditure, the taxpayer may deduct the amount worked out using the formula:

$$\text{Expenditure} \times \frac{\text{Number of days of eligible service period in the year of income}}{\text{Total number of days of eligible service period}}$$

Note: This section does not apply to expenditure incurred by a small or medium business entity unless the entity chooses to apply this section to the expenditure: see paragraph 82KZMA(2)(b).

82KZME Expenditure under some agreements

(1) Section 82KZMF applies to set the amount and timing of deductions for expenditure that a taxpayer incurs in a year of income (the ***expenditure year***) if:
  (a) apart from that section, the taxpayer could deduct the expenditure for the expenditure year under:
    (i) section 8-1; or
    (ii) section 355-205 (R&D expenditure) or 355-480 (earlier year associate R&D expenditure);
  of the *Income Tax Assessment Act 1997*; and
  (c) the requirements of subsections (2) and (3) are met.

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Note: There are some exceptions: see subsections (5), (7), (8) and (9).

General requirements for expenditure

(2) The expenditure must be incurred:
  (a) after 1 pm (by legal time in the Australian Capital Territory) on 11 November 1999 under an agreement; and
  (b) in return for the doing of a thing under the agreement that is not to be wholly done within the expenditure year.

Requirements for agreement

(3) There are these requirements for the agreement:
  (a) the taxpayer's allowable deductions for the expenditure year that are attributable to the agreement must exceed the taxpayer's assessable income (if any) for the expenditure year that is attributable to the agreement; and
  (b) the taxpayer does not have day to day control over the operation of the agreement (whether or not the taxpayer has the right to be consulted or give directions); and
  (c) at least one of these must be satisfied:
    (i) there is more than one participant in the agreement in the same capacity as the taxpayer;
    (ii) the person who manages, arranges or promotes the agreement, or an associate of that person, manages, arranges or promotes similar agreements for other taxpayers.

Activities that relate to the agreement

(4) Without affecting the operation of any other section in this Subdivision, an agreement referred to in this section includes all activities that relate to the agreement, including those that give rise to deductions or assessable income.

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Exception 1: certain negatively geared investments

(5) The expenditure must not be:

(a) a premium for building insurance, contents insurance or rent protection insurance; or

(b) interest on money borrowed to acquire:

(i) real property or an interest in real property; or

(ii) shares that are listed for quotation in the official list of an approved stock exchange; or

(iii) units in a trust that has at least 300 beneficiaries and is a widely held unit trust as defined in section 272-105 in Schedule 2F;

where:

(c) the taxpayer has obtained, or can reasonably be expected to obtain, rent, dividends or trust income from the agreement; and

(d) the taxpayer has not obtained and will not obtain any other kind of assessable income from the agreement (except a capital gain or an insurance receipt); and

(e) all aspects of the agreement have been conducted at arm's length.

Exception 3: expenditure is excluded expenditure

(7) The expenditure must not be excluded expenditure (see subsection 82KZL(1)).

Exception 4: expenditure meets a pre-existing obligation

(8) The expenditure by the taxpayer must not meet a contractual obligation that:

(a) exists under an agreement at or before 1 pm (by legal time in the Australian Capital Territory) on 11 November 1999; and

(b) requires the payment of an amount for the doing of a thing under the agreement; and

(c) requires the payment to be made before the doing of the thing; and

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(d) cannot be escaped by unilateral action by the taxpayer.

Exception 5: agreement to which a product ruling applies

(9) The expenditure must not be under an agreement to which a product ruling applies, describing expenditure under the agreement as being allowable as a deduction.

(10) The product ruling must be made:
(a) on or before 1 pm (by legal time in the Australian Capital Territory) on 11 November 1999; or
(b) in response to an application for a product ruling where:
(i) the application was received by the Commissioner on or before the time specified in paragraph (a); and
(ii) the Commissioner acknowledged receiving the application.

(11) In this section:

product ruling means a public ruling made under Part IVAAA of the *Taxation Administration Act 1953* about a particular investment product.

82KZMF Proportional deduction

(1) If this section applies to expenditure incurred by a taxpayer in a year of income:
(a) the taxpayer cannot deduct all of the expenditure for the expenditure year; and
(b) instead, the taxpayer can deduct, for each year of income during which part of the eligible service period for the expenditure occurs, an amount worked out using this formula:

$$\text{Expenditure} \times \frac{\text{Number of days of eligible service period in the year of income}}{\text{Total number of days of eligible service period}}$$

(2) This section has effect:

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(a) despite section 8-1 of the *Income Tax Assessment Act 1997*; and

(b) subject to Division 245 of the *Income Tax Assessment Act 1997*.

Note: Deductions under section 355-205 or 355-480 of the *Income Tax Assessment Act 1997* for R&D expenditure are subject to this section (see subsection 8-5(2) and section 355-105 of that Act).

82KZMG Deductions for certain forestry expenditure

(1) Sections 82KZMD and 82KZMF do not affect the timing of a deduction for expenditure incurred by a taxpayer in a year of income (the ***expenditure year***) to the extent that the requirements of this section are met.

General requirements for expenditure

(2) There are these requirements for the expenditure:

(a) it must be incurred on or after 2 October 2001 and on or before 30 June 2008 under an agreement; and

(b) the eligible service period for the expenditure must be 12 months or shorter and must end on or before the last day of the year of income after the expenditure year; and

(c) it must be incurred in return for the doing of a thing under the agreement that is not to be wholly done within the expenditure year.

Requirements for agreement

(3) There are these requirements for the agreement:

(a) the agreement must be for planting and tending trees for felling; and

(b) the taxpayer must not have day to day control over the operation of the agreement (whether or not the taxpayer has the right to be consulted or give directions); and

(c) at least one of these must be satisfied:

(i) there is more than one participant in the agreement in the same capacity as the taxpayer;

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(ii) the person (the ***manager***) who manages, arranges or promotes the agreement, or an associate of that person, manages, arranges or promotes similar agreements for other taxpayers.

Requirements for expenditure

(4) The expenditure incurred by the taxpayer must be paid for seasonally dependent agronomic activities undertaken by the manager during the establishment period for the relevant planting of trees for felling.

Example: Examples of seasonally dependent agronomic activities include:

- tending the seedlings prior to planting, and planting them;
- ripping and mounding the site where the planting is to occur;
- applying fertiliser, herbicide or pesticide in conjunction with the planting.

(5) The ***establishment period*** for a particular planting of trees starts on the day when the first seasonally dependent agronomic activity for that planting is done and ends on the later of:

(a) the day when the last seedling is planted as part of that planting, not including replacement of seedlings already planted; and

(b) the day when any fertiliser, herbicide or pesticide is applied to the seedlings in conjunction with that planting.

82KZMGA Deductions for certain forestry expenditure

(1) A taxpayer cannot deduct expenditure in relation to which the requirements in section 82KZMG (apart from paragraph 82KZMG(2)(a)) are met if:

(a) the taxpayer holds the taxpayer's interest in the agreement mentioned in section 82KZMG as an initial participant in the agreement; and

(b) a CGT event happens in relation to that interest within 4 years after the end of the year of income in which the taxpayer first incurred expenditure under the agreement; and

(c) the expenditure is incurred on or before 30 June 2008.

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(1A) Paragraph (1)(b) does not apply to a CGT event if:

(a) the CGT event happens because of circumstances outside the taxpayer's control; and

Example: The interest is compulsorily acquired.

(b) when the taxpayer acquired the interest, the taxpayer could not reasonably have foreseen the CGT event happening.

(2) Despite section 170, the Commissioner may amend the taxpayer's assessment at any time within 2 years after the end of the year of income in which the CGT event happens, for the purpose of giving effect to this section.

82KZMGB CGT event in relation to interest in 82KZMG agreement

(1) This section applies if:

(a) a taxpayer holds an interest in an agreement mentioned in section 82KZMG as an initial participant in the agreement; and

(b) at least one of these conditions is satisfied:

(i) the taxpayer can deduct or has deducted an amount for a year of income in relation to the interest;

(ii) the condition in subparagraph (i) would be satisfied if section 82KZMGA were disregarded; and

(c) subsection 82KZMG(1) applies to the timing of the deduction (or would apply if section 82KZMGA were disregarded); and

(d) a CGT event happens in relation to the interest, other than a CGT event that happens in respect of thinning.

(2) The taxpayer's assessable income for the year of income in which the CGT event happens includes:

(a) if, as a result of the CGT event, the taxpayer no longer holds the interest—the market value of the interest (worked out as at the time of the event); or

(b) otherwise—the decrease (if any) in the market value of the interest as a result of the CGT event.

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(3) Any amount that the taxpayer actually receives because of the CGT event is not included in the taxpayer's assessable income (nor is it exempt income).

82KZN Transfer etc. of rights under agreement

Where:

(a) under an agreement entered into either before or after the commencement of this section, a taxpayer (in this section called the ***original taxpayer***) incurs expenditure in return for the doing of a thing during a period after the incurring of the expenditure; and

(b) either:

(i) the original taxpayer transfers to another taxpayer (in this section called the ***recipient taxpayer***) all of his or her rights under the agreement in relation to the doing of the thing during the remainder of the period; or

(ii) the agreement is discharged (whether by performance or otherwise) in so far as it relates to the doing of the thing during the remainder of the period;

the following provisions have effect for the purpose of this Subdivision:

(c) if the whole or part of a deduction under former section 51 of this Act or section 8-1 of the *Income Tax Assessment Act 1997* in respect of the expenditure is, because of this Subdivision, allowable from the assessable income of the original taxpayer of any year of income occurring after the year of income in which the transfer or discharge occurs—that deduction is instead allowable from the assessable income of the year of income in which the transfer, assignment or discharge occurs;

(d) if the recipient taxpayer incurs expenditure in return for the transfer—the recipient taxpayer shall be taken to have incurred, under an agreement entered into at the time of the transfer, so much of that expenditure as is not of a capital, private or domestic nature in return for the doing of the thing during the remainder of the period.

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82KZO Partnership changes where entire interest in agreement rights is not transferred

Where:

(a) under an agreement entered into after 25 May 1988, a person (in this section called the ***original person***), or the partners in a partnership (in this section called the ***original partnership***), incurs or incur expenditure in return for the doing of a thing during a period after the incurring of the expenditure;

(b) either of the following (in this section called a ***partnership change***) happens:

(i) a partnership is formed or the original partnership is dissolved, or both; or

(ii) the constitution of the original partnership, or the interests of the partners in the original partnership, is or are varied;

with the result that, after the partnership change:

(iii) a person (in this section called the ***later person***), or the partners in a partnership (in this section called the ***later partnership***), holds or hold all of any rights under the agreement to have the thing done during the period after the partnership change; and

(iv) the original person, or one or more of the partners in the original partnership, has an interest in the rights after the partnership change; and

(c) the whole or part of a deduction under former section 51 of this Act or section 8-1 of the *Income Tax Assessment Act 1997* in respect of the expenditure (which whole or part is in this section called a ***spread deduction***) is, because of the application of this Subdivision, allowable from the assessable income of the original person or the original partnership of the year of income in which the partnership change happens or a subsequent year of income;

the following provisions have effect:

(d) if a spread deduction is allowable in relation to the year of income in which the partnership change occurs—the entitlement to the deduction shall, for the purposes of this

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Act but subject to any later application of this section, be apportioned between the original person or original partnership and the later person or later partnership according to the portions of the eligible service period in the year of income (or, if the case requires, of so much of the period as occurs after a partnership change resulting from a previous application of this section) that occur before and after the partnership change;

(e) if a spread deduction relates to a subsequent year of income—the later person or later partnership, instead of the original person or original partnership, shall, for the purposes of this Act but subject to any later application of this section, be entitled to the deduction;

(f) for the purposes of any later application of this section or section 82KZN, the later person or later partnership, instead of the original person or original partnership, shall be taken to have incurred the expenditure under the agreement.

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Division 3A—Convertible notes

82LA Application of Division

(1) This Division applies only for the purposes of:
  (a) calculating an eligible CFC's attributable income for the purposes of Part X; and
  (b) defining ***convertible note***.

(2) A term used in paragraph (1)(a) has the same meaning as it has when used in Part X.

82L Interpretation

(1) In this Division, unless the contrary intention appears:

attributable income has the meaning given by Division 7 of Part X.

CFC or ***controlled foreign company*** has the meaning given by section 340.

convertible note includes a note issued by a company that provides, whether in pursuance of or by virtue of a trust deed or otherwise:
  (a) that the amount of the loan to the company that is evidenced, acknowledged or created by the note or to which the note relates:
    (i) whether with or without interest;
    (iii) whether at the option of the holder or owner of the note or of some other person or not;
    (iv) whether in whole or in part; or
    (v) whether exclusively or otherwise;
  is to be or may be converted into shares in the capital of the company or of another company or is to be or may be redeemed, repaid or satisfied by:

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(vi) the allotment or transfer of shares in the capital of the company or of some other company, whether to the holder or owner of the note or to some other person;

(vii) the acquisition of such shares, whether by the holder or owner or by some other person, otherwise than as mentioned in subparagraph (vi); or

(viii) application in or towards paying-up, in whole or in part, the balance unpaid on shares issued or to be issued by the company or by some other company, whether to the holder or owner or to some other person; or

(b) that the holder or owner of the note is to have, or may have, any right or option to have allotted or transferred to him or her or to some other person, or for him or her or some other person otherwise to acquire, shares in the capital of the company or of some other company.

foreign loan means a loan to a company raised outside Australia in a currency other than the currency of Australia.

instrument includes debenture, bond, certificate, receipt or any other document or writing.

issued includes given and executed, and ***issue*** has a corresponding meaning.

loan, in relation to a company, means:

(a) a loan, advance or deposit of money to or with the company;

(b) money subscribed to the company; or

(c) any other form of debt or liability of the company;

whether secured or unsecured and whenever redeemable, repayable or to be satisfied.

note means a note or other instrument issued by a company that evidences, acknowledges, creates or relates to a loan to the company.

prescribed stock exchange means an approved stock exchange (within the meaning of the *Income Tax Assessment Act 1997*) operating in Australia.

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qualified person, in relation to the valuing of a share in the capital of a company, means a person registered as a company auditor under a law in force in a State or a Territory, but does not include:

(a) a director, secretary or employee of the company;

(b) a partner, employer or employee of a person referred to in paragraph (a); or

(c) a partner or employee of an employee of a person so referred to.

the date of offer, in relation to a loan to a company means the earliest date on which, by any relevant prospectus, notice, circular, advertisement or other written invitation, any person was or persons were invited to subscribe to the loan:

(a) in the case of a new loan—by the payment of money to the company; or

(b) in the case of an approved replacement loan—by converting, in whole or in part, an earlier loan, or by converting, in whole or in part, an earlier loan and the payment of money to the company.

the maturity date, in relation to a loan to which a convertible note applies, means the date by which the whole of the loan is, under the terms applicable to the note, to be repaid, redeemed or satisfied.

the relevant valuation period, in relation to a share, means:

(a) where neither paragraph (b) nor (c) applies in relation to the share—the period of one month ending on the date that is the valuation date in relation to the share;

(b) where:

(i) the share is included in a class of shares that, during the whole of the period of 2 months ending on the valuation date, was listed for quotation in the official list of a stock exchange that was a prescribed stock exchange during the whole of that period of 2 months, or in the official lists of 2 or more stock exchanges each of which was a prescribed stock exchange during the whole of that period of 2 months; and

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(ii) fully paid shares included in that class of shares were not recorded by that stock exchange or by any of those stock exchanges, as the case may be, as having been sold during the period of one month specified in paragraph (a) but were recorded by that stock exchange or by one or more of those stock exchanges, as the case may be, as having been sold during the period of one month immediately preceding the commencement of the period of one month so specified;

that preceding period of one month; or

(c) where:

(i) the share is included in a class of shares that, during the whole of the period of 3 months ending on the valuation date, was listed for quotation in the official list of a stock exchange that was a prescribed stock exchange during the whole of that period of 3 months, or in the official lists of 2 or more stock exchanges each of which was a prescribed stock exchange during the whole of that period of 3 months; and

(ii) fully paid shares included in that class of shares were not recorded by that stock exchange or by any of those stock exchanges, as the case may be, as having been sold during the period of 2 months ending on the valuation date but were recorded by that stock exchange or by one or more of those stock exchanges, as the case may be, as having been sold during the period of one month immediately preceding the commencement of that period of 2 months;

that preceding period of one month.

the valuation date, in relation to a share, means the date that is earlier by 6 weeks than the date that is the date of offer in relation to the loan in respect of which the value of the share is to be ascertained.

(2) Where the combined effect or operation of 2 or more related instruments, whether issued at the same time or not, would have the effect or operation of a convertible note, those instruments

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shall, for the purposes of this Division, be deemed to be together a convertible note.

(3) Where:

(a) a company issues a note that provides that the amount of the loan to the company that is evidenced, acknowledged or created by the note or to which the note relates:

(i) whether with or without interest;

(iii) whether at the option of the holder or owner of the note or of some other person or not;

(iv) whether in whole or in part; or

(v) whether exclusively or otherwise;

is to be or may be redeemed, repaid or satisfied by the issue, whether by the same company or by another company, of an instrument or a series of instruments; and

(b) that instrument, or any instrument in that series of instruments, is to provide, whether in pursuance of or by virtue of a trust deed or otherwise, as mentioned in paragraph (a) or (b) of the definition of ***convertible note*** in subsection (1);

that note and the instrument, or that note and each of the instruments in the series of instruments, shall, for the purposes of this Division, be deemed to be a convertible note.

(4) For the purposes of this Division, a convertible note issued by a company applies to a loan to a company if it evidences, acknowledges or creates the loan.

(5) A reference in this Division to the terms, or a term, applicable to a convertible note shall be read as including a reference to terms, or a term, that so apply or applies in pursuance of or by virtue of a trust deed or otherwise.

82M New loans and replacement loans

(1) Where:

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(a) a loan to a company is made, and is wholly made, by money being paid to the company at the time when the loan is made; and

(b) the loan is not part of or related to a transaction, or is not one of a series of related transactions, under which the person making the loan is to receive or has received, for the purpose of enabling him or her to make, or of assisting him or her in making, the loan, any money or other property from the company, or from another company or person as a result of arrangements made with that other company or person by the first-mentioned company;

the loan shall, for the purposes of this Division, be treated as a new loan.

(2) Where:

(a) a loan to a company is, under subsection (1), to be treated as a new loan for the purposes of this Division;

(b) the loan is not evidenced, acknowledged or created by a convertible note or is not a loan to which a convertible note otherwise applies;

(c) the loan is for a fixed period;

(d) the rate of interest payable in respect of the loan is the same in respect of all periods occurring before the date by which the whole of the loan is to be repaid, redeemed or satisfied; and

(e) the loan is, in whole or in part, converted into another loan to the company or to another company, or the loan is, in whole or in part, converted into a part of another loan to the company or to another company and the remainder of the other loan:

(i) is made by money being paid to the company or other company at the time when the loan is made; and

(ii) would, if it were a separate loan, be a loan that, under subsection (1), is to be treated as a new loan for the purposes of this Division;

that other loan shall, for the purposes of this Division, be treated as an approved replacement loan.

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82P Bonus share allotments

(1) For the purposes of this section, the making of a bonus share allotment by a company is the allotment by the company of shares (in this section referred to as ***bonus shares***) in the capital of the company (being shares all of which are of the same class as each other) to persons who are the holders of other shares (in this section referred to as ***qualifying shares***) in the capital of the company or in the capital of another company (being shares all of which are of the same class as each other but which are not necessarily of the same class as the bonus shares), being an allotment made to the holders of all shares of the same class as the qualifying shares or an allotment made in pursuance of applications for the allotment of the bonus shares by the holders of the qualifying shares in accordance with an invitation to apply for the allotment of shares given to the holders of the qualifying shares and the holders of all other shares of the same class as the qualifying shares.

(2) Where:

(a) the option to convert that exists under a convertible note is an option to have shares allotted to the holder or owner of the note; and

(b) the terms applicable to the note are such that, if a bonus share allotment is made by the company that issued the note or by another company in respect of qualifying shares that are of the same class as the shares that are to be allotted to the holder or owner of the note upon the exercise of the option to convert, the holder or owner of the note is to have the right to have allotted to him or her shares in the capital of the company or of that other company, as the case may be, of the same class as the bonus shares on terms and conditions that are the same as or correspond with, or are no more favourable to him or her than, the terms and conditions on which bonus shares are allotted to any holder of qualifying shares;

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that right shall, for the purposes of subparagraph 82SA(1)(d)(ii), be deemed to be an approved right relating to the allotting or transfer of bonus shares to the holder or owner of the convertible note.

(3) Where:

(a) the option to convert that exists under a convertible note is an option to have shares transferred to the holder or owner of the note; and

(b) the terms applicable to the note are such that, if a bonus share allotment is made by the company that issued the note or by another company, being an allotment the qualifying shares relating to which include the shares that are to be transferred to the holder or owner of the note upon the exercise of the option to convert, and bonus shares allotted in respect of the qualifying shares to be so transferred are allotted to the holder of those shares on terms and conditions that are the same as or correspond with, or are no more favourable to him or her than, the terms and conditions on which bonus shares are allotted to any other holder of qualifying shares, the holder or owner of the note is to have the right to have the bonus shares allotted to that person transferred to him or her upon the payment by him or her, where a consideration was paid or is payable in respect of the allotment of the bonus shares to the other person, of a consideration not less than that consideration;

that right shall, for the purposes of subparagraphs 82S(1)(d)(ii) and 82SA(1)(d)(ii), be deemed to be an approved right relating to the allotting or transfer of bonus shares to the holder or owner of the convertible note.

82Q Classes of shares

(1) Shares in the capital of a company to which there are attached the same rights, including the following rights:

(a) rights in respect of voting;

(b) rights in respect of dividends;

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(c) rights in respect of distribution of share capital in consequence of a reduction of share capital;
(d) rights in respect of distribution of the property of the company in the event of the winding up of the company;

constitute a class of shares for the purposes of this Division, and no other shares in the capital of the company constitute a class of shares for such purposes.

(2) Notwithstanding anything contained in subsection (1), a share in the capital of a company to be allotted upon the exercise of the option to convert given under the terms applicable to a convertible note shall not, for the purposes of this Division, be deemed to be a share of a different class from a share in the capital of the company already allotted by reason only that during the period of one year after the allotment of the first-mentioned share, any dividend payable in respect of the share will or may be less than any dividend payable in respect of the second-mentioned share.

82R Interest on certain convertible notes not to be an allowable deduction

(1) Subject to section 82SA, this section applies to a convertible note issued by a company, not being:
(a) a convertible note issued on or before 15 November 1960; or
(b) a convertible note:
(i) the terms of the issue of which were announced by the company on or before that date; or
(ii) that the company was, in pursuance of an agreement made on or before that date, bound to issue.

(2) Where, in pursuance of the terms upon which any convertible notes were issued by a company, a person was entitled to have a convertible note issued to him or her by that company, the company shall, for the purposes of subsection (1), be deemed to have issued the convertible note to that person at the time when the person first became entitled to have the convertible note issued to him or her.

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(3) An outgoing consisting of interest, or a payment in the nature of interest, under a convertible note to which this section applies shall be deemed not to be an allowable deduction from the assessable income of the company.

(4) Where a payment has been made by a person (whether under a guarantee or otherwise) that represents, in effect, a payment of interest under a convertible note to which this section applies and the company has incurred an outgoing by way of making good the first-mentioned payment to that person, whether by way of indemnification or otherwise, the amount of that outgoing shall, for the purposes of this section, be deemed to be an outgoing consisting of interest under the convertible note.

(5) Section 25-25 (Borrowing expenses) of the *Income Tax Assessment Act 1997* does not apply to the expenditure incurred by the company in borrowing money by means of convertible notes to which this section applies.

82SA Interest on certain convertible notes to be an allowable deduction—where loan made on or after 1 January 1976

(1) Subject to the succeeding provisions of this section, section 82R does not apply in relation to a convertible note issued by a company where:

(a) the loan to the company to which the note applies is, under section 82M, to be treated as a new loan or an approved replacement loan for the purposes of this Division;

(b) the loan was made on or after 1 January 1976;

(c) the convertible note was issued before the expiration of 2 months after the loan was made; and

(d) the terms applicable to the convertible note are, at the time the note was issued and at all subsequent times, such that:

(i) an option is given to the holder or owner of the convertible note (in this Division referred to as the ***option to convert***) to have allotted or transferred to him or her shares in the capital of the company or of another company;

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(ii) no provision is made for the allotting or transferring of shares in the capital of the company or of another company to the holder or owner of the convertible note except in pursuance of the exercise of the option to convert or except in pursuance of a right that, under section 82P, is an approved right relating to the allotting or transfer of bonus shares to the holder or owner of the note;

(iii) the convertible note would not, but for the option to convert and any right of the kind referred to in subparagraph (ii), be a convertible note;

(iv) the earliest date on which the option to convert may be exercised is a date not later than 2 years after the date of offer;

(v) the latest date on which the option to convert may be exercised is a date not later than the maturity date of the loan or, if the date of offer is more than 10 years earlier than the maturity date, a date not later than 10 years after the date of offer;

(vi) the rate of interest payable in respect of the loan is, subject to subsection (5), the same in respect of all periods occurring before the maturity date of the loan;

(vii) subject to subsection (6), the obligations and rights of the holder or owner of the convertible note (including, but without limiting the generality of the foregoing, obligations and rights with respect to the amount payable on repayment, redemption or satisfaction of the loan and the terms on which shares are to be allotted or transferred in pursuance of the exercise of the option to convert) do not vary in his or her favour by reason that he or she exercises the option, or he, she or the company exercises any other right in relation to the note, at a later rather than at an earlier time after the issue of the note;

(viii) the rights of the holder or owner of the convertible note with respect to the amount payable on repayment, redemption or satisfaction of the loan do not vary

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according to whether or not he or she exercises the option to convert;

(ix) the shares to be allotted or transferred upon the exercise of the option to convert:

(A) are to be allotted or transferred within 2 months after the exercise of the option;

(B) in the case of shares to be allotted, are, upon payment of the amount payable in respect of the allotment, to be fully paid shares or, in the case of shares to be transferred, are, at the time of transfer, to be fully paid shares; and

(C) are to be shares of the same class as shares in the capital of the company that, not later than 6 weeks before the date that is the date of offer in relation to the loan, had been allotted and were fully paid;

(x) the shares to be allotted or transferred upon the exercise of the option to convert are to be shares with respect to which no provision is made (whether by the memorandum, or memorandum and articles, of the company, or other instrument constituting or defining the constitution of the company, or otherwise) for changing or converting them into shares of another class, except for the purpose of enabling, in accordance with any law relating to companies, the consolidation and division of all or any of the share capital of the company or of another company or the sub-division of all or any of the shares in the capital of the company or of another company; and

(xi) the amount payable in respect of the allotment or transfer of a share in pursuance of the exercise of the option to convert is to be paid not later than 1 month after the allotment or transfer, and is to be not less than 90% of the amount that, in accordance with section 82T, is the value as at the valuation date of a fully paid share included in the class of shares in which the share to be allotted or transferred will be, or is, included.

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(2) Where subsection (1) ceases to have effect in relation to a convertible note by reason of a change in the terms applicable to the note (not being a change resulting from a compromise or arrangement approved by a court), subsection (1) shall be deemed never to have had effect in relation to the note.

(3) Where a note is a convertible note in relation to which subsection (1) has effect and the right to exercise the option to convert relating to the note becomes exercisable by a person other than the holder or owner of the note by reason of an assignment of that right, the assignment shall, for the purposes of this section, be disregarded.

(4) Where, in relation to a convertible note issued by a company, the company or a director of the company does any act or thing for the purpose of, or purposes that include the purpose of, and having the effect of, causing the amount that, for the purposes of subsection (1), is the minimum amount applicable to a share to be allotted or transferred in pursuance of the exercise of the option to convert relating to the note, to be less than it would otherwise have been, subsection (1) does not have effect in relation to the note.

(5) Where, under the terms applicable to a convertible note, the rate of interest payable in respect of the loan to which the note applies is to be varied from time to time (otherwise than with retrospective effect) in accordance with changes, or changes exceeding a specified percentage, in the rate of interest prevailing from time to time:

(a) where the loan is a foreign loan, at a specified place outside Australia in respect of a specified class of transactions; or

(b) where the loan is not a foreign loan, in respect of a specified class of securities issued under an Act;

the term shall, for the purposes of subparagraph (1)(d)(vi), be deemed not to be a term providing for a variation in the rate of interest payable in respect of the loan.

(6) For the purposes of subparagraph (1)(d)(vii), the obligations and rights of the holder or owner of a convertible note shall not be deemed to vary in a manner referred to in that subparagraph by

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reason only that any dividend payable in respect of a share in the capital of a company to be allotted upon the exercise of the option to convert relating to the note, being a dividend payable during the period of 1 year after the allotment of the share, will or may vary according to the time when, in relation to the period to which the dividend relates, the option to convert is exercised.

82T Value of shares

(1) For the purposes of section 82SA, the value of a fully paid share as at the valuation date is:

(a) where:

(i) the share is included in a class of shares that, during the whole of the relevant valuation period, was listed for quotation in the official list of a stock exchange that was a prescribed stock exchange during the whole of that period, or in the official lists of 2 or more stock exchanges each of which was a prescribed stock exchange during the whole of that period; and

(ii) fully paid shares included in that class of shares were recorded by that stock exchange, or by one or more of those stock exchanges, as the case may be, as having been sold during that period;

an amount ascertained by dividing the total consideration paid or payable in respect of those sales by the total number of shares so recorded as having been sold; and

(b) in any other case—the amount that a person who is a qualified person in relation to the valuing of the share certifies that, on a true and fair view of the state of the company's affairs, would, in respect of a sale at the end of the relevant valuation period between a willing but not anxious seller and a willing but not anxious buyer, be expected to be the consideration paid for the share, on the assumption, in a case where the class of shares in which that share is included was not, at the end of the relevant valuation period, listed for quotation in the official list of a stock exchange that, at that time, was a prescribed stock exchange, that the memorandum, or memorandum and articles, of the

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company, or other instrument constituting or defining the constitution of the company, satisfied, at that time, such of the requirements of a stock exchange that, at that time, was a prescribed stock exchange as it would have been necessary to satisfy to enable that class of shares to be listed for quotation in the official list of that stock exchange.

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Division 5—Partnerships

90 Interpretation

In this Division:

exempt income, in relation to a partnership, means the exempt income of the partnership calculated as if the partnership were a taxpayer who was a resident.

net income, in relation to a partnership, means the assessable income of the partnership, calculated as if the partnership were a taxpayer who was a resident, less all allowable deductions except deductions allowable under section 290-150 or Division 36 of the *Income Tax Assessment Act 1997*.

non-assessable non-exempt income, in relation to a partnership, means the non-assessable non-exempt income of the partnership calculated as if the partnership were a taxpayer who was a resident.

partnership loss, in relation to a partnership, means the excess (if any) of the allowable deductions, other than deductions allowable under section 290-150 or Division 36 of the *Income Tax Assessment Act 1997*, over the assessable income of the partnership calculated as if the partnership were a taxpayer who was a resident.

91 Liability of partnerships

A partnership shall furnish a return of the income of the partnership, but shall not be liable to pay tax thereon.

92 Income and deductions of partner

(1) The assessable income of a partner in a partnership shall include:

(a) so much of the individual interest of the partner in the net income of the partnership of the year of income as is attributable to a period when the partner was a resident; and

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(b) so much of the individual interest of the partner in the net income of the partnership of the year of income as is attributable to a period when the partner was not a resident and is also attributable to sources in Australia.

(2) Subject to section 830-45 of the *Income Tax Assessment Act 1997*, if a partnership loss is incurred by a partnership in a year of income, there shall be allowable as a deduction to a partner in the partnership:

(a) so much of the individual interest of the partner in the partnership loss as is attributable to a period when the partner was a resident; and

(b) so much of the individual interest of the partner in the partnership loss as is attributable to a period when the partner was not a resident and is also attributable to sources in Australia.

(2AA) However, if:

(a) the partner is a limited partner in a partnership; and

(b) the partnership is a VCLP, an ESVCLP, an AFOF or a VCMP during the year of income;

the amount allowable under subsection (2), in respect of the year of income, as a deduction must not exceed the amount worked out as follows:

Method statement

Step 1. Work out the sum of the amounts that the partner has contributed (the ***partner's contribution***) to the partnership.

Step 2. Subtract the sum of all the amounts (if any) of the partner's contribution that are repaid to the partner.

Step 3. Subtract the sum of all deductions allowed to the partner for losses of the partnership in previous years of income.

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Step 4.	Subtract the sum of the amounts of all the debt interests issued by the partner to the extent that they are secured by the partner's interest in the partnership.

Example: A limited partner contributes $100,000 to a VCLP, having borrowed $80,000. Because the lender values the partner's interest in the partnership at $70,000, the partner also provides, as additional security, other assets valued at $10,000.

If none of the partner's contribution has been repaid and the partner has not been allowed deductions for partnership losses in previous years of income, the amount allowable to the partner for a partnership loss cannot exceed $30,000.

(2A) Subsection (2) does not apply to a partnership loss if the partner's interest in the partnership at the end of the year of income is:

(a) a segregated exempt asset (as defined in the *Income Tax Assessment Act 1997*) of a life assurance company; or

(b) a segregated current pension asset (as defined in the *Income Tax Assessment Act 1997*) of a complying superannuation fund.

(3) The exempt income of a partner in a partnership shall include:

(a) so much of the individual interest of the partner in the exempt income of the partnership of the year of income as is attributable to a period when the partner was a resident; and

(b) so much of the individual interest of the partner in the exempt income of the partnership of the year of income as is attributable to a period when the partner was not a resident and is also attributable to sources in Australia.

(4) The non-assessable non-exempt income of a partner in a partnership shall include:

(a) so much of the individual interest of the partner in the non-assessable non-exempt income of the partnership of the year of income as is attributable to a period when the partner was a resident; and

(b) so much of the individual interest of the partner in the non-assessable non-exempt income of the partnership of the year of income as is attributable to a period when the partner

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was not a resident and is also attributable to sources in Australia.

92A Deductions in respect of outstanding subsection 92(2AA) amounts

(1) If:

(a) the partner is a limited partner in a partnership; and

(b) the partnership is a VCLP, an ESVCLP, an AFOF or a VCMP during the year of income; and

(c) the amount allowable under subsection 92(2) as a deduction to the partner for partnership losses incurred by the partnership in the year of income is not reduced because of subsection 92(2AA); and

(d) the partner has an outstanding subsection 92(2AA) amount for the year of income;

there is allowable as a deduction to the partnership an amount worked out as follows:

Method statement

Step 1. Subtract the amount allowable under subsection 92(2) as a deduction to the partner for partnership losses incurred by the partnership in the year of income from the amount worked out using the method statement in subsection 92(2AA).

Step 2. If the amount worked out under step 1 is greater than or equal to the outstanding subsection 92(2AA) amount for the year of income, the amount of the deduction allowable under this section is the outstanding subsection 92(2AA) amount.

Step 3. If the amount worked out under step 1 is less than the outstanding subsection 92(2AA) amount for the year of income, the amount of the deduction allowable under this section is the amount worked out under step 1.

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(2) The partner has an outstanding subsection 92(2AA) amount for a year of income if:

(a) an amount allowable under subsection 92(2) as a deduction to the partner for partnership losses incurred by the partnership in a previous year of income was reduced because of subsection 92(2AA); and

(b) the difference between:

(i) the sum of all reductions made under subsection 92(2AA) to amounts allowable under subsection 92(2) as deductions to the partner for partnership losses incurred by the partnership in previous years of income; and

(ii) the sum of all amounts allowable under this section, in respect of previous years of income, as deductions to the partner in relation to those reductions;

is greater than zero.

The amount of that difference is the partner's ***outstanding subsection 92(2AA) amount*** for the year of income.

(3) To avoid doubt, a partner's outstanding subsection 92(2AA) amount for a year of income cannot form part of a tax loss for the purposes of Division 36 or 160 of the *Income Tax Assessment Act 1997*.

94 Partner not having control and disposal of share in partnership income

(1) Subject to this section, where:

(a) a share in the net income of a partnership of a year of income is included in the assessable income of a partner in the partnership, not being:

(i) a company;

(ii) a person in the capacity of a trustee; or

(iii) a person who was under the age of 18 years on the last day of the year of income of the person that corresponds with the year of income of the partnership; and

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(b) the partnership is so constituted or controlled, or its operations are so conducted, that the partner has not the real and effective control and disposal of that share or of a part of that share;

this section applies to that share or that part of that share, as the case may be.

(2) Subject to the succeeding provisions of this section, where:

(a) a partnership is so constituted or controlled, or its operations are so conducted, that a partner in the partnership, being a trustee of a trust estate, has not the real and effective control and disposal of his or her share in the net income of the partnership of a year of income or of a part of that share (which share or part of a share, as the case may be, is in this subsection referred to as ***uncontrolled partnership income***); and

(b) in calculating in accordance with section 95 the net income of that trust estate or of any other trust estate, there is included in the assessable income of the trust estate any uncontrolled partnership income;

then:

(c) if:

(i) a beneficiary, not being a company or a person who was under the age of 18 years on the last day of the year of income of the person that corresponds with the year of income of the partnership, is presently entitled to the whole of the income of the trust estate otherwise than in the capacity of a trustee; or

(ii) there is no part of the net income of the trust estate that is included in the assessable income of a beneficiary in pursuance of section 97 or in respect of which the trustee is assessed and liable to pay tax in pursuance of section 98;

this section applies to the portion of the net income of the trust estate that was derived from uncontrolled partnership income;

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(d) if a beneficiary, not being a company or a person who was under the age of 18 years on the last day of the year of income of the person that corresponds with the year of income of the partnership, is presently entitled to a share of the income of the trust estate otherwise than in the capacity of a trustee, this section applies to so much of that share of the net income of the trust estate as bears to that share the same proportion as the portion of the net income of the trust estate that was derived from uncontrolled partnership income bears to the net income of the trust estate; and

(e) if there is a part of the net income of the trust estate that is not included in the assessable income of a beneficiary in pursuance of section 97 and in respect of which the trustee is not assessed and is not liable to pay tax in pursuance of section 98, this section applies to so much of that part of the net income of the trust estate as bears to that part the same proportion as the portion of the net income of the trust estate that was derived from uncontrolled partnership income bears to the net income of the trust estate.

(5) For the purposes of this section:

(a) where:

(i) the assessable income of a trust estate includes the net income or a share of the net income of another trust estate; and

(ii) the assessable income of the other trust estate by reference to which that net income is calculated included income of a particular class (including an amount that is to be deemed by an application or applications of this paragraph to be income of a particular class);

the assessable income of the first-mentioned trust estate shall be deemed to include income of that class of an amount equal to so much of the net income or share of the net income of the other trust estate that is included in the assessable income of the first-mentioned trust estate as bears to that net income or share of that net income the same proportion as the portion of the net income of the other trust estate that was derived

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from income of that class bears to the net income of the other trust estate; and

(b) the portion of the net income of a trust estate that is derived from income of a particular class that is included in the assessable income of the trust estate is the amount remaining after deducting from the income of that class that is included in the assessable income of the trust estate:

(i) any prescribed deductions that relate exclusively to that income of that class;

(ii) so much of any other prescribed deductions (other than apportionable deductions) as, in the opinion of the Commissioner, may appropriately be related to that income of that class; and

(iii) the amount that bears to the prescribed deductions (being apportionable deductions) the same proportion as the amount that, but for this subparagraph, would be the portion of the net income of the trust estate that is derived from that income of that class bears to the sum of the net income of the trust estate and those last-mentioned prescribed deductions.

(6) Where the assessable income of a trust estate includes, or, by virtue of paragraph (5)(a), is to be deemed to include, income of a particular class but the Commissioner is of the opinion that it would be unreasonable to treat each part or share of the net income of the trust estate that is included in the assessable income of a beneficiary, or on or in respect of which the trustee is assessed and liable to pay tax, as including a proportionate part of the portion of the net income of the trust estate that is derived from income of that class, the amount:

(a) that is the amount of a part or share of the net income of the trust estate to which this section applies by virtue of paragraph (2)(d) or (e); or

(b) that is, by virtue of paragraph (5)(a), the amount of the income of that class that is to be deemed to be included in the assessable income of another trust estate;

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is, in lieu of the amount that, but for this subsection, would be the amount of that part or share of that net income or the amount of that income of that class, as the case may be, such amount as the Commissioner considers reasonable in the circumstances.

(8) Where the Commissioner is of the opinion that, by reason of special circumstances, it would be unreasonable that this section should apply to any income, this section does not apply to that income.

(8A) In forming an opinion for the purposes of subsection (8) as to whether it is unreasonable that this section should apply in relation to any of the net income of a trust estate, the Commissioner shall take into consideration the extent (if any) to which that net income represents income to which a beneficiary is presently entitled that is attributable to a period when the beneficiary was not a resident and is also attributable to sources out of Australia.

(9) Where the assessable income of a taxpayer, other than a taxpayer in the capacity of a trustee, includes income to which this section applies, the taxpayer shall be assessed and is liable to pay further tax, in accordance with subsection (10A) or (10B), upon the portion (in this section referred to as the ***eligible portion***) of his or her taxable income that is derived from income to which this section applies.

(10) For the purposes of subsection (9), the portion of the taxable income of a taxpayer that is derived from income to which this section applies is the amount remaining after deducting from the income to which this section applies that is included in his or her assessable income:

(a) any deductions allowed or allowable in his or her assessment that relate exclusively to the income to which this section applies that is included in his or her assessable income;

(b) so much of any other deductions allowed or allowable in his or her assessment (other than apportionable deductions) as, in the opinion of the Commissioner, may appropriately be related to the income to which this section applies that is included in his or her assessable income; and

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(c) the amount that bears to the apportionable deductions allowed or allowable in his or her assessment the same proportion as the amount that, but for this paragraph, would be the portion of his or her taxable income that is derived from income to which this section applies bears to the sum of his or her taxable income and those apportionable deductions.

(10A) Where Division 392 (Long-term averaging of primary producers' tax liability) of the *Income Tax Assessment Act 1997* does not apply in relation to the income of a taxpayer of the year of income, the taxpayer is liable to pay further tax upon the eligible portion of his or her taxable income at the rate declared by the Parliament to be the rate of further tax payable in pursuance of subsection (9) in respect of the relevant part of the taxable income.

(10B) Where Division 392 (Long-term averaging of primary producers' tax liability) of the *Income Tax Assessment Act 1997* applies in relation to the income of a taxpayer of the year of income, the taxpayer is liable to pay further tax upon the relevant part of the eligible portion of his or her taxable income at the rate declared by the Parliament to be the rate of further tax payable in pursuance of subsection (9) in respect of the relevant part of the taxable income and is, in addition, liable to pay further tax upon the prescribed part of the eligible portion of his or her taxable income at the rate declared by the Parliament to be the rate of further tax payable in pursuance of subsection (9) in respect of the prescribed part of the taxable income.

(10C) For the purposes of subsections (10A) and (10B):

(a) the prescribed part of the eligible portion of the taxable income of a taxpayer of a year of income is:

(i) in a case to which subparagraph (ii) does not apply—the sum of:

(A) the amount ascertained by deducting from so much of the assessable primary production income of the taxpayer as is also income to which this section applies so much of the

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deductions allowable in his or her assessment as constitutes primary production deductions and is also deductible in accordance with subsection (10) from income to which this section applies; and

(B) the amount (if any) ascertained in accordance with the formula $\frac{A\ B}{C}$, where:

A is the amount shown in the following table:

Value of A for formula

Item	Taxpayer's taxable non-primary production income	Value of A
1	Nil	Nil
2	Not more than $5,000 (but more than nil)	Difference between basic taxable income and taxable primary production income
3	Between $5,000 and $10,000	$10,000 taxable non-primary production income
4	At least $10,000	Nil

B is the number of whole dollars in the amount ascertained by deducting from the eligible portion the amount calculated in accordance with sub-subparagraph (A); and

C is the number of whole dollars in the amount ascertained by deducting from the taxable income of the taxpayer of the year of income the taxable primary production income of the taxpayer of the year of income; and

(ii) in a case where the taxpayer's primary production deductions for the year of income exceed the taxpayer's assessable primary production income for that year—the

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amount ascertained in accordance with the formula $\frac{A\ B}{C\ +\ D}$, where:

A is the amount shown in the following table:

Value of A for formula

Item	Taxpayer's taxable non-primary production income	Value of A
1	Nil	Nil
2	Not more than $5,000 (but more than nil)	Basic taxable income
3	Between $5,000 and $10,000	Non-primary production shade-out amount worked out under subsection 392-90(3) of the *Income Tax Assessment Act 1997*
4	At least $10,000	Nil

B is the number of whole dollars in the eligible portion.

C is the number of whole dollars in the taxable income of the taxpayer of the year of income; and

D is the number of whole dollars in the difference between the taxpayer's primary production deductions for the year of income and the taxpayer's assessable primary production income for that year; and

(b) the relevant part of the eligible portion of the taxable income of the taxpayer is the amount ascertained by deducting from the amount of that eligible portion so much of that eligible portion as is the prescribed part of that eligible portion.

(11) Where:

(a) section 98 applies in relation to the net income of a trust estate or a share of that net income; and

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(b) this section applies to a portion (in this subsection referred to as the ***relevant portion***) of that net income or of that share of that net income, as the case may be;

the trustee of the trust estate shall be assessed and is liable to pay further tax, in accordance with subsection (12A) or (12B), upon the relevant portion of that net income or of that share of that net income, as the case may be.

(12) Where:

(a) section 99 applies in relation to the net income of a trust estate or a part of that net income; and

(b) this section applies to a portion (in this section referred to as the ***eligible trust portion***) of that net income or of that part of that net income, as the case may be;

the trustee of the trust estate shall be assessed and is liable to pay further tax, in accordance with subsection (12A) or (12B), upon the eligible trust portion.

(12A) Where Division 16 does not apply in respect of the net income of a trust estate of which the eligible trust portion is a portion, the trustee is liable to pay further tax upon the eligible trust portion at the rate declared by the Parliament to be the rate of further tax payable in pursuance of subsection (11) or (12) in respect of the relevant part of the net income of a trust estate.

(12B) Where Division 16 applies in respect of the net income of a trust estate of which the eligible trust portion is a portion, the trustee is liable to pay further tax upon the relevant part of the eligible trust portion at the rate declared by the Parliament to be the rate of further tax payable in pursuance of subsection (11) or (12) in respect of the relevant part of the net income of a trust estate and is, in addition, liable to pay further tax upon the prescribed part of the eligible trust portion at the rate declared by the Parliament to be the rate of further tax payable in pursuance of subsection (11) or (12) in respect of the prescribed part of the net income of a trust estate.

(12C) For the purposes of subsections (12A) and (12B):

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(a) the prescribed part of the eligible trust portion in relation to a trust estate in relation to a year of income is:

(i) in a case to which subparagraph (ii) does not apply—the sum of:

(A) the amount ascertained by deducting from so much of the assessable primary production income of the trust estate of the year of income as is also income that was taken into account in determining the amount of the eligible trust portion so much of the deductions allowable in the assessment of the trustee of the trust estate as constitutes relevant primary production deductions and was also deductible in accordance with subsection (5) in determining the amount of the eligible trust portion; and

(B) the amount (if any) ascertained in accordance with the formula $\frac{A\ B}{C}$, where:

A is the amount of the notional net income from primary production of the trust estate of the year of income.

B is the number of whole dollars in the amount ascertained by deducting from the eligible trust portion the amount calculated in accordance with sub-subparagraph (A); and

C is the number of whole dollars in the amount ascertained by deducting from the net income of the trust estate of which the eligible trust portion is a portion the actual net income from primary production of the trust estate of the year of income; and

(ii) in a case where the aggregate of the relevant primary production deductions allowable in calculating the net income of the trust estate of the year of income exceeds the assessable primary production income of the trust

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estate of the year of income—the amount ascertained in accordance with the formula $\frac{A\ B}{C\ +\ D}$, where:

A is the amount of the notional net income from primary production of the trust estate of the year of income.

B is the number of whole dollars in the eligible trust portion.

C is the number of whole dollars in the net income of the trust estate of which the eligible trust portion is a portion; and

D is the number of whole dollars in the amount by which the net income of the trust estate of which the eligible trust portion is a portion would have been increased if the aggregate of the relevant primary production deductions allowable in calculating the net income of the trust estate of the year of income had been equal to the assessable primary production income of the trust estate of the year of income; and

(b) the relevant part of the eligible trust portion in relation to a trust estate is the amount ascertained by deducting from that eligible trust portion so much of that eligible trust portion as is the prescribed part of that eligible trust portion.

(13) In this section:

prescribed deductions, in relation to a trust estate, means the deductions that are allowable in calculating in accordance with section 95 the net income of the trust estate.

share in the net income of a partnership, in relation to a partner, means:

(a) so much of the individual interest of the partner in the net income of the partnership and of any income derived by the partner from the partnership otherwise than as a partner as is attributable to a period when the partner was a resident; and

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(b) so much of the individual interest of the partner in the net income of the partnership and of any income derived by the partner from the partnership otherwise than as a partner as is attributable to a period when the partner was not a resident and is also attributable to sources in Australia.

(14) In this section, ***actual net income from primary production***, ***assessable primary production income***, ***notional net income from primary production*** and ***relevant primary production deductions*** have the same respective meanings as in section 156.

(15) In this section, the following terms have the same meanings that they have in Division 392 (Long-term averaging of primary producers' tax liability) of the *Income Tax Assessment Act 1997*:

(a) assessable primary production income;

(b) basic taxable income;

(c) non-primary production shade-out amount;

(d) primary production deductions;

(e) taxable non-primary production income;

(f) taxable primary production income.

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Division 5A—Income of certain limited partnerships

Subdivision A—Preliminary

94A Object

The object of this Division is to provide for certain limited partnerships to be treated as companies for tax purposes.

94B Interpretation

In this Division:

income tax law means:

(a) this Act (other than this Division and Division 830 of the *Income Tax Assessment Act 1997*); and

(b) an Act that imposes any tax payable under this Act; and

(c) the *Income Tax Rates Act 1986*; and

(d) the *Taxation Administration Act 1953*, so far as it relates to an Act covered by paragraph (a), (b) or (c); and

(e) any other Act, so far as it relates to an Act covered by paragraph (a), (b), (c) or (d); and

(f) regulations under an Act covered by any of the preceding paragraphs.

year of income means (except in paragraph 94L(b)) the year of income in which 19 August 1992 occurred or a later year of income.

94C Continuity of limited partnership not affected by changes in composition

For the purposes of this Division, a change in the composition of a limited partnership does not affect the continuity of the partnership.

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Subdivision B—Corporate limited partnerships

94D Corporate limited partnerships

(1) For the purposes of this Division, a limited partnership is a corporate limited partnership in relation to a year of income of the partnership if:

(a) the year of income is the 1995-96 year of income or a later year of income; or

(b) the partnership was formed on or after 19 August 1992; or

(c) both:

(i) the partnership was formed before 19 August 1992; and

(ii) the partnership does not pass the continuity of business test set out in section 94E; or

(d) all of the following apply:

(i) the partnership was formed before 19 August 1992;

(ii) a change in the composition of the partnership occurs during the period:

(A) beginning on 19 August 1992; and

(B) ending at the end of the year of income;

(iii) the partners do not elect, in accordance with section 94F, that the partnership is not to be treated as a corporate limited partnership in relation to the year of income.

(2) However, a partnership that is a VCLP, an ESVCLP, an AFOF or a venture capital management partnership cannot be a corporate limited partnership.

Note 1: This subsection can apply without the partnership meeting the applicable registration requirements under the *Venture Capital Act 2002*. It must be registered under that Act in order to be a VCLP, an ESVCLP or an AFOF, but it is possible for it to remain registered while the requirements are not met.

Note 2: VCLPs, ESVCLPs, AFOFs and VCMPs are taxed as ordinary partnerships under Division 5.

Note 3: If the partnership's registration as a VCLP, ESVCLP or AFOF is unconditional, some partners' share in capital gains and losses from

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CGT events relating to some investments may be disregarded: see Subdivision 118-F of the *Income Tax Assessment Act 1997*.

(3) A ***venture capital management partnership*** is a limited partnership that:

(a) is a general partner of one or more of the following:

(i) one or more VCLPs;

(ia) one or more ESVCLPs;

(ii) one or more AFOFs; and

(b) only carries on activities that are related to being such a general partner.

A limited partnership ceases to be a venture capital management partnership if it ceases to meet the requirements of paragraphs (a) and (b).

Note: In this Act, the term "venture capital management partnership" is usually abbreviated to "VCMP".

(4) The place of residence of a VCMP is the place at which the partnership has its central management and control.

(5) A limited partnership that is a foreign hybrid limited partnership in relation to a year of income because of subsection 830-10(1) of the *Income Tax Assessment Act 1997* is not a corporate limited partnership in relation to the year of income.

Note: As result, both the normal partnership provisions and special provisions relating to foreign hybrid limited partnerships will apply to the entity.

(6) If, for the purpose of applying this Act and the *Income Tax Assessment Act 1997* in relation to a partner's interest in a limited partnership, the partnership is a foreign hybrid limited partnership in relation to a year of income because of subsection 830-10(2) of that Act, the partnership is not a corporate limited partnership in relation to the partner's interest in relation to the year of income.

Note: As result, both the normal partnership provisions and special provisions relating to foreign hybrid limited partnerships will apply to the entity, but only in relation to the partner's interest.

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94E Continuity of business test

In determining whether a limited partnership is a corporate limited partnership in relation to a year of income, the partnership passes the continuity of business test if, and only if:

(a) at all times during the period:

(i) beginning on 19 August 1992; and

(ii) ending at the end of the year of income;

the partnership carried on the same business as it carried on immediately before the beginning of that period; and

(b) the partnership did not, at any time during that period, derive income from a business of a kind that it did not carry on, or from a transaction of a kind that it had not entered into in the course of its business operations, before that period.

94F Change in composition of limited partnership—election that partnership not be treated as an eligible limited partnership

An election referred to in paragraph 94D(1)(d) in relation to a limited partnership and in relation to a year of income has no effect unless:

(a) the partnership passes the continuity of ownership test set out in section 94G; and

(b) the election is made:

(i) within 6 months after the end of the later of the following years of income:

(A) the year of income to which the election relates;

(B) the year of income in which the *Taxation Laws Amendment Act (No. 6) 1992* received the Royal Assent; or

(ii) within such further period as the Commissioner allows.

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94G Continuity of ownership test

In determining whether a limited partnership is a corporate limited partnership in relation to a year of income, the partnership passes the continuity of ownership test if, and only if:

(a) at all times during the period:

(i) beginning on 19 August 1992; and

(ii) ending at the end of the year of income;

more than 50% of the interests in the partnership were held by persons who, immediately before that period, held more than 50% of the interests in the partnership; or

(b) the condition set out in paragraph (a) is not satisfied only because of the acquisition during so much of that period as occurred before 1 July 1993 of interests in the partnership, where the acquisitions are in response to, and in accordance with the terms of:

(i) a prospectus, offer or invitation issued before 19 August 1992; or

(ii) if that prospectus, offer or invitation was varied before 19 August 1992—that prospectus, offer or invitation as so varied.

Subdivision C—Corporate tax modifications applicable to corporate limited partnerships

94H Corporate tax modifications applicable to corporate limited partnerships

If a partnership is a corporate limited partnership in relation to a year of income, the income tax law has effect, in relation to the partnership and in relation to the year of income, subject to the changes set out in the following provisions of this Subdivision.

94J *Company* includes corporate limited partnership

A reference in the income tax law (other than the definitions of ***dividend***, and ***resident*** or ***resident of Australia***, in section 6 of this

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Act and other than Division 355 of the *Income Tax Assessment Act 1997*) to a company or to a body corporate includes a reference to the partnership.

94K *Partnership* does not include corporate limited partnership

A reference in the income tax law to a partnership does not include a reference to the partnership.

94L *Dividend* includes distribution of corporate limited partnership

A reference in the income tax law (other than subsection 44(1A) of this Act) to a dividend or to a dividend within the meaning of section 6:

(a) includes a reference to a distribution made by the partnership, whether in money or in other property, to a partner in the partnership; and

(b) does not include a reference to a distribution to the extent to which the distribution is attributable to profits or gains arising during a year of income in relation to which the partnership was not a corporate limited partnership.

94M Drawings etc. deemed to be dividends paid out of profits

(1) If the partnership pays or credits an amount to a partner in the partnership:

(a) against the profits or anticipated profits of the partnership; or

(b) otherwise in anticipation of the profits of the partnership;

(whether or not the amount of the profits or anticipated profits is ascertainable), the amount paid or credited is taken, for the purposes of the income tax law, to be a dividend paid by the partnership to the partner out of profits derived by the partnership.

(2) If the partnership makes a subsequent distribution, the Commissioner must take such steps (if any) as are necessary to ensure that the partner is not subject to double taxation.

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94N *Private company* does not include corporate limited partnership

A reference in the income tax law to a private company in relation to the year of income does not include a reference to the partnership.

Note: Division 7A (Distributions to entities connected with a private company) applies to certain corporate limited partnerships in the same way as it applies to private companies: see section 109BB.

94P *Share* includes interest in corporate limited partnership

A reference in the income tax law to a share includes a reference to an interest in the partnership.

94Q *Shareholder* includes partner in corporate limited partnership

A reference in the income tax law to a shareholder includes a reference to a partner in the partnership.

94R *Liquidator* may include partner in corporate limited partnership

For the purposes of the income tax law:

(a) a reference to the liquidator of the partnership includes a reference to a partner in the partnership who carries out the winding-up of the partnership; and

(b) a reference to distributions made by a liquidator in the course of winding up the partnership includes a reference to distributions made by such a partner to himself or herself in the course of winding-up the partnership.

94S Continuity of corporate limited partnership not affected by changes in composition

For the purposes of the income tax law, a change in the composition of the partnership does not affect the continuity of the partnership.

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94T Residence of corporate limited partnership

(1) For the purposes of the income tax law, the partnership is:

(a) a resident; and

(b) a resident within the meaning of section 6; and

(c) a resident of Australia; and

(d) a resident of Australia within the meaning of section 6;

if and only if:

(e) the partnership was formed in Australia; or

(f) either:

(i) the partnership carries on business in Australia; or

(ii) the partnership's central management and control is in Australia.

(2) In determining whether the partnership carries on business in Australia for the purposes of subparagraph (1)(f)(i), if, for the year of income, the partnership is an IMR entity (within the meaning of the *Income Tax Assessment Act 1997*, but disregarding paragraph 842-220(a) of that Act), disregard business that:

(a) is carried on by the partnership (either by itself directly or by another entity on its behalf); and

(b) solely relates to IMR financial arrangements (within the meaning of that Act).

94U Incorporation

For the purposes of the income tax law, the partnership is taken to have been incorporated:

(a) in the place where it was formed; and

(b) under a law in force in that place.

94V Obligations and offences

(1) The application of the income tax law to the partnership as if the partnership were a company is subject to the following changes:

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(a) obligations that would be imposed on the partnership are imposed instead on each partner, but may be discharged by any of the partners;
(b) the partners are jointly and severally liable to pay any amount that would be payable by the partnership;
(c) any offence against the income tax law that would otherwise be committed by the partnership is taken to have been committed by each of the partners.

(2) In a prosecution of a person for an offence that the person is taken to have committed because of paragraph (1)(c), it is a defence if the person proves that the person:
(a) did not aid, abet, counsel or procure the relevant act or omission; and
(b) was not in any way knowingly concerned in, or party to, the relevant act or omission (whether directly or indirectly and whether by any act or omission of the person).

94X Modification of loss provisions

Subdivisions 165-A and 165-B of the *Income Tax Assessment Act 1997* apply in relation to the partnership as if the provisions relating to voting power had not been enacted.

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Division 6—Trust income

95AAA Simplified outline of the relationship between this Division, Division 6E and Subdivisions 115-C and 207-B of the *Income Tax Assessment Act 1997*

The following is a simplified outline of the relationship between this Division, Division 6E and Subdivisions 115-C and 207-B of the *Income Tax Assessment Act 1997*.

This Division sets out the basic income tax treatment of the net income of the trust estate. Generally:

(a) it has the result of assessing beneficiaries on a share of the net income of the trust estate based on their present entitlement to a share of the income of the trust estate; and

(b) it has the result of assessing the trustee directly on any residual net income; and

(c) as a collection mechanism, it has the result of assessing the trustee in respect of some beneficiaries, such as non-residents or those under a legal disability.

If the trust estate has capital gains, franked distributions or franking credits, this basic treatment is modified as described below.

Division 6E modifies the operation of this Division for the purpose of excluding amounts relevant to capital gains, franked distributions and franking credits from the calculations of assessable amounts under sections 97, 98, 99, 99A and 100.

Division 6E does not modify the operation of this Division (or any other provision of this Act) for any other purpose. For example:

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(a) it does not modify the operation of this Division for the purposes of applying section 100A; and

(b) it does not modify amounts taxed in the hands of the trustee under Subdivisions 115-C and 207-B of the *Income Tax Assessment Act 1997*.

Subdivisions 115-C and 207-B of the *Income Tax Assessment Act 1997* provide the corresponding taxation treatment for those capital gains, franked distributions and franking credits. Specifically:

(a) Subdivision 115-C of that Act has the effect that an amount corresponding to each of those capital gains is taxed in the hands of the beneficiaries of the trust (as a capital gain) and, if necessary, assessed to the trustee.

(b) Subdivision 207-B of that Act has the effect that an amount corresponding to each of those franked distributions is taxed in the hands of the beneficiaries of the trust and, if necessary, the trustee. It also has the effect that the entity in whose hands those distributions are taxed can take advantage of the relevant amount of related franking credits.

95AAB Adjustments under Subdivision 115-C or 207-B of the *Income Tax Assessment Act 1997*—references in this Act to assessable income under section 97, 98A or 100

(1) Subsection (2) applies if an amount is included in the assessable income of a beneficiary of a trust estate because of Subdivision 115-C or 207-B of the *Income Tax Assessment Act 1997*.

(2) For the purposes of a provision of this Act (other than a provision mentioned in subsection (3)), treat the amount as being included in

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the beneficiary's assessable income in relation to the net income of the trust estate under section 97, 98A or 100 (as the case requires).

(3) The provisions are as follows:

(a) sections 97, 98A (other than subsection 98A(2)) and 100 (other than subsections 100(2) and (3));

(b) sections 98, 99 and 99A;

(c) Subdivisions 115-C and 207-B of the *Income Tax Assessment Act 1997*.

(4) To avoid doubt, subsection (2) applies despite subsection 6(1AA).

95AAC Adjustments under Subdivision 115-C or 207-B of the *Income Tax Assessment Act 1997*—references in this Act to liabilities under section 98, 99 or 99A

(1) Subsection (2) applies if an amount in respect of which a trustee of a trust estate is liable to be assessed (and pay tax) under section 98 in respect of the beneficiary is increased because of Subdivision 115-C or 207-B of the *Income Tax Assessment Act 1997*.

(2) For the purposes of a provision of this Act (other than a provision mentioned in subsection (5)), treat the amount of the increase as being an amount in respect of which the trustee is liable to be assessed (and pay tax) under section 98 in respect of the beneficiary's interest in or share of the net income of the trust estate.

(3) Subsection (4) applies if an amount in respect of which a trustee of a trust estate is liable to be assessed (and pay tax) under section 99 or 99A is increased because of Subdivision 115-C or 207-B of the *Income Tax Assessment Act 1997*.

(4) For the purposes of a provision of this Act (other than a provision mentioned in subsection (5)), treat the amount of the increase as being an amount in respect of which the trustee is liable to be assessed (and pay tax) under section 99 or 99A in respect of the net income of the trust estate.

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(5) The provisions are as follows:
   (a) sections 97, 98A (other than subsection 98A(2)) and 100 (other than subsections 100(2) and (3));
   (b) sections 98, 99 and 99A;
   (c) Subdivisions 115-C and 207-B of the *Income Tax Assessment Act 1997*.

(6) To avoid doubt, subsections (2) and (4) apply despite subsection 6(1AA).

95AAD Division does not apply in relation to AMIT

This Division does not apply in relation to a trust estate that is an AMIT.

95 Interpretation

(1) In this Division:

adjusted Division 6 percentage, of an entity that is a beneficiary or trustee of a trust estate, means the entity's Division 6 percentage of the income of the trust estate calculated on the assumption that the amount of a capital gain or franked distribution to which any beneficiary or the trustee of the trust estate is specifically entitled were disregarded in working out the income of the trust estate.

adjusted net income, in relation to a trust estate, has the meaning given by subsection 100AB(4).

Division 6 percentage:
   (a) a beneficiary of a trust estate has a ***Division 6 percentage*** of the income of the trust estate equal to the share (expressed as a percentage) of the income of the trust estate to which the beneficiary is presently entitled; and
   (b) the trustee of a trust estate has a ***Division 6 percentage*** of the income of the trust estate equal to the share (expressed as a percentage) of the income of the trust estate to which no beneficiary is presently entitled.

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However, if the income of a trust estate is nil:

(c) a beneficiary of a trust estate has a ***Division 6 percentage*** of the income of the trust estate of 0%; and

(d) the trustee of a trust estate has a ***Division 6 percentage*** of the income of the trust estate of 100%.

exempt income, in relation to a trust estate, means the exempt income of the trust estate calculated as if the trustee were a taxpayer who was a resident.

Note: See also Division 54 of the *Income Tax Assessment Act 1997* (in particular, the provisions in section 54-70 about trusts), which provides a tax exemption for certain payments under structured settlements and structured orders.

net income, in relation to a trust estate, means the total assessable income of the trust estate calculated under this Act as if the trustee were a taxpayer in respect of that income and were a resident, less all allowable deductions, except deductions under Division 393 of the *Income Tax Assessment Act 1997* (Farm management deposits) and except also, in respect of any beneficiary who has no beneficial interest in the corpus of the trust estate, or in respect of any life tenant, the deductions allowable under Division 36 of the *Income Tax Assessment Act 1997* in respect of such of the tax losses of previous years as are required to be met out of corpus.

A trust may be required to work out its net income in a special way by Division 266 or 267 in Schedule 2F to this Act or Division 275 of the *Income Tax Assessment Act 1997*.

non-assessable non-exempt income, in relation to a trust estate, means the non-assessable non-exempt income of the trust estate calculated as if the trustee were a taxpayer who was a resident.

specifically entitled has the same meaning as in the *Income Tax Assessment Act 1997*.

(2) For the purposes of this Division, a trust estate shall be taken to be a resident trust estate in relation to a year of income if:

(a) a trustee of the trust estate was a resident at any time during the year of income; or

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(b) the central management and control of the trust estate was in Australia at any time during the year of income.

(3) In this Division, a trust estate that is not a resident trust estate in relation to a year of income is referred to as a non-resident trust estate in relation to that year of income.

95AB Modifications for special disability trusts

(1) This Division applies with the modifications set out in this section in relation to a year of income in relation to a trust estate that is a special disability trust at the end of the year of income.

(2) Treat the principal beneficiary of the trust estate as being presently entitled to all of the income of the trust estate of the year of income.

(3) If the principal beneficiary of the trust estate is a resident of Australia at the end of the year of income treat that person as being under a legal disability throughout the year of income.

(4) If there is no income of the trust estate assume that:
(a) there is income of the trust estate of the year of income; and
(b) the principal beneficiary of the trust estate is presently entitled to all of the income of the trust estate of the year of income.

(5) If the amount to be deducted under subsection 100(2) from the income tax assessed against the principal beneficiary is greater than the amount of the income tax assessed against the principal beneficiary, the Commissioner must pay to the principal beneficiary an amount equal to the difference between those 2 amounts.

Note: The tax offset is subject to the refundable tax offset rules: see section 67-23 of the *Income Tax Assessment Act 1997*.

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95A Special provisions relating to present entitlement

(1) For the purposes of this Act, where a beneficiary of a trust estate is presently entitled to any income of the trust estate, the beneficiary shall be taken to continue to be presently entitled to that income notwithstanding that the income is paid to, or applied for the benefit of, the beneficiary.

(2) For the purposes of this Act, where a beneficiary has a vested and indefeasible interest in any of the income of a trust estate but is not presently entitled to that income, the beneficiary shall be deemed to be presently entitled to that income of the trust estate.

95B Certain beneficiaries deemed not to be under legal disability

For the purposes of this Act, a beneficiary of a trust estate who is presently entitled to a share of the income of the trust estate in the capacity of a trustee of another trust estate shall, in respect of his or her present entitlement to that share, be deemed not to be under a legal disability.

96 Trustees

Except as provided in this Act, a trustee shall not be liable as trustee to pay income tax upon the income of the trust estate.

97 Beneficiary not under any legal disability

(1) Subject to Division 6D, where a beneficiary of a trust estate who is not under any legal disability is presently entitled to a share of the income of the trust estate:

(a) the assessable income of the beneficiary shall include:

(i) so much of that share of the net income of the trust estate as is attributable to a period when the beneficiary was a resident; and

(ii) so much of that share of the net income of the trust estate as is attributable to a period when the beneficiary

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was not a resident and is also attributable to sources in Australia; and

(b) the exempt income of the beneficiary shall include:

(i) so much of the individual interest of the beneficiary in the exempt income of the trust estate as is attributable to a period when the beneficiary was a resident; and

(ii) so much of the individual interest of the beneficiary in the exempt income of the trust estate as is attributable to a period when the beneficiary was not a resident and is also attributable to sources in Australia;

except to the extent to which the exempt income to which that individual interest relates was taken into account in calculating the net income of the trust estate; and

(c) the non-assessable non-exempt income of the beneficiary shall include:

(i) so much of the individual interest of the beneficiary in the non-assessable non-exempt income of the trust estate as is attributable to a period when the beneficiary was a resident; and

(ii) so much of the individual interest of the beneficiary in the non-assessable non-exempt income of the trust estate as is attributable to a period when the beneficiary was not a resident and is also attributable to sources in Australia.

(2) A reference in this section to income of a trust estate to which a beneficiary is presently entitled shall be read as not including a reference to income of a trust estate:

(a) to which a beneficiary is deemed to be presently entitled by virtue of the operation of subsection 95A(2) where the beneficiary:

(i) is a natural person;

(ii) is a resident at the end of the year of income;

(iii) is not, in respect of that income, a beneficiary in the capacity of a trustee of another trust estate; and

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(iv) is not a beneficiary to whom subsection 97A(1) or (1A) applies in relation to the year of income; or

(b) to which a beneficiary is presently entitled where the beneficiary:

(i) is a non-resident at the end of the year of income;

(ii) is not a beneficiary to whom subsection (3) of this section or subsection 97A(1) or (1A) applies in relation to the year of income; and

(iii) is not, in respect of that income, a beneficiary in the capacity of a trustee of another trust estate.

(3) Where:

(a) a beneficiary of a trust estate is presently entitled to a share of the income of the trust estate;

(b) the beneficiary is a non-resident at the end of the year of income; and

(c) the beneficiary is:

(i) a body, association, fund or organization the income of which is exempt from tax by virtue of the operation of Subdivision 50-A or section 51-5, 51-10 or 51-30 of the *Income Tax Assessment Act 1997*; or

(ii) an organization the income of which is exempt from tax by virtue of a regulation in force under the *International Organisations (Privileges and Immunities) Act 1963*;

that beneficiary is, for the purposes of the application of this Division in relation to that beneficiary in relation to that year of income, a beneficiary to whom this subsection applies.

97A Beneficiaries who are owners of farm management deposits

(1) Where a beneficiary who is under a legal disability:

(a) is presently entitled to a share of the income of a trust estate derived during a year of income of the beneficiary; and

(b) is the owner of a farm management deposit made during the year of income;

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this Division applies in relation to the beneficiary in relation to the year of income as if the beneficiary were not under any legal disability.

(1A) Where a beneficiary who is deemed by subsection 95A(2) to be presently entitled to any income of a trust estate derived during a year of income of the beneficiary:

(a) is not under a legal disability; and

(b) is the owner of a farm management deposit made during the year of income;

the beneficiary is, for the purposes of the application of this Division in relation to that beneficiary in relation to that year of income, a beneficiary to whom this subsection applies.

Note: This section applies to certain beneficiaries as if they were individuals who are carrying on a primary production business: see subsections 393-25(3), (4), (5) and (6) of the *Income Tax Assessment Act 1997*.

98 Liability of trustee

(1) Where a beneficiary of a trust estate who is under a legal disability is presently entitled to a share of the income of the trust estate, the trustee of the trust estate shall be assessed and liable to pay tax in respect of:

(a) so much of that share of the net income of the trust estate as is attributable to a period when the beneficiary was a resident; and

(b) so much of that share of the net income of the trust estate as is attributable to a period when the beneficiary was not a resident and is also attributable to sources in Australia;

as if it were the income of an individual and were not subject to any deduction.

(2) Where a beneficiary of a trust estate:

(a) is deemed to be presently entitled to a share of the income of the trust estate of a year of income by virtue of the operation of subsection 95A(2);

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(aa) is a natural person and is not, in respect of that share of the income of the trust estate, a beneficiary in the capacity of a trustee of another trust estate;

(b) is not a beneficiary to whom subsection 97A(1) or (1A) applies in relation to the year of income; and

(c) is not under a legal disability;

the trustee of the trust estate shall be assessed and liable to pay tax in respect of:

(d) so much of that share of the net income of the trust estate as is attributable to a period when the beneficiary was a resident; and

(e) so much of that share of the net income of the trust estate as is attributable to a period when the beneficiary was not a resident and is also attributable to sources in Australia;

as if it were the income of an individual and were not subject to any deduction.

(2A) If:

(a) a beneficiary of a trust estate who is presently entitled to a share of the income of the trust estate:

(i) is a non-resident at the end of the year of income; and

(ii) is not, in respect of that share of the income of the trust estate, a beneficiary in the capacity of a trustee of another trust estate; and

(iii) is not a beneficiary to whom section 97A applies in relation to the year of income; and

(iv) is not a beneficiary to whom subsection 97(3) applies; and

(b) the trustee of the trust estate is not assessed and is not liable to pay tax under subsection (1) or (2) in respect of any part of that share of the net income of the trust estate;

subsection (3) applies to the trustee in respect of:

(c) so much of that share of the net income of the trust estate as is attributable to a period when the beneficiary was a resident; and

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(d) so much of that share of the net income of the trust estate as is attributable to a period when the beneficiary was not a resident and is also attributable to sources in Australia.

(3) A trustee to whom this subsection applies in respect of an amount of net income is to be assessed and is liable to pay tax:

(a) if the beneficiary is not a company—in respect of the amount of net income as if it were the income of an individual and were not subject to any deduction; or

(b) if the beneficiary is a company—in respect of the amount of net income at the rate declared by the Parliament for the purposes of this paragraph.

Note: If the trust estate's net income includes a net capital gain, and the beneficiary is a company, Subdivision 115-C of the *Income Tax Assessment Act 1997* affects the assessment of the trustee.

(4) If:

(a) a beneficiary of a trust estate (the ***first trust estate***) who is presently entitled to a share of the income of the first trust estate:

(i) is, in respect of that share of the income of the first trust estate, a beneficiary in the capacity of a trustee of another trust estate; and

(ii) is not a beneficiary to whom subsection 97(3) applies; and

(b) a trustee of the other trust estate is a non-resident at the end of the year of income;

the trustee of the first trust estate is to be assessed and is liable to pay tax in respect of so much of that share of the net income of the first trust estate as is attributable to sources in Australia at the rate declared by the Parliament for the purposes of this subsection.

Note: If the trust estate's net income includes a net capital gain, Subdivision 115-C of the *Income Tax Assessment Act 1997* affects the assessment of the trustee.

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98A Non-resident beneficiaries assessable in respect of certain income

(1) Where the trustee of a trust estate is assessed and is liable to pay tax in respect of the whole or a part of a share of the net income of a trust estate of a year of income in pursuance of subsection 98(3), the assessable income of the beneficiary who is presently entitled to that share of the income of the trust estate shall include:

(a) so much of the individual interest of the beneficiary in the net income of the trust estate as is attributable to a period when the beneficiary was a resident; and

(b) so much of the individual interest of the beneficiary in the net income of the trust estate as is attributable to a period when the beneficiary was not a resident and is also attributable to sources in Australia.

(2) Where the trustee of a trust estate is assessed and is liable to pay tax in respect of the whole or a part of a share of the net income of a trust estate of a year of income in pursuance of subsection 98(3):

(a) there shall be deducted from the income tax assessed against the beneficiary the amount (in this subsection referred to as the ***relevant amount***) of the tax paid by the trustee in respect of the beneficiary's interest in the net income of the trust estate; and

(b) if the relevant amount is greater than the amount of the income tax assessed against the beneficiary—the Commissioner shall pay to the beneficiary an amount equal to the difference between those 2 amounts.

Note: See Division 3A of Part IIB of the *Taxation Administration Act 1953* for the rules about how the Commissioner must pay the entity. Division 3 of Part IIB allows the Commissioner to apply the amount owing as a credit against tax debts that the entity owes to the Commonwealth.

(3) If a beneficiary of a trust estate who is presently entitled to a share of the income of the trust estate:

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(a) is not, in respect of that share of the income of the trust estate, a beneficiary in the capacity of a trustee of another trust estate; and

(b) is a non-resident at the end of the year of income;

the assessable income of the beneficiary includes so much of the individual interest of the beneficiary in the net income of the trust estate as is reasonably attributable to a part of the net income of another trust estate in respect of which the trustee of the other trust estate is assessed and is liable to pay tax under subsection 98(4).

(4) To the extent that subsection (3) includes an amount in the assessable income of a beneficiary of a trust estate, the amount is not included by subsection (1) or section 100.

98B Deduction from beneficiary's tax

(1) This section applies to a beneficiary of a trust estate for a year of income if the assessable income of the beneficiary of the year of income includes an amount covered by subsection (2).

(2) This subsection covers an amount (the ***assessable amount***) if:

(a) the amount is included in the assessable income of the beneficiary under one of the following:

(i) section 97;

(ii) subsection 98A(3);

(iii) section 100; and

(b) the amount does not represent income of the trust estate to which the beneficiary is presently entitled in the capacity of a trustee of another trust estate; and

(c) the amount is reasonably attributable to:

(i) an amount (the ***taxed net income***) in respect of which the trustee of another trust estate is assessed and liable to pay tax (the ***subsection 98(4) tax***) under subsection 98(4); or

(ii) an amount (the ***taxed component***) in respect of which the trustee of an AMIT is assessed and liable to pay tax (the ***paragraph 276-105(2)(c) tax***) because of

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paragraph 276-105(2)(c) of the *Income Tax Assessment Act 1997*.

(3) A proportion of the subsection 98(4) tax or of the paragraph 276-105(2)(c) tax (as applicable) is to be deducted from the income tax assessed against the beneficiary of the year of income. That proportion is the same as the proportion of the taxed net income or of the taxed component (as applicable) that gave rise to the assessable amount.

Note: To work out the proportion of the taxed net income that gives rise to assessable income for a beneficiary of another trust estate, you would have regard to the share of the income of each interposed trust estate to which a beneficiary (including a beneficiary in the capacity of a trustee) is presently entitled.

Example: The P Trust has two non-resident trustee beneficiaries, the trustees of the S Trust and the H Trust. Each trustee is presently entitled to a 1/2 share of the income of the P Trust. The net income of the P Trust is $100,000. The trustee of the P Trust pays tax of $22,500 under subsection 98(4) in respect of the trustee of the S Trust's interest and $22,500 under subsection 98(4) in respect of the trustee of the H Trust's interest.

The S Trust has a non-resident beneficiary, G, who is presently entitled to a 1/3 share of the income of the S Trust. The net income of the S Trust is $30,000. Subsection 98A(3) includes $10,000 in G's assessable income.

The taxed net income of the P trust is $50,000. The proportion of that taxed net income that gave rise to the $10,000 being included in G's assessable income is 1/3.This is because G had a 1/3 share of the income of the S Trust. $7,500 (1/3 x $22,500) is deducted from the income tax assessed against G.

If section 97, subsection 98A(3) or section 100 also includes amounts in the assessable income of any beneficiaries of the H Trust, each of those beneficiaries also works out the amount of the deduction against the income tax assessed against them in the same way.

(4) If the amount to be deducted under subsection (3) is greater than the amount of the income tax assessed against the beneficiary, the Commissioner must pay to the beneficiary an amount equal to the difference between those 2 amounts.

Note: See Division 3A of Part IIB of the *Taxation Administration Act 1953* for the rules about how the Commissioner must pay the entity.

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Division 3A of Part IIB allows the Commissioner to apply the amount owing as a credit against tax debts that the entity owes to the Commonwealth.

99 Certain trust income to be taxed as income of an individual

(1) This section applies in relation to a trust estate in relation to a year of income only if section 99A does not apply in relation to that trust estate in relation to that year of income.

(2) Where there is no part of the net income of a resident trust estate:

(a) that is included in the assessable income of a beneficiary of the trust estate in pursuance of section 97;

(b) in respect of which the trustee of the trust estate is assessed and liable to pay tax in pursuance of section 98; or

(c) that represents income to which a beneficiary is presently entitled that is attributable to a period when the beneficiary was not a resident and is also attributable to sources out of Australia;

the trustee shall be assessed and is liable to pay tax on the net income of the trust estate as if it were the income of an individual who was a resident and were not subject to any deduction.

(3) Where there is a part of the net income of a resident trust estate:

(a) that is not included in the assessable income of a beneficiary of the trust estate in pursuance of section 97;

(b) in respect of which the trustee is not assessed and is not liable to pay tax in pursuance of section 98; and

(c) that does not represent income to which a beneficiary is presently entitled that is attributable to a period when the beneficiary was not a resident and is also attributable to sources out of Australia;

the trustee shall be assessed and is liable to pay tax on that part of the net income of the trust estate as if it were the income of an individual who was a resident and were not subject to any deduction.

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(4) Where there is no part of the net income of a trust estate that is not a resident trust estate:

(a) that is included in the assessable income of a beneficiary of the trust estate in pursuance of section 97;

(b) in respect of which the trustee of the trust estate is assessed and liable to pay tax in pursuance of section 98; or

(c) that is attributable to sources out of Australia;

the trustee shall be assessed and is liable to pay tax on the net income of the trust estate as if it were the income of an individual and were not subject to any deduction.

(5) Where there is a part of the net income of a trust estate that is not a resident trust estate:

(a) that is attributable to sources in Australia;

(b) that is not included in the assessable income of a beneficiary of the trust estate in pursuance of section 97; and

(c) in respect of which the trustee of the trust estate is not assessed and is not liable to pay tax in pursuance of section 98;

the trustee shall be assessed and is liable to pay tax on that part of the net income of the trust estate as if it were the income of an individual and were not subject to any deduction.

99A Certain trust income to be taxed at special rate

(2) This section does not apply in relation to a trust estate in relation to a year of income, being a trust estate:

(a) that resulted from:

(i) a will, a codicil or an order of a court that varied or modified the provisions of a will or a codicil; or

(ii) an intestacy or an order of a court that varied or modified the application, in relation to the estate of a deceased person, of the provisions of the law relating to the distribution of the estates of persons who die intestate;

(b) that consists of the property of a person who has become bankrupt, being property that has vested in The Official

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Receiver in Bankruptcy, or in a registered trustee, under the *Bankruptcy Act 1966*;

(c) that is administered under Part XI of the *Bankruptcy Act 1966*; or

(d) that consists of property of a kind referred to in paragraph 102AG(2)(c);

if the Commissioner is of the opinion that it would be unreasonable that this section should apply in relation to that trust estate in relation to that year of income.

(3) In forming an opinion for the purposes of subsection (2):

(a) the Commissioner shall have regard to the circumstances in which and the conditions, if any, upon which, at any time, property (including money) was acquired by or lent to the trust estate, income was derived by the trust estate, benefits were conferred on the trust estate or special rights or privileges were conferred on or attached to property of the trust estate, whether or not the rights or privileges have been exercised;

(b) if a person who has, at any time, directly or indirectly:

(i) transferred or lent any property (including money) to, or conferred any benefits on, the trust estate; or

(ii) conferred or attached any special right or privilege, or done any act or thing, either alone or together with another person or persons, that has resulted in the conferring or attaching of any special right or privilege, on or to property of the trust estate whether or not the right or privilege has been exercised;

has not, at any time, directly or indirectly:

(iii) transferred or lent any property (including money) to, or conferred any benefits on, another trust estate; or

(iv) conferred or attached any special right or privilege, or done any act or thing, either alone or together with another person or persons, that has resulted in the conferring or attaching of any special right or privilege, on or to property of another trust estate, whether or not the right or privilege has been exercised;

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the Commissioner shall have regard to that fact; and

(c) the Commissioner shall have regard to such other matters, if any, as he or she thinks fit.

(3A) For the purposes of the application of paragraph (3)(a) in relation to a trust estate of the kind referred to in paragraph (2)(a), a reference in that first-mentioned paragraph to the trust estate shall be read as including a reference to the person as a result of whose death the trust estate arose.

(4) Where there is no part of the net income of a resident trust estate:

(a) that is included in the assessable income of a beneficiary of the trust estate in pursuance of section 97;

(b) in respect of which the trustee of the trust estate is assessed and liable to pay tax in pursuance of section 98; or

(c) that represents income to which a beneficiary is presently entitled that is attributable to a period when the beneficiary was not a resident and is also attributable to sources out of Australia;

the trustee shall be assessed and is liable to pay tax on the net income of the trust estate at the rate declared by the Parliament for the purposes of this section.

Note: If the trust estate's net income includes a net capital gain, Subdivision 115-C of the *Income Tax Assessment Act 1997* affects the assessment of the trustee.

(4A) Where there is a part of the net income of a resident trust estate:

(a) that is not included in the assessable income of a beneficiary of the trust estate in pursuance of section 97;

(b) in respect of which the trustee is not assessed and is not liable to pay tax in pursuance of section 98; and

(c) that does not represent income to which a beneficiary is presently entitled that is attributable to a period when the beneficiary was not a resident and is also attributable to sources out of Australia;

the trustee shall be assessed and is liable to pay tax on that part of the net income of the trust estate at the rate declared by the Parliament for the purposes of this section.

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Note: If the trust estate's net income includes a net capital gain, Subdivision 115-C of the *Income Tax Assessment Act 1997* affects the assessment of the trustee.

(4B) Where there is no part of the net income of a trust estate that is not a resident trust estate:

(a) that is included in the assessable income of a beneficiary of the trust estate in pursuance of section 97;

(b) in respect of which the trustee of the trust estate is assessed and liable to pay tax in pursuance of section 98; or

(c) that is attributable to sources out of Australia;

the trustee shall be assessed and is liable to pay tax on the net income of the trust estate at the rate declared by the Parliament for the purposes of this section.

Note: If the trust estate's net income includes a net capital gain, Subdivision 115-C of the *Income Tax Assessment Act 1997* affects the assessment of the trustee.

(4C) Where there is a part of the net income of a trust estate that is not a resident trust estate:

(a) that is attributable to sources in Australia;

(b) that is not included in the assessable income of a beneficiary of the trust estate in pursuance of section 97; and

(c) in respect of which the trustee of the trust estate is not assessed and is not liable to pay tax in pursuance of section 98;

the trustee shall be assessed and is liable to pay tax on that part of the net income of the trust estate at the rate declared by the Parliament for the purposes of this section.

Note: If the trust estate's net income includes a net capital gain, Subdivision 115-C of the *Income Tax Assessment Act 1997* affects the assessment of the trustee.

99B Receipt of trust income not previously subject to tax

(1) Where, at any time during a year of income, an amount, being property of a trust estate, is paid to, or applied for the benefit of, a beneficiary of the trust estate who was a resident at any time during

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the year of income, the assessable income of the beneficiary of the year of income shall, subject to subsection (2), include that amount.

(2) The amount that, but for this subsection, would be included in the assessable income of a beneficiary of a trust estate under subsection (1) by reason that an amount, being property of the trust estate, was paid to, or applied for the benefit of, the beneficiary shall be reduced by so much (if any) of the amount, as represents:

(a) corpus of the trust estate (except to the extent to which it is attributable to amounts derived by the trust estate that, if they had been derived by a taxpayer being a resident, would have been included in the assessable income of that taxpayer of a year of income);

(b) an amount that, if it had been derived by a taxpayer being a resident, would not have been included in the assessable income of that taxpayer of a year of income;

(ba) an amount that is non-assessable non-exempt income of the beneficiary because of section 802-17 of the *Income Tax Assessment Act 1997*;

(c) an amount:

(i) that is or has been included in the assessable income of the beneficiary in pursuance of section 97; or

(ii) in respect of which the trustee of the trust estate is or has been assessed and liable to pay tax in pursuance of section 98, 99 or 99A; or

(iii) that is reasonably attributable to a part of the net income of another trust estate in respect of which the trustee of the other trust estate is assessed and is liable to pay tax under subsection 98(4);

(d) an amount that is or has been included in the assessable income of any taxpayer (other than a company) under section 102AAZD; or

(e) if the beneficiary is a company—an amount that is or has been included in the assessable income of the beneficiary under section 102AAZD.

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(2A) An amount that is not included in a beneficiary's assessable income because of paragraph (2)(d) or (e) is not assessable income and is not exempt income.

(3) In paragraphs (2)(d) and (e):

company means a company other than a company in the capacity of a trustee.

99C Determining whether property is applied for benefit of beneficiary

(1) In determining for the purposes of section 99B whether any amount has been applied for the benefit of a beneficiary of a trust estate, regard shall be had to all benefits that have accrued at any time to the beneficiary (whether or not the beneficiary had rights at law or in equity in or to those benefits) as a result of the derivation of, or in relation to, that amount, irrespective of the nature or form of the benefits.

(2) Without limiting the generality of subsection (1), an amount shall be taken, for the purposes of section 99B, to have been applied for the benefit of a beneficiary if:

(a) whether by re-investment, accumulation, capitalization or otherwise, and whether directly or indirectly, the amount has been so dealt with that it will, at a future time, and whether in the form of income or not, enure for the benefit of the beneficiary;

(b) the derivation of the amount has operated to increase the value to the beneficiary of any property or rights of any kind held by or for the benefit of the beneficiary;

(c) the beneficiary has received or become entitled to receive any benefit (including a loan or a repayment, in whole or in part, of a loan, or any other payment of any kind) provided directly or indirectly out of that amount or out of property or money that was available for the purpose by reason of the derivation of the amount;

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(d) the beneficiary has power, by means of the exercise by the beneficiary of any power of appointment or revocation or otherwise, to obtain, whether with or without the consent of any other person, the beneficial enjoyment of the amount; or

(e) the beneficiary has directly or indirectly assigned to another person his or her interest in the amount or is able, in any manner whatsoever, and whether directly or indirectly, to control the application of that interest.

99D Refund of tax to non-resident beneficiary

(1) Where:

(a) a trustee of a trust estate has been assessed and was liable to pay tax in pursuance of subsection 99(2) or (3) or subsection 99A(4) or (4A) in respect of the net income or a part of the net income of the trust estate of a year of income (in this subsection referred to as the ***relevant year of income***), being the year of income that commenced on 1 July 1978 or a subsequent year of income;

(b) the amount (in this subsection referred to as the ***relevant tax amount***) of the tax so assessed in respect of that net income or that part of that net income has been paid;

(c) the trustee of the trust estate has, in accordance with the terms of the trust, paid an amount (in this subsection referred to as the ***distributed amount***) of the income of the trust estate of the relevant year of income to a beneficiary of the trust estate;

(d) before the expiration of 60 days after the date on which the payment was made, or within such further period as the Commissioner allows, the beneficiary, by writing signed by or on behalf of the beneficiary, makes an application to the Commissioner for a refund under this section in relation to the distributed amount; and

(e) the beneficiary satisfies the Commissioner that the whole or a part (which whole or part, as the case may be, is in this subsection referred to as the ***non-Australian distributed amount***) of the distributed amount:

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(i) is attributable to a period when the beneficiary was not a resident and is also attributable to sources out of Australia;

(ii) was taken into account in calculating the net income of the trust estate of the relevant year of income; and

(iii) is not income that, by the operation of section 100A, is deemed not to have been paid to or applied for the benefit of the beneficiary or to be income to which the beneficiary is not presently entitled;

the Commissioner shall, subject to subsection (2), refund to the beneficiary so much (if any) of the relevant tax amount as is attributable to the non-Australian distributed amount, reduced by so much of any refund or credit to which the trustee is or was entitled in respect of the relevant tax amount as is attributable to the non-Australian distributed amount.

(2) The Commissioner may refuse to make a refund of tax in relation to an amount paid to a beneficiary of a trust estate if the Commissioner considers that the whole or a part of that amount was paid to the beneficiary by the trustee for the purpose or for purposes that included the purpose of enabling the beneficiary to become entitled to a refund of tax under this section in relation to that amount.

99E Later trust not taxed on income already taxed under subsection 98(4)

Sections 98, 99 and 99A do not apply to so much of the net income of a trust estate of a year of income as is reasonably attributable to a part of the net income of another trust estate in respect of which the trustee of the other trust estate is assessed and is liable to pay tax under subsection 98(4).

99G Amounts covered by withholding requirement

Subsection 98(4) does not apply to so much of the net income of a trust estate as represents income to which a beneficiary is presently entitled and gives rise to an amount from which an entity is

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required to withhold an amount under Subdivision 12-H in Schedule 1 to the *Taxation Administration Act 1953*.

99GA Amounts covered by sovereign immunity exemption

Subsection 98(3) does not apply to so much of the net income of a trust estate as represents income to which a beneficiary is presently entitled and gives rise to an amount that is non-assessable non-exempt income because of:

(a) Division 880 of the *Income Tax Assessment Act 1997*; or

(b) Division 880 of the *Income Tax (Transitional Provisions) Act 1997*.

99H Late payments

(1) This section applies if:

(a) a beneficiary of a trust estate that is a managed investment trust is presently entitled to a share of the income of the trust estate of a year of income; and

(b) the beneficiary is a non-resident at the end of the year of income; and

(c) all or part of that share of the net income of the trust estate (the ***late amount***) has not been paid to the beneficiary by the end of the period applicable under subsection 12-405(4) in Schedule 1 to the *Taxation Administration Act 1953*; and

Note: That subsection requires payments to be made before the end of 3 months after the end of the relevant year of income or within a longer period allowed by the Commissioner.

(d) if the late amount had been paid to the beneficiary within that period, the payment would have been a fund payment made by the trustee of the managed investment trust.

(2) This Division applies as if that portion of the beneficiary's income that represents the late amount were income to which no beneficiary was presently entitled.

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(3) In working out the net income of the trust estate for the year of income for the purposes of subsection (1), disregard these amounts (***excluded amounts***):

(a) a dividend (as defined in Division 11A of Part III) that is subject to, or exempted from, a requirement to withhold under Subdivision 12-F in Schedule 1 to the *Taxation Administration Act 1953*;

(b) interest (as so defined) that is subject to, or exempted from, such a requirement;

(c) a royalty that is subject to, or exempted from, such a requirement;

(d) a capital gain or capital loss from a CGT event that happens in relation to a CGT asset that is not taxable Australian property;

(e) amounts that are not from a source in Australia;

and disregard deductions relating to excluded amounts.

100 Beneficiary assessable in respect of certain trust income

(1) The assessable income of any beneficiary who:

(a) is under a legal disability or is deemed to be presently entitled to any of the income of a trust estate by virtue of the operation of subsection 95A(2); and

(b) is a beneficiary in more than one trust estate or derives income from any other source;

shall include:

(c) so much of the individual interest of the beneficiary in the net income of the trust estate or of each of the trust estates as is attributable to a period when the beneficiary was a resident; and

(d) so much of the individual interest of the beneficiary in the net income of the trust estate or of each of the trust estates as is attributable to a period when the beneficiary was not a resident and is also attributed to sources in Australia.

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Note: An amount is not included in assessable income under this section to the extent that subsection 98A(3) already includes it: see subsection 98A(4).

(1AA) If an amount is included in the assessable income of a beneficiary of a trust estate because of Subdivision 115-C or 207-B of the *Income Tax Assessment Act 1997*, for the purposes of paragraph (1)(b), treat the beneficiary as deriving income from another source.

(1A) If:

(a) a beneficiary in a trust estate is under a legal disability or is deemed to be presently entitled to any of the income of the trust estate by virtue of the operation of subsection 95A(2); and

(b) the beneficiary is not a beneficiary in any other trust estate and does not derive income from any other source; and

(c) the beneficiary would receive a refund of tax offsets under Division 67 of the *Income Tax Assessment Act 1997* for a particular year of income if the following amounts were included in the assessable income of the beneficiary for that year:

(i) so much of the individual interest of the beneficiary in the net income of the trust estate for that year as is attributable to a period when the beneficiary was a resident;

(ii) so much of the individual interest of the beneficiary in the net income of the trust estate for that year as is attributable to a period when the beneficiary was not a resident and is also attributable to sources in Australia;

then those amounts are included in the assessable income of the beneficiary for that year.

(1B) If a beneficiary in a trust estate who is under a legal disability or is deemed to be presently entitled to any of the income of the trust estate by virtue of the operation of subsection 95A(2):

(a) is a resident at the end of the year of income; and

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(b) is not a beneficiary in any other trust estate and does not derive income from any other source;

the assessable income of the beneficiary includes so much of the individual interest of the beneficiary in the net income of the trust estate as is reasonably attributable to a part of the net income of another trust estate in respect of which the trustee of the other trust estate is assessed and is liable to pay tax under subsection 98(4).

Note 2: A credit is available under section 98B for an appropriate part of the subsection 98(4) tax.

Note 3: An amount is not included in assessable income under this section to the extent that subsection 98A(3) already includes it: see subsection 98A(4).

(1C) If a beneficiary in a trust estate who is under a legal disability or is deemed to be presently entitled to any of the income of the trust estate by virtue of the operation of subsection 95A(2):

(a) is a resident at the end of the year of income; and

(b) is not a beneficiary in any other trust estate and does not derive income from any other source;

the assessable income of the beneficiary includes so much of the individual interest of the beneficiary in the net income of the trust estate as is represented by or reasonably attributable to a payment from which an entity was required to withhold an amount under Subdivision 12-H in Schedule 1 to the *Taxation Administration Act 1953*.

Note: A credit is available under section 18-50 in Schedule 1 to the *Taxation Administration Act 1953* for an appropriate part of the amount withheld.

(2) There shall be deducted from the income tax assessed against a beneficiary to whom subsection (1) or (1A) applies (or a beneficiary under a legal disability whose assessable income is increased as a result of Subdivision 115-C or 207-B of the *Income Tax Assessment Act 1997*) the tax paid or payable by any trustee in respect of that beneficiary's interest in the net income of the trust estate.

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(3) However, an amount of tax is not to be deducted under subsection (2) from the income tax assessed against a beneficiary to the extent that the amount is deducted under section 98B from the income tax assessed against the beneficiary.

100AA Failure to pay or notify present entitlement of exempt entity

(1) Subsection (3) applies if:

(a) an exempt entity is presently entitled to an amount of the income of a trust estate; and

(b) the exempt entity is not an exempt Australian government agency (within the meaning of the *Income Tax Assessment Act 1997*); and

(c) at the end of 2 months after the end of the relevant income year, the trustee has failed to notify the exempt entity in writing of the present entitlement.

(2) For the purposes of this section, treat the trustee as giving the exempt entity notice in writing of the present entitlement at a time to the extent that the trustee pays the exempt entity the amount of the present entitlement at that time.

(3) For the purposes of this Act, treat the exempt entity as *not* being presently entitled, and having never been presently entitled, to the amount mentioned in paragraph (1)(a) of the income of the trust estate, to the extent that the trustee failed to notify the exempt entity of that amount as mentioned in paragraph (1)(c).

(4) However, subsection (3) does not apply if the Commissioner decides that the failure mentioned in paragraph (1)(c) of the trustee should be disregarded.

(5) In making a decision under subsection (4) (or refusing to make such a decision), the Commissioner must have regard to the following:

(a) the circumstances that led to the failure mentioned in paragraph (1)(c);

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(b) the extent to which the trustee has taken action to try to correct the failure and if so, how quickly that action was taken;

(c) whether this section has operated previously in relation to the trustee, and if so, the circumstances in which this occurred;

(d) any other matters that the Commissioner considers relevant.

(6) If subsection (3) applies, for the purposes of any application of section 99A in relation to the trust estate in relation to the relevant year of income, treat the trust estate as a resident trust estate.

(7) This section does not apply in relation to a trust estate that is a managed investment trust (within the meaning of the *Income Tax Assessment Act 1997*) in relation to a year of income.

100AB Adjusted Division 6 percentage exceeding benchmark percentage: present entitlement of exempt entity

(1) Subsection (2) applies if:

(a) an exempt entity is presently entitled to an amount of the income of a trust estate; and

(b) the exempt entity is not an exempt Australian government agency (within the meaning of the *Income Tax Assessment Act 1997*); and

(c) the exempt entity's adjusted Division 6 percentage of the income of the trust estate exceeds the benchmark percentage determined under subsection (3).

(2) Subject to subsection 100AA(3), for the purposes of this Act, treat the exempt entity as *not* being presently entitled, and having never been presently entitled, to the amount of the income of the trust estate mentioned in paragraph (1)(a) of this section, to the extent that ensures that the exempt entity's adjusted Division 6 percentage of the income of the trust estate equals the benchmark percentage determined under subsection (3) of this section.

(3) Determine the benchmark percentage by working out the following fraction (expressed as a percentage):

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$$\frac{\text{The amount to which the exempt entity is presently entitled from the trust estate, to the extent that the amount forms part of the trust estate's adjusted net income for the year of income}}{\text{The trust estate's adjusted net income for the year of income}}$$

(4) A trust estate's ***adjusted net income*** for a year of income is its net income for that year of income, with the following adjustments:

(a) firstly, in determining that net income, disregard any capital gain or franked distribution to the extent to which a beneficiary of the trust estate or the trustee is specifically entitled to that gain or distribution;

(b) next, in determining the net capital gain (if any) of the trust for the year of income, disregard steps 3 and 4 of the method statement in subsection 102-5(1) (CGT discount and small business concessions);

(c) next, reduce that net income by amounts (if any) that do not represent net accretions of value to the trust estate in that year of income (other than amounts included in that net income under Part IVA).

(5) Subsection (2) does not apply in relation to a trust estate in relation to a year of income if the Commissioner is of the opinion that it would be unreasonable that the subsection should apply in relation to that trust estate in relation to that year of income.

(6) In forming an opinion for the purposes of subsection (5), the Commissioner must consider the following matters:

(a) the circumstances that led to the exempt entity's adjusted Division 6 percentage exceeding the benchmark percentage determined under subsection (3);

(b) the extent to which the exempt entity's adjusted Division 6 percentage exceeds that benchmark percentage;

(c) the extent to which the exempt entity actually received distributions from the trust estate in respect of the year of income;

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(d) the extent to which other beneficiaries of the trust estate were entitled to receive distributions of, or otherwise benefit from, amounts representing the adjusted net income of the trust estate;

(e) any other matters that the Commissioner considers relevant.

(7) If subsection (2) applies, for the purposes of any application of section 99A in relation to the trust estate in relation to the relevant year of income, treat the trust estate as a resident trust estate.

(8) This section does not apply in relation to a trust estate that is a managed investment trust (within the meaning of the *Income Tax Assessment Act 1997*) in relation to a year of income.

100A Present entitlement arising from reimbursement agreement

(1) Where:

(a) apart from this section, a beneficiary of a trust estate who is not under any legal disability is presently entitled to a share of the income of the trust estate; and

(b) the present entitlement of the beneficiary to that share or to a part of that share of the income of the trust estate (which share or part, as the case may be, is in this subsection referred to as the ***relevant trust income***) arose out of a reimbursement agreement or arose by reason of any act, transaction or circumstance that occurred in connection with, or as a result of, a reimbursement agreement;

the beneficiary shall, for the purposes of this Act, be deemed not to be, and never to have been, presently entitled to the relevant trust income.

(2) Where:

(a) apart from this section, a beneficiary of a trust estate who is not under any legal disability would, by reason that income of the trust estate was paid to, or applied for the benefit of, the beneficiary, be deemed to be presently entitled to income of the trust estate; and

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(b) that income or a part of that income (which income or part, as the case may be, is in this subsection referred to as the ***relevant trust income***) was paid to, or applied for the benefit of, the beneficiary as a result of a reimbursement agreement or as a result of any act, transaction or circumstance that occurred in connection with, or as a result of, a reimbursement agreement;

the relevant trust income shall, for the purposes of this Act, be deemed not to have been paid to, or applied for the benefit of, the beneficiary.

(3) In the preceding provisions of this section:

(a) a reference to income of a trust estate to which a beneficiary is, apart from this section, presently entitled shall be read as not including a reference to:

(i) income of the trust estate to which the beneficiary is presently entitled in the capacity of a trustee of another trust estate, being income that was paid to, or applied for the benefit of, the beneficiary before 6 March 1980; or

(ii) income that was paid to, or applied for the benefit of, the beneficiary before 12 June 1978; and

(b) a reference to income of a trust estate that was paid to, or applied for the benefit of, a beneficiary of the trust estate shall be read as not including a reference to:

(i) income of the trust estate that, before 6 March 1980, was paid to, or applied for the benefit of, the beneficiary in the capacity of a trustee of another trust estate; or

(ii) income of the trust estate that was paid to, or applied for the benefit of, the beneficiary before 12 June 1978.

(3A) Where:

(a) apart from this section, a beneficiary (in this subsection referred to as the ***trustee beneficiary***) of a trust estate is presently entitled to a share of the income of the trust estate in the capacity of a trustee of another trust estate (in this subsection referred to as the ***interposed trust estate***);

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(b) apart from this subsection, the trustee beneficiary would, by virtue of subsection (1), be deemed not to be, and never to have been, presently entitled to that share or a part of that share of the income of the first-mentioned trust estate (which share or part is in this subsection referred to as the ***relevant trust income***); and

(c) apart from this section, a beneficiary of the interposed trust estate is or was, or beneficiaries of the interposed trust estate are or were, presently entitled, or deemed to be presently entitled, to any income of the interposed trust estate (in this subsection referred to as the ***distributable trust income***) that is attributable to the relevant trust income;

subsection (1) does not apply, and shall be deemed never to have applied, in relation to the trustee beneficiary, in relation to any part of the relevant trust income to which the distributable trust income is attributable.

(3B) Where:

(a) apart from this section, a beneficiary (in this subsection referred to as the ***trustee beneficiary***) of a trust estate would, by reason that income of the trust estate was paid to, or applied for the benefit of, the trustee beneficiary, be deemed to be presently entitled to income of the trust estate in the capacity of a trustee of another trust estate (in this subsection referred to as the ***interposed trust estate***);

(b) apart from this subsection, that income or a part of that income (which income or part is in this subsection referred to as the ***relevant trust income***) would, by virtue of subsection (2), be deemed not to have been paid to, or applied for the benefit of, the trustee beneficiary; and

(c) apart from this section, a beneficiary of the interposed trust estate is or was, or beneficiaries of the interposed trust estate are or were, presently entitled, or deemed to be presently entitled, to any income of the interposed trust estate (in this subsection referred to as the ***distributable trust income***) that is attributable to the relevant trust income;

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subsection (2) does not apply, and shall be deemed never to have applied, in relation to the trustee beneficiary, in relation to any part of the relevant trust income to which the distributable trust income is attributable.

(3C) A reference in paragraph (3A)(c) or (3B)(c) to a beneficiary of a trust estate shall be read as not including a reference to a beneficiary who is under a legal disability.

(4) Where subsection (1) or (2) applies in relation to any income of a trust estate of a year of income:

(a) in the application of this Division in relation to the trust estate in relation to the year of income, section 99A shall be read as if subsections (2), (3) and (3A) of that section were omitted; and

(b) for the purposes of any application of section 99A in relation to the trust estate in relation to the year of income, the trust estate shall be deemed to be a resident trust estate.

(5) For the purposes of subsection (1), but without limiting the generality of that subsection, where:

(a) a reimbursement agreement was entered into at or after the time when a person became a beneficiary of a trust estate (whether the person became a beneficiary of the trust estate before or after the commencement of this section); and

(b) the amount (in this subsection referred to as the ***increased amount***) of the share of the income of the trust estate to which the beneficiary is presently entitled exceeds the amount (in this subsection referred to as the ***original amount***) of the income of the trust estate to which the beneficiary would have been, or could reasonably be expected to have been, presently entitled if the reimbursement agreement had not been entered into or if an act, transaction or circumstance that occurred in connection with, or as a result of, the reimbursement agreement had not occurred;

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the present entitlement of the beneficiary to so much of the increased amount as exceeds the original amount shall be taken to have arisen out of the reimbursement agreement.

(6) For the purposes of subsection (2), but without limiting the generality of that subsection, where:

(a) a reimbursement agreement was entered into at or after the time when a person became a beneficiary of a trust estate (whether the person became a beneficiary of the trust estate before or after the commencement of this section); and

(b) income of the trust estate was paid to, or applied for the benefit of, the beneficiary and the amount (in this subsection referred to as the ***increased amount***) of that income exceeds the amount (in this subsection referred to as the ***original amount***) that would have been, or could reasonably be expected to have been, paid to, or applied for the benefit of, the beneficiary if the reimbursement agreement had not been entered into or if an act, transaction or circumstance that occurred in connection with, or as a result of, the reimbursement agreement had not occurred;

so much of the increased amount as exceeds the original amount shall be taken to be income of the trust estate that was paid to, or applied for the benefit of, the beneficiary as a result of the reimbursement agreement.

(6A) Where:

(a) subsection (1) or (2) applies, or would but for subsection (3A) or (3B) apply, in relation to a beneficiary of a trust estate in relation to a reimbursement agreement in relation to any income of the trust estate; and

(b) as part of, under or in connection with the reimbursement agreement, the beneficiary incurred or incurs a loss or outgoing after 5 March 1980 in respect of which a deduction has been allowed or would, but for this subsection, be allowable;

then, notwithstanding any other provision of this Act, a deduction shall be deemed not to have been, or not to be, allowable, as the case may be, in respect of that loss or outgoing.

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(6B) Where subsection (6A) deems a deduction not to have been, or not to be, allowable in respect of a loss or outgoing incurred by a taxpayer in the acquisition of property that, for the purposes of the application of this Act and the *Income Tax Assessment Act 1997* in relation to the taxpayer is or was trading stock, then, notwithstanding any other provision of this Act or that Act, the cost or cost price of that property, for the purposes of the application of Subdivision B of Division 2 of Part III of this Act or Division 70 (Trading stock) or 385 (Primary production) of the *Income Tax Assessment Act 1997* in relation to that property in relation to the taxpayer, shall be taken to be, and at all times to have been, nil.

(7) Subject to subsection (8), a reference in this section, in relation to a beneficiary of a trust estate, to a reimbursement agreement shall be read as a reference to an agreement, whether entered into before or after the commencement of this section, that provides for the payment of money or the transfer of property to, or the provision of services or other benefits for, a person or persons other than the beneficiary or the beneficiary and another person or other persons.

(8) A reference in subsection (7) to an agreement shall be read as not including a reference to an agreement that was not entered into for the purpose, or for purposes that included the purpose, of securing that a person who, if the agreement had not been entered into, would have been liable to pay income tax in respect of a year of income would not be liable to pay income tax in respect of that year of income or would be liable to pay less income tax in respect of that year of income than that person would have been liable to pay if the agreement had not been entered into.

(9) For the purposes of subsection (8), an agreement shall be taken to have been entered into for a particular purpose, or for purposes that included a particular purpose, if any of the parties to the agreement entered into the agreement for that purpose, or for purposes that included that purpose, as the case may be.

(10) A reference in subsection (7) to the payment of money to a person or persons shall be read as including a reference to the payment of money to a person or persons by way of loan.

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(11) A reference in this section to a person shall be read as including a reference to a person in the capacity of a trustee.

(12) For the purposes of this section, an agreement that provides for a person to release, abandon, fail to demand payment of or postpone payment of, a debt owed by another person shall be deemed to be an agreement that provides for the payment of money to that other person.

(13) In this section:

agreement means any agreement, arrangement or understanding, whether formal or informal, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings, but does not include an agreement, arrangement or understanding entered into in the course of ordinary family or commercial dealing.

Note: Section 960-255 of the *Income Tax Assessment Act 1997* may be relevant to determining family relationships for the purposes of the definition of ***agreement***.

property includes a chose in action and also includes an estate, interest, right or power, whether at law or in equity, in or over property.

101 Discretionary trusts

For the purposes of this Act, where a trustee has a discretion to pay or apply income of a trust estate to or for the benefit of specified beneficiaries, a beneficiary in whose favour the trustee exercises the trustee's discretion shall be deemed to be presently entitled to the amount paid to the beneficiary or applied for the beneficiary's benefit by the trustee in the exercise of that discretion.

101A Income of deceased received after death

(1) Where in the year of income, the trustee of the estate of a deceased person receives any amount which would have been assessable income in the hands of the deceased person if it had been received

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by him or her during his or her lifetime, that amount shall be included in the assessable income of that year of the trust estate and shall be deemed to be income to which no beneficiary is presently entitled.

(2) Subsection (1) does not apply in relation to an amount received by the trustee of the estate of a deceased person to the extent to which, if it had been received by the deceased person during his or her lifetime, it would have been included in the assessable income of that person by virtue of section 83-10 or 83-80 of the *Income Tax Assessment Act 1997*.

(3) To avoid doubt, if in the year of income an amount is included in the assessable income of a deceased taxpayer under Division 82 or 302 of the *Income Tax Assessment Act 1997* in respect of a payment received by the trustee of the estate of the deceased taxpayer, that amount shall be included in the assessable income of that year of income of the trust estate.

(4) This section does not apply in relation to any amount received by the trustee of the estate of a deceased person if the amount is a farm management deposit, of which the deceased person was the owner, that has become repayable.

102 Revocable trusts

(1) Where a person has created a trust in respect of any income or property (including money) and:

(a) the person has power, whenever exercisable, to revoke or alter the trusts so as to acquire a beneficial interest in the income derived by the trustee during the year of income, or the property producing that income, or any part of that income or property; or

(b) income is, under that trust, in the year of income, payable to or accumulated for, or applicable for the benefit of a child or children of that person who is or are under the age of 18 years;

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the Commissioner may assess the trustee to pay income tax, under this section, and the trustee shall be liable to pay the tax so assessed.

(2) The amount of the tax payable in pursuance of this section shall be the amount by which the tax actually payable on the person's own taxable income by the person who created the trust is less than the tax which would have been payable by the person if he or she had received, in addition to any other income derived by the person, so much of the net income of the trust estate as:

(a) is attributable to the property in which he or she has power to acquire the beneficial interest;

(b) represents the income, or the part of the income, in which he or she has power to acquire the beneficial interest; or

(c) is payable to or accumulated for, or applicable for the benefit of, a child or children of that person who is or are under the age of 18 years.

(2A) Where any property the subject of a trust has been converted into other property, this section shall apply in the same way as if the trust had originally been created in respect of that other property.

(2B) In the application of subsection (2) in determining the amount of tax that is payable by a trustee of a trust estate in pursuance of this section, the reference in that subsection to the net income of the trust estate shall be read as a reference to that net income reduced by:

(a) so much (if any) of that net income as is attributable to a period when the person who created the trust was not a resident and is also attributable to sources out of Australia; and

(b) so much (if any) of that net income as is not covered by paragraph (a) and represents an amount included in the assessable income of any taxpayer under section 102AAZD.

(3) Where this section is applied to the assessment of the income of a trust estate or part thereof derived in the year of income, no beneficiary shall be assessed in his or her individual capacity in

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respect of his or her individual interest in the income or part to which this section has been so applied, and the trustee shall not be assessed in respect of that income or part otherwise than under this section.

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Division 6AAA—Special provisions relating to non-resident trust estates etc.

Subdivision A—Preliminary

102AAA Object of Division

The object of this Division is to set out rules relating to the following:

(a) the payment of interest on distributions from certain non-resident trust estates (Subdivision B);

(b) the winding-up of certain non-resident trust estates in existence on 12 April 1989 (Subdivision C);

(c) an accruals system of taxation of certain non-resident trust estates (Subdivision D).

102AAB Interpretation

In this Division, unless the contrary intention appears:

1 July 1990 net worth, in relation to a trust estate, means the market value, as at the beginning of 1 July 1990, of the assets of the trust estate, reduced by the liabilities of the trust estate as at the beginning of that day.

accounts has the same meaning as in Part X.

actual transfer, in relation to property or services, means a transfer of the property or services other than a transfer that is taken to have been made because of subsection 102AAK(1), (2), (5), (6), (8), (10) or (11).

arm's length amount, in relation to an actual transfer of property or services to a trust estate, means the amount that the trustee could reasonably be expected to have been required to pay to obtain the property or the services concerned from the transferor under a

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transaction where the parties to the transaction are dealing with each other at arm's length in relation to the transaction.

associate has the same meaning as in Part X.

attributable income, in relation to a trust estate, has the meaning given by section 102AAU.

attributable taxpayer has the meaning given by section 102AAT.

attribution account payment has the same meaning as in Part X.

attribution debit has the same meaning as in Part X.

Australian entity has the same meaning as in Part X.

Australian trust has the same meaning as in Part X.

base interest rate for a day has the same meaning as in section 8AAD of the *Taxation Administration Act 1953*.

CFC has the same meaning as in Part X.

controlled foreign trust has the same meaning as in Part X.

de facto relationship means:

(a) a relationship between 2 persons (whether of the same sex or different sexes) that is registered under a law of a State or Territory prescribed for the purposes of section 2E of the *Acts Interpretation Act 1901* as a kind of relationship prescribed for the purposes of that section; or

(b) a relationship between 2 persons (whether of the same sex or different sexes) who, although not legally married to each other, live with each other on a genuine domestic basis in a relationship as a couple.

depreciation provision means:

(a) any provision of Division 40 of the *Income Tax Assessment Act 1997* (other than Subdivision 40-E); or

(b) any provision of Division 43 of that Act.

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designated concession income has the same meaning as in Part X.

discretionary trust estate means a trust estate where:

(a) both of the following conditions are satisfied:

(i) a person (who may include the trustee) is empowered (either unconditionally or on the fulfilment of a condition) to exercise any power of appointment or other discretion;

(ii) the exercise of the power or discretion, or the failure to exercise the power or discretion, has the effect of determining, to any extent, either or both of the following:

(A) the identities of those who may benefit under the trust;

(B) how beneficiaries are to benefit, as between themselves, under the trust; or

(b) one or more of the beneficiaries under the trust have a contingent or defeasible interest in some or all of the corpus or income of the trust estate; or

(c) the trustee of another trust estate, being a trust estate where both of the conditions in paragraph (a) are satisfied, benefits, or is capable (whether by the exercise of a power of appointment or otherwise) of benefiting, under the first-mentioned trust estate.

eligible designated concession income has the same meaning as in Part X.

entity means any of the following:

(a) a company;

(b) a partnership;

(c) a person in the capacity of trustee;

(d) any other person.

exempt income, in relation to a trust estate, means the exempt income of the trust estate calculated as if the trustee were a taxpayer who was a resident.

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IP time means 7.30 p.m., by standard time in the Australian Capital Territory, on 12 April 1989.

listed country has the same meaning as in Part X.

listed country trust estate has the meaning given by section 102AAE.

net income, in relation to a trust estate, in relation to a year of income, means:

(b) if the trust estate is a public trading trust in relation to the year of income—the net income (within the meaning of Division 6C) of the public trading trust of the year of income; or

(c) in any other case—the net income (within the meaning of Division 6) of the trust estate.

non-attributable year of income, in relation to a trust estate, means a non-resident year of income of the trust estate where no amount calculated by reference to the attributable income of the trust estate of that year of income is included in the assessable income of any taxpayer under subsection 102AAZD(1).

non-discretionary trust estate means a trust estate other than a discretionary trust estate.

non-resident family trust has the meaning given by section 102AAH.

non-resident trust estate (except in section 102AAA), in relation to a year of income, means a trust estate that is not a resident trust estate in relation to the year of income.

non-resident year of income, in relation to a trust estate, means a year of income in relation to which the trust estate is a non-resident trust estate.

profits includes gains, whether of an income or capital nature.

property includes money.

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public trading trust, in relation to a year of income, means a unit trust that is a public trading trust in relation to the year of income for the purposes of Division 6C.

public unit trust has the meaning given by section 102AAF.

resident trust estate, in relation to a year of income, means:

(a) a resident trust estate in relation to the year of income within the meaning of Division 6; or

(b) a unit trust that is a public trading trust, in relation to the year of income; or

(c) a complying superannuation fund, a non-complying superannuation fund, a complying approved deposit fund, a non-complying approved deposit fund or a pooled superannuation trust in relation to the year of income.

scheme means:

(a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings; and

(b) any scheme, plan, proposal, action, course of action or course of conduct, whether there are 2 or more parties or only one party involved.

services includes any benefit, right (including a right in relation to, and an interest in, real or personal property), privilege or facility and, without limiting the generality of the foregoing, includes a benefit, right, privilege, service or facility that is, or is to be, provided under:

(a) an arrangement for or in relation to:

(i) the performance of work (including work of a professional nature), whether with or without the provision of property; or

(ii) the provision of, or of the use of facilities for, entertainment, recreation or instruction; or

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(iii) the conferring of benefits, rights or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction; or

(b) a contract of insurance; or

(c) an arrangement for or in relation to the lending of money.

subject to tax has the same meaning as in Part X.

tax accounting period has the same meaning as in Part X.

tax law, in relation to a listed country or an unlisted country, has the same meaning as in Part X.

tax offset has the same meaning as in the *Income Tax Assessment Act 1997*.

transfer:

(a) in relation to property—includes dispose of (whether by assignment, declaration of trust or otherwise) or provide; and

(b) in relation to services—includes allow, confer, give, grant, perform or provide.

trust estate, in relation to a transfer of property or services, means the trust estate or, as the case requires, the trustee of the trust estate.

underlying transfer, in relation to a transfer of property or services to a trust estate, means:

(a) if that transfer was an actual transfer—the actual transfer; or

(b) if that transfer was taken to have been made because of subsection 102AAK(1)—the actual transfer referred to in that subsection; or

(c) if that transfer was taken to have been made because of subsection 102AAK(2)—the actual transfer referred to in paragraph 102AAK(2)(d); or

(d) if that transfer was taken to have been made because of subsection 102AAK(5)—the actual transfer referred to in paragraph 102AAK(5)(b); or

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(e) if that transfer was taken to have been made because of the application of subsection 102AAK(6) or (8) to an actual transfer—the actual transfer; or

(f) if that transfer was taken to have been made because of the application of subsection 102AAK(6) or (8) to a transfer that was taken to have been made because of subsection 102AAK(1)—the actual transfer referred to in subsection 102AAK(1); or

(g) if that transfer was taken to have been made because of the application of subsection 102AAK(6) or (8) to a transfer that was taken to have been made because of subsection 102AAK(5)—the actual transfer referred to in paragraph 102AAK(5)(b); or

(h) if that transfer was taken to have been made because of subsection 102AAK(10)—the actual transfer referred to in paragraph 102AAK(10)(b); or

(j) if that transfer was taken to have been made because of one or more applications of subsection 102AAK(11) to an actual transfer—the actual transfer; or

(k) if that transfer was taken to have been made because of one or more applications of subsection 102AAK(11) to a transfer (in this paragraph called the ***deemed transfer***) that was taken to have been made because of subsection 102AAK(1), (2), (5), (6), (8) or (10)—the actual transfer that, under a preceding paragraph of this definition, is the underlying transfer in relation to the deemed transfer.

underlying transferor, in relation to a transfer of property or services to a trust estate, means the entity who made the underlying transfer concerned.

unlisted country has the same meaning as in Part X.

weighted statutory interest rate, in relation to a year of income, means:

(a) if there is only one base interest rate in relation to the year of income—that rate; or

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(b) if there are 2 or more base interest rates in relation to the year of income—the weighted average of the base rates for the year of income.

102AAC Each listed country and unlisted country to be treated as a separate foreign country

For the purposes of the application of section 6AB to this Division, each listed country and each unlisted country is to be treated as a separate foreign country.

102AAD *Subject to tax*—application of subsection 324(2)

Subsection 324(2) applies in relation to this Division in a corresponding way to the way in which it applies in relation to Part X.

102AAE Listed country trust estates

(1) For the purposes of this Division, a trust estate is taken to be a listed country trust estate in relation to a year of income if, and only if, either of the following paragraphs applies to each item of income or profit derived by the trust estate in the year of income:

(a) the income or profit is either:

(i) subject to tax in a listed country in a tax accounting period ending before the end of the year of income or commencing during the year of income; or

(ii) designated concession income in relation to any listed country;

(b) both of the following conditions are satisfied:

(i) a part of the income or profit is either:

(A) subject to tax in a listed country in a tax accounting period ending before the end of the year of income or commencing during the year of income; or

(B) designated concession income in relation to any listed country;

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(ii) the remaining part, or each of the remaining parts, of the income or profit:

(A) is subject to tax in another listed country or in different listed countries, as the case may be, in a tax accounting period ending before the end of the year of income or commencing during the year of income; or

(B) is designated concession income in relation to any listed country.

(2) For the purposes of the application of subparagraph (1)(b)(ii) to a trust estate, if a particular part of an item of income or profit (which part is in this subsection called the ***item part***) derived by the trust estate is included, or would apart from Subdivision 50-A or section 51-5, 51-10 or 51-30 of the *Income Tax Assessment Act 1997* be included, in the assessable income of the trust estate of a year of income (in this subsection called the ***trust's year of income***) and one of the following paragraphs applies:

(a) both of the following conditions are satisfied:

(i) the trustee of the trust estate is liable to be assessed and pay tax under section 98, 99 or 99A in respect of a part of, or a share in, the net income of the trust estate of the trust's year of income;

(ii) the whole or a part of the part or share of the net income is attributable to the item part;

(b) all of the following conditions are satisfied:

(i) an amount is included in the assessable income of another taxpayer of the trust's year of income or the next following year of income (which taxpayer is in this subsection called the ***actual taxpayer***) under subsection 92(1) or section 97, 98A or 100;

(ii) the actual taxpayer is:

(A) a company or a natural person (other than a company or a natural person in the capacity of a trustee); or

(B) the trustee of a complying superannuation fund, a non-complying superannuation fund, a

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complying approved deposit fund, a non-complying approved deposit fund or a pooled superannuation trust in relation to the year of income concerned; or

(D) the trustee of a public trading trust in relation to the year of income concerned; or

(E) the trustee of a trust estate who is liable to be assessed and pay tax under section 98, 99 or 99A in respect of a part of, or a share in, the net income of a trust estate;

(iii) if sub-subparagraph (ii)(A), (B), (C) or (D) applies—the whole or a part of the amount so included in the actual taxpayer's assessable income is attributable (either directly or indirectly through one or more interposed partnerships or trusts) to the item part;

(iv) if sub-subparagraph (ii)(E) applies—the whole or a part of the part or share of the net income is attributable (either directly or indirectly through one or more interposed partnerships or trusts) to the item part;

(c) both of the following conditions are satisfied:

(i) trustee beneficiary non-disclosure tax is payable under Division 6D on the whole or part (the ***net income amount***) of a share of the net income of the trust estate of the trust's year of income;

(ii) the whole or part of the net income amount is attributable to the item part;

the item part is to be treated as if it were subject to tax in a listed country in a tax accounting period ending before the end of the trust's year of income.

(3) For the purposes of this section, where a part of a particular item of income or profits derived by an entity would, if it were a separate item of income or profits, be taken to be subject to tax in a listed country in a particular tax accounting period, that part is taken to be subject to tax in that listed country in that tax accounting period.

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102AAF Public unit trusts

(1) Subject to this section, for the purposes of this Division, a unit trust is a public unit trust at all times during a year of income if either of the following conditions are satisfied:

(a) at any time during the year of income:

(i) any of the units in the unit trust were listed for quotation in the official list of a stock exchange in Australia or elsewhere; or

(ii) any of the units in the unit trust were offered to the public;

(b) at all times during the year of income, the units in the unit trust were held by not fewer than 50 persons.

(2) In determining whether a unit trust is a public unit trust at all times during a year of income for the purposes of this Division, subsections 102P(3) to (9) (inclusive) and (11) apply as if:

(a) a reference in those subsections to Division 6C were a reference to this Division; and

(b) a reference in those subsections to subsection 102P(1) were a reference to subsection (1) of this section; and

(c) a reference in those subsections to a public unit trust in relation to a year of income were a reference to a public unit trust at all times during a year of income.

(3) In determining whether a unit trust (in this subsection called the ***first unit trust***) is a public unit trust at all times during a year of income for the purposes of this Division, the following provisions have effect:

(a) the following entities are taken to be one person:

(i) an entity, whether or not it holds units in the first unit trust; and

(ii) the entity or entities who are the associate or associates of the entity;

(b) where any units in the first unit trust are held by the trustee of another trust that, apart from this paragraph, is a public unit trust at all times during the year of income—a person who

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has a beneficial interest in property of that other trust that consists of those units is taken to hold those units;

(c) where any units in the first unit trust are held by the trustee of another trust that:

(i) apart from paragraph (b); or

(ii) by virtue of the application of paragraph (b);

is a public unit trust at all times during the year of income—a person who has a beneficial interest in the property of that other trust that consists of those units (whether or not that beneficial interest is taken to be held by virtue of the application of this paragraph) is taken to hold those units.

102AAG When entity is in a position to control a trust estate

(1) For the purposes of this Division, an entity is taken to be in a position to control a trust estate if, and only if:

(a) a group in relation to the entity had the power by means of the exercise by the group of any power of appointment or revocation or otherwise, to obtain, with or without the consent of any other entity, the beneficial enjoyment of the corpus or income of the trust estate; or

(b) a group in relation to the entity was able in any manner whatsoever, whether directly or indirectly, to control the application of the corpus or income of the trust estate; or

(c) a group in relation to the entity was capable under a scheme of gaining the enjoyment or the control referred to in paragraph (a) or (b); or

(d) a trustee of the trust estate was accustomed or under an obligation (whether formally or informally) or might reasonably be expected to act in accordance with the directions, instructions or wishes of a group in relation to the entity; or

(e) a group in relation to the entity was able to remove or appoint the trustee, or any of the trustees, of the trust estate.

(2) In subsection (1), a reference to a group in relation to an entity is a reference to:

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(a) the entity acting alone; or
(b) an associate of the entity acting alone; or
(c) the entity and one or more associates of the entity acting together; or
(d) 2 or more associates of the entity acting together.

102AAH Non-resident family trusts

(1) Subject to subsections (4) and (5), for the purposes of this Division, a trust estate is a non-resident family trust in relation to a natural person at a particular time if, and only if, at that time:
  (a) the trust estate is either:
    (i) a post-marital or post-relationship family trust in relation to the natural person; or
    (ii) a family relief trust in relation to the natural person; and
  (b) the trust is constituted by:
    (i) a deed of trust or other instrument; or
    (ii) an order or declaration of a court.

(2) For the purposes of this section, a trust estate is a post-marital or post-relationship family trust in relation to a natural person at a particular time if:
  (a) either of the following conditions is satisfied:
    (i) the trust was created pursuant to:
      (A) a decree or order of dissolution or annulment of marriage, being a dissolution or annulment that, because of the *Family Law Act 1975*, has effect, or continues to have effect in Australia or is recognised as valid in Australia; or
      (B) a decree or order of judicial separation or a similar decree or order;
    (ii) the trust was created in consequence of the break-down of a de facto relationship; and
  (b) at that time, the only persons who benefit, or are capable (whether by the exercise of a power of appointment or otherwise) of benefiting, under the trust (which persons are in

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subsections (4) and (5) called the ***primary potential beneficiaries***) are natural persons who:

(i) are non-residents at that time; and

(ii) are covered by any of the following categories:

(A) the spouse or former spouse of the natural person;

(B) a child of the natural person;

(C) a child of the former spouse of the natural person, being a child who was such a child at a time when the former spouse was the spouse of the natural person;

(D) a child of the spouse of the natural person.

(3) For the purposes of this section, a trust estate is a family relief trust in relation to a natural person at a particular time (in this subsection called the ***test time***) if:

(a) the only persons who benefit, or are capable (whether by the exercise of a power of appointment or otherwise) of benefiting, under the trust (which persons are in subsections (4) and (5) called the ***primary potential beneficiaries***) are natural persons who:

(i) are identified by name in the trust deed or instrument, or in the court order or declaration, constituting the trust; and

(ii) are non-residents at that time; and

(iii) are covered by any of the following categories:

(A) the spouse or former spouse of the natural person;

(B) a parent of the natural person or of the natural person's spouse or former spouse;

(C) a child of the natural person or of the natural person's spouse or former spouse;

(D) a grandparent of the natural person;

(E) a grandchild of the natural person;

(F) a brother or sister of the natural person or of the natural person's spouse or former spouse;

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(G) a child of a brother or sister mentioned in sub-subparagraph (F); and

(b) the trust was established, and is operated, for the relief of persons who are in necessitous circumstances; and

(c) any of the following conditions is satisfied:

(i) at the test time, the assets of the trust are not excessive having regard to the requirements, or likely requirements, of the primary potential beneficiaries;

(ii) no transfers of property or services to the trust estate were made during the period (in this paragraph called the ***test period***) commencing at the IP time and ending at the test time;

(iii) immediately after each transfer of property or services to the trust estate made during the test period, the assets of the trust were not excessive having regard to the requirements, or likely requirements, of the beneficiaries at the time of the transfer.

Note: Section 960-255 of the *Income Tax Assessment Act 1997* may be relevant to determining relationships for the purposes of subparagraph (3)(a)(iii).

(4) Subsection (1) does not prevent a trust estate from being a non-resident family trust in relation to a natural person at a particular time if, in the event of the death of a particular primary potential beneficiary at that time, one or more natural persons (which persons are in subsection (5) called the ***secondary potential beneficiaries***) who:

(a) are non-residents at that time; and

(b) are children of the primary potential beneficiary;

would benefit, or be capable (whether by the exercise of a power of appointment or otherwise) of benefiting, under the trust.

(5) Subsections (1) and (4) do not prevent a trust estate from being a non-resident family trust in relation to a natural person at a particular time if, in the event of the death of all of the primary potential beneficiaries and all of the secondary potential beneficiaries at that time, there are one or more deductible gift

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recipients covered by an item in any of the tables in Subdivision 30-B of the *Income Tax Assessment Act 1997*, or item 2 of the table in section 30-15 of that Act, that would benefit, or be capable (whether by the exercise of a power of appointment or otherwise) of benefiting, under the trust.

(6) For the purposes of this section, if, at a particular time, an entity holds an interest in, or right to benefit under, a trust that is dependent on the death of one or more natural persons, then, the entity is taken to be an entity who, in the event of the death of that natural person or those natural persons immediately after that time, would benefit under the trust.

(7) A reference in this section to a natural person does not include a reference to a natural person in the capacity of a trustee.

102AAJ Transfer of property or services

(1) A reference in this Division to the transfer of property or services to a trust estate includes a reference to the transfer of such property or services by way of the creation of the trust estate.

(2) For the purposes of this Division, where an entity acquires property that did not previously exist, the property is taken to have existed immediately before the acquisition and to have been transferred by the entity who created the property.

(3) For the purposes of this Division, property or services are taken to have been transferred to an entity if the property or services have been applied for the benefit of, or in accordance with the directions of, the entity.

(4) Without limiting the generality of subsection (3), a reference in that subsection to the application of property or services for the benefit of an entity includes a reference to the application of property or services in the discharge, in whole or in part, of a debt due by the entity.

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(5) Unless the contrary intention appears, a reference in this Division to a transfer of property or services includes a reference to a transfer made before the commencement of this Division.

(6) A reference in this Division to a transfer of property or services made before the IP time includes a reference to a transfer made at the IP time.

102AAK Deemed transfers of property or services to trust estate

(1) For the purposes of this Division, where an entity (in this subsection called the ***prime entity***) causes another entity to actually transfer property or services to a trust estate, the prime entity is taken to have transferred the property or services (instead of the other entity).

(2) For the purposes of this Division, where:

(a) the trustee of a trust estate issues units in the trust to an entity (in this subsection called the ***first entity***) in the first entity's capacity as a manager, underwriter or dealer in relation to the marketing or placement of the units; and

(b) in the course of the marketing or placement of the units, the units are disposed of by the first entity to another entity (in this subsection called the ***second entity***); and

(c) at a particular time (in this subsection called the ***second entity's transfer time***), the second entity transfers property or services to the first entity as consideration for the acquisition of the units; and

(d) the first entity has actually transferred, or actually transfers, property or services (in this subsection called the ***original property or services***) to the trust estate for the sole purpose of acquiring the units;

the second entity is taken to have transferred the original property or services (instead of the first entity) at the second entity's transfer time.

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(3) A reference in subsection (2) to a unit in a trust estate is a reference to an interest (however described) in any of the income or property of the trust estate.

(4) Subsections (1) and (2) do not limit the operation of subsection (5).

(5) Where, under a scheme:

(a) an entity (in this subsection called the ***scheme entity***) actually transfers property or services to another entity; and

(b) property or services are actually transferred to a trust estate at a particular time otherwise than by the scheme entity;

the Commissioner may, for the purposes of this Division, treat the property or services mentioned in paragraph (b) as having been transferred by the scheme entity to the trust estate (instead of by any other entity) at that time to such extent as the Commissioner considers reasonable.

(6) For the purposes of this Division, if (apart from subsections (8), (10) and (11)) an entity, being a partnership, transfers property or services to a trust estate at a particular time:

(a) each partner in the partnership is taken to have transferred a part of the property or services to the trust estate at that time; and

(b) the market value of the part transferred by a particular partner is calculated using the formula:

$$\text{Market value} \times \text{Partner's interest}$$

where:

Market value means the market value, immediately before the transfer, of the property or services transferred by the partnership.

Partner's interest means:

(i) the partner's percentage interest in the profits of the partnership as at that time; or

(ii) the partner's percentage interest in the property of the partnership as at that time;

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or, if they are different, whichever is the higher.

(7) Nothing in paragraph (6)(a) affects the application of this Division to the transfer made by the partnership concerned.

(8) For the purposes of this Division, if:

(a) apart from this subsection, subsections (6), (10) and (11), an entity being the trustee of a trust estate (in this subsection called the ***transferor trust estate***) transfers property or services (in this subsection called the ***transferred property or services***) to another trust estate (in this subsection called the ***transferee trust estate***) at a particular time (in this subsection called the ***transfer time***); and

(b) the transferor trust estate was an Australian trust, or a controlled foreign trust, at the transfer time; and

(c) the transferor trust estate was a discretionary trust estate at the transfer time; and

(d) apart from this subsection, subsections (6), (10) and (11), one or more other entities transferred property or services to the transferor trust estate at or before the transfer time;

each of those other entities is taken to have transferred the transferred property or services to the transferee trust estate at the transfer time.

(9) Nothing in subsection (8) affects the application of this Division to the transfer mentioned in paragraph (8)(a).

(10) For the purposes of this Division, where:

(a) any of the following subparagraphs applies:

(i) any of the following events occurs in relation to a company (which company is in this subsection called the ***transferor***):

(A) the company passes a resolution for its winding-up;

(B) an order is made for the winding-up of the company;

(C) any similar event;

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(ii) a partnership (in this subsection also called the ***transferor***) ceases to exist for the purposes of this Act;

(iii) either of the following sub-subparagraphs applies in relation to the trustee of a trust estate (in this subsection also called the ***transferor***):

(A) the trust estate commences to be wound-up;

(B) the trust estate ceases to exist for the purposes of this Act; and

(b) an actual transfer of property or services is made to a trust estate (in this subsection called the ***transferee***) as a consequence of the transferor being wound-up or ceasing to exist;

the transferor is taken to have transferred to the transferee the property or services concerned.

(11) For the purposes of this Division, where:

(a) the following subparagraphs apply to an entity (in this subsection called the ***defunct entity***):

(i) the defunct entity is a company, a partnership or the trustee of a trust estate;

(ii) the defunct entity transferred property or services to a trust estate (including a transfer that was taken to have been made because of another application or other applications of this subsection) at a particular time;

(iii) if the defunct entity is a company—any of the following events occurs:

(A) the company passes a resolution for its winding-up;

(B) an order is made for the winding-up of the company;

(C) any similar event;

(iv) if the defunct entity is a partnership—the partnership ceases to exist for the purposes of this Act;

(v) if the defunct entity is a trustee of a trust estate—either of the following sub-subparagraphs applies:

(A) the trust estate commences to be wound-up;

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(B) the trust estate ceases to exist for the purposes of this Act; and

(b) the Commissioner is satisfied that another entity (in this subsection called the ***successor entity***) has benefited or is capable (whether by the exercise of a power of appointment or otherwise) of benefiting (either directly or indirectly through one or more interposed companies, partnerships or trusts) by, or as a result of:

(i) a transfer of property or services made by the defunct entity; or

(ii) a transfer of property or services made as a consequence of the defunct entity being wound-up or ceasing to exist; and

(c) the Commissioner is of the opinion that it is appropriate to apply this subsection to the successor entity;

the assessable income of the successor entity of the year of income in which the event, or the earliest event, mentioned in subparagraph (a)(iii), (iv) or (v) occurred and of each subsequent year of income is to be determined as if the successor entity had transferred to the trust estate mentioned in subparagraph (a)(ii), at the time mentioned in that subparagraph:

(d) the whole of the property or services mentioned in that subparagraph; or

(e) if the Commissioner thinks it appropriate—a part of the property or services referred to in that subparagraph.

102AAL Division not to apply to transfers by trustees of deceased estates

A reference in this Division to a transfer of property or services to a trust estate does not include a reference to a transfer made by the trustee of the estate of a deceased person under:

(a) the terms of the deceased person's will or codicil; or

(b) an order of a court that varied or modified the provisions of the deceased person's will or codicil;

unless:

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(c) the transfer was made in or as the result of the exercise (by the trustee or any other person) of a power of appointment or any other discretion; or

(d) under subsection 102AAK(1), the property or services are taken to have been transferred by an entity other than the trustee, instead of by the trustee; or

(e) under subsection 102AAK(5), the Commissioner treats the property or services as having been (to any extent) transferred by an entity other than the trustee, instead of by the trustee.

Subdivision B—Payment of interest by taxpayer on distributions from certain non-resident trust estates

102AAM Payment of interest by taxpayer on distributions from certain non-resident trust estates

(1) For the purposes of this section, if:

(a) an amount is included in the assessable income of a taxpayer of a year of income (which year of income is in this section called the ***current year of income***), being the year of income commencing on 1 July 1990 or a subsequent year of income, under section 99B in relation to a trust estate; and

(b) the whole or a part of the amount so included in the taxpayer's assessable income (which whole or part is in this section called the ***distributed amount***) is attributable to:

(i) if the trust estate was a listed country trust estate in relation to a particular non-resident year of income of the trust estate (in this section called the ***non-resident trust's year of income***)—so much of the income and profits of the trust estate of the non-resident trust's year of income as represents eligible designated concession income in relation to any listed country in relation to the non-resident trust's year of income; or

(ii) if the trust estate was not a listed country trust estate in relation to a particular non-resident year of income of the trust estate (in this section also called the

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non-resident trust's year of income)—so much of the income and profits of the trust estate of the non-resident trust's year of income as has not been subject to tax in any listed country in a tax accounting period:

(A) ending before the end of the non-resident trust's year of income; or

(B) commencing during the non-resident trust's year of income;

then:

(c) the distributed amount is the distributed amount of the non-resident trust's year of income; and

(d) the taxpayer is the original taxpayer in relation to the distributed amount of the non-resident trust's year of income.

(1A) For the purposes of subsection (1), unless the contrary is established by the taxpayer:

(a) a distributed amount in relation to a listed country trust estate in relation to a non-resident trust's year of income is taken to be wholly attributable to income and profits of the trust estate of that year of income that represent eligible designated concession income in relation to a listed country; and

(b) a distributed amount in relation to a trust estate that was not a listed country trust estate in relation to a non-resident trust's year of income is taken to be wholly attributable to income and profits of the trust estate of that year of income that have not been subject to tax in any listed country in a tax accounting period.

(1B) This section does not apply to a distributed amount that is attributable to income or profits of the estate of a deceased person if the amount was paid to, or applied for the benefit of, the taxpayer within 3 years after the death of that person.

(1C) This section does not apply to a distributed amount that was included in the assessable income of a taxpayer of a year of income under section 99B in relation to a trust estate if, at all times during the year of income, the trust:

(a) was a public unit trust; and

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(b) was not a controlled foreign trust.

(2) Subject to this section, if the original taxpayer in relation to the distributed amount of the non-resident trust's year of income is:

(a) a company or a natural person (other than a company or a natural person in the capacity of a trustee); or

(c) the trustee of a public trading trust in relation to the current year of income; or

(d) the trustee of a complying superannuation fund, a non-complying superannuation fund, a complying approved deposit fund, a non-complying approved deposit fund or a pooled superannuation trust in relation to the current year of income;

the taxpayer is liable to pay interest to the Commissioner in respect of the distributed amount of the non-resident trust's year of income, calculated under subsection (5), on the amount calculated using the formula:

$$[\text{Distributed amount} \times \text{Applicable rate of tax}] - \text{FITO}$$

where:

Distributed amount means the distributed amount of the non-resident trust's year of income.

Applicable rate of tax has the meaning given by subsection (10).

FITO (Foreign income tax offset) means so much of any tax offset under Division 770 of the *Income Tax Assessment Act 1997* to which the taxpayer is entitled as is attributable to the distributed amount of the non-resident trust's year of income.

(3) Subject to this section, if:

(a) the original taxpayer in relation to the distributed amount of the non-resident trust's year of income is the trustee of a trust estate who is liable to be assessed and pay tax under section 98, 99 or 99A in respect of a part of, or a share in, the net income of the trust estate; and

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(b) the whole or a part (which whole or part is in this subsection called the ***taxpayer's portion of the distributed amount of the non-resident trust's year of income***) of the part or share of the net income is attributable to the distributed amount of the non-resident trust's year of income;

the taxpayer is liable to pay interest to the Commissioner in respect of the taxpayer's portion of the distributed amount of the non-resident trust's year of income, calculated under subsection (5), on the amount calculated using the formula:

$$\left[\begin{array}{c}\text{Taxpayer's portion of}\\ \text{the distributed amount}\end{array} \times \begin{array}{c}\text{Applicable}\\ \text{rate of tax}\end{array}\right] - \text{FITO}$$

where:

Taxpayer's portion of the distributed amount means the taxpayer's portion of the distributed amount of the non-resident trust's year of income.

Applicable rate of tax has the meaning given by subsection (10).

FITO (Foreign income tax offset) means so much of any tax offset under Division 770 of the *Income Tax Assessment Act 1997* to which the taxpayer is entitled as is attributable to the taxpayer's portion of the distributed amount of the non-resident trust's year of income.

(4) Subject to this section, if:

(a) the original taxpayer in relation to the distributed amount of the non-resident trust's year of income is the trustee of a trust estate or a partnership; and

(b) the following conditions are satisfied in relation to another taxpayer (in this subsection called the ***actual taxpayer***):

(i) an amount is included in the assessable income of the actual taxpayer of a year of income under subsection 92(1) or section 97, 98A or 100;

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(ii) the actual taxpayer is:

(A) a company or a natural person (other than a company or a natural person in the capacity of a trustee); or

(B) the trustee of a complying superannuation fund, a non-complying superannuation fund, a complying approved deposit fund, a non-complying approved deposit fund or a pooled superannuation trust in relation to the year of income; or

(D) the trustee of a public trading trust in relation to the year of income; or

(E) the trustee of a trust estate who is liable to be assessed and pay tax under section 98, 99 or 99A in respect of a part of, or a share in, the net income of a trust estate;

(iii) if sub-subparagraph (ii)(A), (B), (C) or (D) applies—the whole or a part of the amount so included in the actual taxpayer's assessable income (which whole or part is in this subsection called the ***taxpayer's portion of the distributed amount of the non-resident trust's year of income***) is attributable (either directly or indirectly through one or more interposed partnerships or trusts) to the distributed amount of the non-resident trust's year of income;

(iv) if sub-subparagraph (ii)(E) applies—the whole or a part (which whole or part is in this subsection also called the ***taxpayer's portion of the distributed amount of the non-resident trust's year of income***) of the part or share of the net income is attributable (either directly or indirectly through one or more interposed partnerships or trusts) to the distributed amount of the non-resident trust's year of income;

the actual taxpayer is liable to pay interest to the Commissioner in respect of the taxpayer's portion of the distributed amount of the non-resident trust's year of income, calculated under subsection (5), on the amount calculated using the formula:

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$$\left[\begin{array}{l}\text{Taxpayer's portion of}\\ \text{the distributed amount}\end{array} \times \begin{array}{l}\text{Applicable}\\ \text{rate of tax}\end{array}\right] - \text{FITO}$$

where:

Taxpayer's portion of the distributed amount means the taxpayer's portion of the distributed amount of the non-resident trust's year of income.

Applicable rate of tax has the meaning given by subsection (10).

FITO (Foreign income tax offset) means so much of any tax offset under Division 770 of the *Income Tax Assessment Act 1997* to which the taxpayer is entitled as is attributable to the taxpayer's portion of the distributed amount of the non-resident trust's year of income.

(4A) If:

(a) paragraph 102UK(2)(b) or 102UM(2)(b) has the effect that the whole or a part of a share of the net income of a trust estate (the ***first trust estate***) is not included in the assessable income of the trustee of another trust estate (the ***second trust estate***); and

(b) the whole or the part of the share (which whole or part is in this subsection called the ***taxpayer's portion of the distributed amount of the non-resident trust's year of income***) is attributable (either directly or indirectly through one or more interposed partnerships or trusts) to the distributed amount of the non-resident trust's year of income; and

(c) if paragraph 102UK(2)(b) or 102UM(2)(b) were ignored, the second trust estate would be an interposed trust mentioned in applying subparagraph (4)(b)(iii) or (iv) of this section; and

(d) this subsection does not also apply to the trustee of a trust interposed between the first trust estate and the non-resident trust;

the trustee of the first trust estate is liable to pay interest to the Commissioner in respect of the taxpayer's portion of the distributed amount of the non-resident trust's year of income,

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calculated under subsection (5), on the amount calculated using the formula:

$$\left(\begin{array}{l}\text{Taxpayer's portion of}\\ \text{the distributed amount}\end{array} \times \begin{array}{l}\text{Applicable}\\ \text{rate of tax}\end{array}\right) - \text{FITO}$$

where:

applicable rate of tax has the meaning given by subsection (10).

FITO (Foreign income tax offset) means so much of any tax offset under Division 770 of the *Income Tax Assessment Act 1997* to which the trustee of the first trust would be entitled, in respect of the taxpayer's portion of the distributed amount of the non-resident trust's year of income, if the taxpayer's portion of the distributed amount of the non-resident trust's income were an amount in respect of which the trustee were liable to be assessed and to pay tax under section 99A.

taxpayer's portion of the distributed amount means the taxpayer's portion of the distributed amount of the non-resident trust's year of income.

(5) Interest payable by a taxpayer under this section is to be calculated:

(a) in respect of the period commencing at whichever of the following times is the latest:

(i) the beginning of the first year of income of the taxpayer that begins after the end of the non-resident trust's year of income;

(ii) the beginning of the year of income of the taxpayer commencing on 1 July 1990;

(iii) if the taxpayer is a natural person (other than a natural person in the capacity of a trustee) who first commenced to be a resident of Australia at a time (in this subparagraph called the ***first residence time***) on or after 1 July 1990—the beginning of the year of income of the taxpayer next following the year of income of the taxpayer in which the first residence time occurred;

and ending at the end of the assessment year of income; and

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(b) at the base interest rate.

(6) Where the assessable income of a taxpayer of a year of income includes one or more of the following amounts in relation to one or more non-resident years of income of a particular trust estate (which amounts are in this subsection called the ***principal amounts***):

(a) the distributed amount of the non-resident trust's year of income;

(b) the taxpayer's portion of the distributed amount of the non-resident trust's year of income;

the aggregate of the interest payable by the taxpayer in respect of the principal amounts is not to exceed the difference between:

(c) the aggregate of the principal amounts; and

(d) so much of the tax payable in respect of the year of income as is attributable to the aggregate of the principal amounts (ignoring any tax offset under Part 3-6 of the *Income Tax Assessment Act 1997*).

(7) For the purposes of this section, the extent to which an amount (in this subsection called the ***section 99B amount***) included in the assessable income of a taxpayer of a year of income under section 99B in relation to a trust estate is attributable to an amount (in this subsection called the ***trust amount***) covered by subparagraph (1)(b)(i) or (ii) is to be determined in accordance with the following paragraphs:

(a) in all cases—distributions of income and profits of the trust estate are to be taken to have been made in the following order:

(i) first, from income and profits of the earliest non-resident year of income;

(ii) then, successively from income and profits of successive subsequent years of income;

(b) if subparagraph (1)(b)(i) applies—the extent to which the amount (in this paragraph called the ***adjusted section 99B amount***), being so much of the section 99B amount as is attributable to the income and profits of the trust estate of the

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non-resident trust's year of income, represents eligible designated concession income in relation to any listed country in relation to the non-resident trust's year of income is calculated using the formula:

$$\text{Adjusted section 99B amount} \times \frac{\text{Eligible designated concession income}}{\text{Total income}}$$

where:

Adjusted section 99B amount means the adjusted section 99B amount.

Eligible designated concession income means the number of dollars in the amount, being so much of the income and profits of the trust estate of the non-resident trust's year of income as represents eligible designated concession income in relation to any listed country in relation to the non-resident trust's year of income.

Total income means the number of dollars in the income and profits of the trust estate of the non-resident trust's year of income.

(c) if subparagraph (1)(b)(ii) applies—the extent to which the amount (in this paragraph called the ***adjusted section 99B amount***), being so much of the section 99B amount as is attributable to the income and profits of the trust estate of the non-resident trust's year of income, represents income and profits that have not been subject to tax in a listed country in a tax accounting period mentioned in that subparagraph is calculated using the formula:

$$\text{Adjusted section 99B amount} \times \frac{\text{Untaxed income}}{\text{Total income}}$$

where:

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Adjusted section 99B amount means the adjusted section 99B amount.

Untaxed income means the number of dollars in the amount, being so much of the income and profits of the trust estate of the non-resident trust's year of income as is not subject to tax in any listed country in a tax accounting period mentioned in that subparagraph.

Total income means the number of dollars in the income and profits of the trust estate of the non-resident trust's year of income.

(8) For the purposes of subsection (7), an amount of income or profits of a trust estate is to be taken to be distributed if the amount is paid to, or applied for the benefit of (within the meaning of section 99B), a beneficiary of the trust estate.

(9) Where, apart from this subsection, the amount of interest that would be payable under this section by a taxpayer in respect of the distributed amount of a non-resident trust's year of income, or in respect of the taxpayer's portion of the distributed amount of a non-resident trust's year of income, is less than 50 cents, interest is not payable by the taxpayer under this section.

(10) For the purposes of this section, the applicable rate of tax in relation to a taxpayer is:

(a) if the taxpayer is a company (other than a company in the capacity of a trustee)—the corporate tax rate for the year of tax to which the assessment year of income relates; or

(b) in any other case—the maximum rate specified in the table in Part I of Schedule 7 of the *Income Tax Rates Act 1986* that applies for the assessment year of income.

(10A) Paragraph (10)(b) has effect as if the maximum rate specified as mentioned in that paragraph was increased by 2 percentage points for assessment years of income that correspond to the temporary budget repair levy years (within the meaning of section 4-11 of the *Income Tax (Transitional Provisions) Act 1997*).

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(11) For the purposes of the application of this section to a taxpayer, the assessment year of income is:

(a) if subsection (2) or (3) applies—the current year of income; or

(b) if subsection (4) applies—the year of income referred to in subparagraph (4)(b)(i).

(12) For a taxpayer who is not a full self-assessment taxpayer for the assessment year of income, the Commissioner must make an assessment of the interest payable by the taxpayer under this section.

(13A) If:

(a) a taxpayer is a full self-assessment taxpayer for the assessment year of income; and

(b) the taxpayer lodges a return for that year;

then:

(c) the Commissioner is taken to have made an assessment of the interest payable by the taxpayer under this section for the year, equal to the amount specified in the return as the interest so payable; and

Note: If any interest is so payable, the return must specify the amount: see section 161AA.

(d) the assessment is taken to have been made on the day on which the return is lodged; and

(e) the return is taken to be a notice of that assessment given to the taxpayer by the Commissioner on that day.

102AAN Collection etc. of interest

Sections 170, 172, 174, 254 and 255 of this Act, and Division 5 of the *Income Tax Assessment Act 1997* (How to work out when to pay your income tax), apply to interest payable under section 102AAM in the same way as they apply to income tax.

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Subdivision D—Accruals system of taxation of certain non-resident trust estates

102AAS Object of Subdivision

The object of this Subdivision is to set out rules relating to the following:

(a) the determination of attributable taxpayer status (section 102AAT);

(b) the calculation of the attributable income of a trust estate (sections 102AAU to 102AAZC (inclusive));

(c) the inclusion of amounts in assessable income (sections 102AAZD, 102AAZE and 102AAZF);

(d) the keeping of associated records (section 102AAZG).

102AAT Accruals system of taxation—attributable taxpayer

(1) Subject to this Division, for the purposes of this Division, an entity is an attributable taxpayer in relation to a year of income of the entity (which year of income is in this section called the ***entity's current year of income***) and in relation to a particular trust estate if, and only if:

(a) either of the following subparagraphs applies:

(i) all of the following conditions are satisfied:

(A) the trust estate was a discretionary trust estate at any time during the entity's current year of income;

(B) the trust estate was not a public unit trust at all times during the entity's current year of income;

(C) the entity has transferred property or services to the trust estate at a time (in this subparagraph called the ***transfer time***) before or during the entity's current year of income;

(D) if the underlying transfer was made in the course of carrying on a business—it is not the

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case that, at or about the time of the underlying transfer, identical or similar property or services were transferred by the underlying transferor in the ordinary course of business to ordinary clients or customers under arm's length transactions and in similar circumstances and subject to identical or similar terms and conditions as those that applied in relation to the underlying transfer of the property or services concerned;

(E) if the underlying transfer was made under an arm's length transaction otherwise than in the course of carrying on a business—the entity was in a position, at any time after the transfer time and before the end of the entity's current year of income, to control the trust estate;

(F) if the transfer was made before the IP time and the trust estate was in existence, and was a discretionary trust estate, at the IP time—the entity was in a position, at any time after the IP time and before the end of the entity's current year of income, to control the trust estate;

(ii) all of the following conditions are satisfied:

(A) the trust estate was a non-discretionary trust estate, or a public unit trust, at all times during the entity's current year of income when the trust estate was in existence;

(B) the entity has transferred property or services to the trust estate after the IP time and before or during the entity's current year of income;

(C) the underlying transfer was made for no consideration or for a consideration less than the arm's length amount in relation to the underlying transfer;

(D) it is not the case that the sole purpose of the underlying transfer was the acquisition of units in the trust estate where the parties to the

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underlying transfer were at arm's length with each other in relation to the underlying transfer and the trust estate was a public unit trust at all times during the entity's current year of income when the trust estate was in existence; and

(b) if the entity is a natural person (other than a natural person in the capacity of a trustee):

(i) if:

(A) the natural person first commenced to be a resident of Australia at a time (in this subparagraph called the ***first residence time***) after the IP time and before the end of the entity's current year of income; and

(B) the transfer, or each of the transfers, covered by paragraph (a) was made before the first residence time;

the trust estate was not a non-resident family trust in relation to the natural person at all times:

(C) after the beginning of the first year of income of the natural person after the first residence time; and

(D) before the end of the entity's current year of income;

when the trust estate was in existence; or

(ii) in any other case—the trust estate was not a non-resident family trust in relation to the natural person at all times after the beginning of the year of income of the taxpayer commencing on 1 July 1990 and before the end of the entity's current year of income when the trust estate was in existence; and

(c) it is not the case that:

(i) the entity is a natural person (other than a natural person in the capacity of a trustee) who first commenced to be a resident of Australia at a time (in this paragraph called the ***first residence time***) after the IP time and before the end of the entity's current year of income; and

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(ii) the transfer was made before the first residence time; and

(iii) the entity was not in a position to control the trust estate at any time during the period:

(A) commencing at the beginning of the first year of income of the entity after the first residence time; and

(B) ending at the end of the entity's current year of income.

(2) For the purposes of this section, if:

(a) an entity (in this subsection called the ***transferor***) being a partnership is an attributable taxpayer in relation to the entity's current year of income and in relation to a particular trust estate (in this subsection called the ***transferee trust estate***) because of one or more transfers (being actual transfers or transfers taken to have been made because of subsection 102AAK(1), (2) or (5)) of property or services made by the transferor to the transferee trust estate; or

(b) an entity (in this subsection also called the ***transferor***) being a trust estate is an attributable taxpayer in relation to the entity's current year of income and in relation to another trust estate (in this subsection also called the ***transferee trust estate***) because of one or more transfers (being actual transfers or transfers taken to have been made because of subsection 102AAK(1), (2) or (5)) of property or services made by the transferor to the transferee trust estate;

the question whether any other entity is an attributable taxpayer in relation to the same year of income and in relation to the transferee trust estate is to be determined as if:

(c) if paragraph (a) applies—subsection 102AAK(6) did not apply in relation to any of the transfers mentioned in that paragraph; or

(d) if paragraph (b) applies—subsection 102AAK(8) did not apply in relation to any of the transfers mentioned in that paragraph.

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(3) If:

(a) apart from this subsection, an entity, being a natural person (other than a natural person in the capacity of a trustee), is not an attributable taxpayer in relation to the entity's current year of income and in relation to a trust estate; and

(b) apart from paragraph (1)(b), the entity would have been such an attributable taxpayer; and

(c) apart from subparagraph 102AAH(2)(b)(i) or (3)(a)(ii), the trust estate was not a non-resident family trust in relation to the natural person at some time after the entity's current year of income when the natural person was alive and the trust estate was in existence;

the following provisions have effect:

(d) subsection (1) has effect as if paragraph (1)(b) had applied;

(e) section 170 does not prevent the amendment of an assessment at any time for the purposes of giving effect to this subsection.

(4) If:

(a) apart from this subsection, an entity is not an attributable taxpayer in relation to the entity's current year of income and in relation to a trust estate; and

(b) apart from sub-subparagraph (1)(a)(i)(E) or (F) or paragraph (1)(c), the entity would have been such an attributable taxpayer; and

(c) the entity was in a position to control the trust estate at some time after the entity's current year of income when the trust estate was in existence;

the following provisions have effect:

(d) subsection (1) has effect as if sub-subparagraph (1)(a)(i)(E) or (F) or paragraph (1)(c), as the case may be, had applied;

(e) section 170 does not prevent the amendment of an assessment at any time for the purposes of giving effect to this subsection.

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102AAU Attributable income of a trust estate

(1) Subject to this Subdivision, the attributable income of a non-resident trust estate of a year of income is:

(a) if the non-resident trust estate is not a listed country trust estate in relation to the year of income—the net income of the non-resident trust estate of the year of income; or

(b) if the non-resident trust estate is a listed country trust estate in relation to the year of income—the amount that would have been the net income of the non-resident trust estate of the year of income if the exempt income of the trust estate included all income and profits of the trust estate, other than eligible designated concession income in relation to any listed country in relation to the year of income;

reduced by:

(c) so much (if any) of the amount covered by paragraph (a) or (b) as represents:

(i) an amount:

(A) that is or has been included in the assessable income of a beneficiary under section 97; or

(B) in respect of which the trustee of the non-resident trust estate is or has been assessed and liable to pay tax under section 98, 99 or 99A; or

(C) on which trustee beneficiary non-disclosure tax is payable under Division 6D; or

(ii) an amount:

(A) that is paid to a beneficiary, being a resident of a listed country, during the period of 13 months commencing at the beginning of the year of income; and

(B) subject to tax in a listed country in a tax accounting period ending before the end of the year of income or commencing during the year of income; or

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(iii) an amount that consists of, or is attributable to, the franked part of a distribution, or the part of a distribution that has been franked with an exempting credit; or

(v) if an amount is or has been included in the assessable income of any taxpayer under section 102AAZD because the taxpayer is an attributable taxpayer in relation to any year of income (in this subparagraph called the ***taxpayer's year of income***) and in relation to a trust estate other than the non-resident trust estate—so much of an amount paid to the trustee of the non-resident trust estate as represents the attributable income of that other trust estate of the taxpayer's year of income; or

(vii) if:

(A) an attribution account payment is made to the trustee of the trust estate during the year of income; and

(B) the making of the attribution account payment gives rise to an attribution debit, in relation to any taxpayer, for the entity making the payment;

the amount of the attribution debit; or

(viii) an amount of income or profits of the trust estate:

(A) that is subject to tax in any listed country in a tax accounting period ending before the end of the year of income or commencing during the year of income; and

(B) that is not eligible designated concession income in relation to any listed country in relation to the year of income; and

(d) so much of any foreign tax or Australian tax paid by the trustee or a beneficiary as is attributable to so much of the amount covered by paragraph (a) or (b), as the case requires, as remains after the reduction or reductions covered by paragraph (c).

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(2) The attributable income of a resident trust estate of a year of income is 0.

(3) For the purposes of sub-subparagraph (1)(c)(ii)(A), a beneficiary is to be taken to be a resident of a listed country if, and only if, the beneficiary is treated as a resident of the listed country for the purposes of the tax law of the listed country.

(4) If the tax law of a listed country adopts some criterion other than treatment as a resident as the criterion for applying a worldwide source tax base to a beneficiary, then, subsection (3) has effect, in relation to that tax law, as if that criterion were the same as treatment as a resident of the listed country for the purposes of that tax law.

(5) For the purposes of this section, where, because of section 101, a beneficiary is presently entitled to a particular amount, the amount is taken to have been paid to the beneficiary.

(6) For the purposes of this section, the extent to which an amount referred to in subparagraph (1)(c)(i) or (ii) (in this subsection called the ***taxed amount***) represents the amount covered by paragraph (1)(b) (in this subsection called the ***listed country trust amount***) is calculated using the formula:

$$\text{Taxed amount} \times \frac{\text{Listed country trust amount}}{\text{Net income}}$$

where:

Listed country trust amount means the number of dollars in the listed country trust amount.

Taxed amount means the taxed amount.

Net income means the number of dollars in the net income of the non-resident trust estate concerned of the year of income concerned.

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102AAV Double tax agreements to be disregarded

In calculating the attributable income of a trust estate, the *International Tax Agreements Act 1953* is to be disregarded, except for the purpose of references in this Act to that Act.

102AAW Certain provisions to be disregarded in calculating attributable income

(1) For the purpose of applying this Act in calculating the attributable income of a trust estate, sections 23AI, 128D, 456, 457, and 459A of this Act and section 802-15 of the *Income Tax Assessment Act 1997* are to be disregarded.

(2) For the purpose of applying this Act in calculating the attributable income of a trust estate:

(aa) Division 230 of the *Income Tax Assessment Act 1997*; and

(a) Division 974 of the *Income Tax Assessment Act 1997*; and

(b) the operation of any provision of this Act to the extent to which that operation depends on an expression whose meaning is given by a Division mentioned in paragraph (aa) or (a);

are to be disregarded.

102AAY Modified application of trading stock provisions

When applying this Act and the *Income Tax Assessment Act 1997* in calculating the attributable income of the trust estate, Division 70 of the *Income Tax Assessment Act 1997* has effect as if the cost of the item of trading stock were the value to be taken into account at the start of the year of income.

102AAZ Modified application of depreciation provisions

(1) For the purpose of determining the attributable income of a trust estate of a year of income (in this section called the ***attributable year of income***), where property has been held by the trustee of the trust estate in a non-attributable year of income before the

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attributable year of income, then, in relation to the application of a depreciation provision to the property, subsection (2) applies.

(2) Such amount as the Commissioner considers appropriate to take account of the holding of the property as mentioned in subsection (1) is, under the depreciation provision:

(a) an allowable deduction to the trustee of the trust estate; or

(b) included in the assessable income of the trust estate;

as the case requires, for the attributable year of income in substitution for any amount that would otherwise be so included or allowable.

(4) For the purpose of exercising the Commissioner's power under subsection (2) in relation to deductions allowable under Division 40 of the *Income Tax Assessment Act 1997*, the Commissioner must assume that the property was used by the trustee of the trust estate during any non-attributable year of income wholly and exclusively for a taxable purpose (within the meaning of that Division).

102AAZB General modifications—CGT

For the purposes of applying this Act in calculating the attributable income of a trust estate, Parts 3-1 and 3-3 of the *Income Tax Assessment Act 1997* (about CGT) apply as if:

(a) sections 118-12 (about assets used to produce non-assessable income) and 855-50 (about a trust becoming a resident trust) were disregarded; and

(b) the trust estate were a resident trust for CGT purposes.

102AAZBA Modified application of CGT—effect of certain changes of residence

For the purposes of applying this Act in calculating the attributable income of a trust estate of a year of income (in this section called the ***attributable income year***), where:

(a) disregarding the assumption in paragraph 102AAZB(b), at any time (in this section called the ***residence-change time***)

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during the attributable income year or an earlier year of income, the trust estate ceased to be a resident trust for CGT purposes and became a non-resident trust estate; and

(b) the trust estate owned a CGT asset at the residence-change time; and

(c) a CGT event happens in relation to the asset during the attributable income year; and

(d) section 104-170 of the *Income Tax Assessment Act 1997* (CGT event I2) applies to the asset in respect of the change of residence for the purposes of the application of this Act apart from this Subdivision;

then sections 411 to 414 (inclusive) apply to the asset as if:

(e) those sections had effect for the purposes of calculating attributable income under this Subdivision instead of Part X; and

(f) any reference in those sections to an eligible CFC were a reference to the trust estate; and

(g) any reference in those sections to a commencing day asset were a reference to the asset; and

(h) any reference in those sections relating to the eligible CFC's commencing day or the day following the eligible CFC's commencing day were a reference relating respectively to the residence-change time or a time immediately after the residence-change time; and

(j) subsections 412(2) and (3), and paragraphs 414(3)(b) and (4)(b), referred only to the market value of the asset concerned.

102AAZC Modified application of loss provisions—pre-1990-91 losses

In calculating the attributable income of a trust estate of a year of income, no deductions are allowable under Division 36 of the *Income Tax Assessment Act 1997* in respect of tax losses of a year of income earlier than the year of income commencing on 1 July 1990.

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102AAZD Assessable income of attributable taxpayer to include attributable income of trust estate to which taxpayer has transferred property or services

(1) Subject to section 102AAZE and to this section, if:

(a) an entity is an attributable taxpayer:

(i) in relation to the year of income of the taxpayer commencing on 1 July 1990 (which year of income is in this section called the ***taxpayer's current year of income***) or in relation to a subsequent year of income of the taxpayer (which year of income is in this section also called the ***taxpayer's current year of income***); and

(ii) in relation to a trust estate; and

(b) any part of a non-resident year of income of the trust estate occurs during the taxpayer's current year of income; and

(c) the taxpayer is a resident at any time during the taxpayer's current year of income;

the assessable income of the taxpayer of the taxpayer's current year of income includes:

(d) if the taxpayer is a resident at all times during the taxpayer's current year of income—the whole of the notional attributable income of the trust estate of the taxpayer's current year of income; or

(e) if the taxpayer is a resident for only part of the taxpayer's current year of income—the amount calculated using the formula:

$$\text{Notional attributable income} \times \frac{\text{Days in residency period}}{\text{Days in year of income}}$$

where:

Notional attributable income means the notional attributable income of the trust estate of the taxpayer's current year of income.

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Days in residency period means the number of whole days during the taxpayer's current year of income when the taxpayer was a resident.

Days in year of income means the number of whole days in the taxpayer's current year of income.

(2) A reference in subsection (1) to the notional attributable income of the trust estate of the taxpayer's current year of income is a reference to:

(a) if there is a year of income of the trust estate that begins at the same time as the beginning of the taxpayer's current year of income—the attributable income of the trust estate of that year of income; or

(b) in any other case—the amount obtained:

(i) by calculating, for each year of income of the trust estate (in this paragraph called the ***trust's year of income***) any part of which occurs during the taxpayer's current year of income, the amount calculated using the formula:

$$\text{Attributable income} \times \frac{\text{Days in overlapping period}}{\text{Days in trust's year of income}}$$

where:

Attributable income means the attributable income of the trust estate of the trust's year of income.

Days in overlapping period means the number of whole days in the trust's year of income that occurred during the taxpayer's current year of income.

Days in trust's year of income means the number of whole days in the trust's year of income; and

(ii) by adding together the amounts calculated under subparagraph (i).

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(3) If:

(a) an amount is included in the assessable income of an attributable taxpayer of the taxpayer's current year of income under subsection (1); and

(b) before or during the taxpayer's current year of income, one or more entities other than the taxpayer have transferred property or services to the trust estate concerned; and

(c) the taxpayer gives to the Commissioner, in accordance with the approved form, such information in connection with the operation of this Division as is required by the form to be set out;

the Commissioner may reduce the amount included in the taxpayer's assessable income of the taxpayer's current year of income under subsection (1) having regard to:

(d) the extent to which the attributable income of the trust estate is, in the opinion of the Commissioner, attributable to property or services transferred by the taxpayer; and

(e) such other matters as the Commissioner considers relevant.

(4) If:

(a) apart from this subsection, an amount would be included in the assessable income of an attributable taxpayer of the taxpayer's current year of income under subsection (1) in relation to a particular trust estate; and

(b) the taxpayer could not reasonably be expected to obtain the information required to determine the attributable income of the trust estate;

the following provisions have effect:

(c) no amount is to be included in the assessable income of the taxpayer of the taxpayer's current year of income under subsection (1) in relation to the trust estate;

(d) the assessable income of the taxpayer of the taxpayer's current year of income includes the amount obtained:

(i) if any of the transfers that were taken into account in determining whether the taxpayer was an attributable taxpayer in relation to the taxpayer's current year of

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income and in relation to the trust estate were made by the taxpayer to the trust estate after the IP time—by calculating, for each such transfer, the amount calculated using the formula:

$$\text{Adjusted value of the transfer} \times \left[\text{Weighted statutory interest rate} + 5\%\right]$$

where:

Adjusted value of the transfer has the meaning given by subsection (5).

Weighted statutory interest rate means the weighted statutory interest rate in relation to the taxpayer's current year of income; and

(ii) if any of the transfers that were taken into account in determining whether the taxpayer was an attributable taxpayer in relation to the taxpayer's current year of income and in relation to the trust estate were made by the taxpayer to the trust estate before the IP time—the amount calculated using the formula:

$$\text{Adjusted net worth of trust estate} \times \left[\text{Weighted statutory interest rate} + 5\%\right]$$

where:

Adjusted net worth of trust estate has the meaning given by subsection (6).

Weighted statutory interest rate means the weighted statutory interest rate in relation to the taxpayer's current year of income; and

(iii) by adding together the amounts calculated under subparagraphs (i) and (ii).

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(5) For the purposes of subsection (4), the adjusted value of a transfer of property or services made by an attributable taxpayer to a trust estate is:

(a) if the transfer occurred during the taxpayer's current year of income—the amount calculated using the formula:

$$\text{Market value of transferred property or services} \times \frac{\text{Days after transfer}}{\text{Days in year of income}}$$

where:

Market value of transferred property or services means the market value, immediately before the transfer, of the property or services.

Days after transfer means the number of whole days in the taxpayer's current year of income after the day on which the transfer took place.

Days in year of income means the number of whole days in the taxpayer's current year of income; or

(b) if the transfer of the property or services occurred before the taxpayer's current year of income—the sum of:

(i) the market value, immediately before the transfer, of the property or services; and

(ii) the amount obtained:

(A) by calculating, in respect of the transfer, for each year of income preceding the taxpayer's current year of income, the amount ascertained using the formula in subparagraph (4)(d)(i); and

(B) by adding together the amounts calculated under sub-subparagraph (A).

(6) For the purposes of the application of subsection (4) in relation to a transfer of property or services made by an attributable taxpayer to a trust estate, the adjusted net worth of the trust estate is:

(a) if the taxpayer's current year of income is the year of income commencing on 1 July 1990—the 1 July 1990 net worth of the trust estate; or

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(b) in any other case—the sum of:

(i) the 1 July 1990 net worth of the trust estate; and

(ii) the amount obtained:

(A) by calculating, in respect of the transfer, for each year of income preceding the taxpayer's current year of income, the amount ascertained using the formula in subparagraph (4)(d)(ii); and

(B) by adding together the amounts calculated under sub-subparagraph (A).

(7) If:

(a) subsection (4) applies to an attributable taxpayer in relation to the taxpayer's current year of income; and

(b) any of the transfers taken into account in determining whether the taxpayer was an attributable taxpayer in relation to the taxpayer's year of income and in relation to the trust estate concerned were made before the IP time; and

(c) the taxpayer gives to the Commissioner, in accordance with the approved form, such information in connection with the operation of this Division as is required by the form to be set out;

the Commissioner may reduce the amount included in the taxpayer's assessable income of the taxpayer's current year of income under subsection (4) having regard to:

(d) the extent to which the market value, as at the beginning of the taxpayer's current year of income, of the assets of the trust estate is, in the opinion of the Commissioner, attributable to property or services transferred by the taxpayer before the IP time; and

(e) such other matters as the Commissioner considers relevant.

102AAZE Accruals system of taxation does not apply to small amounts

An amount is not to be included in the assessable income of the taxpayer of a year of income under section 102AAZD in relation to

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a trust estate that is a listed country trust estate in relation to the year of income if the amount obtained by:

(a) identifying each trust estate in relation to which the taxpayer is an attributable taxpayer in relation to the year of income; and

(b) calculating the attributable income of the year of income of each such trust estate; and

(c) adding the amounts calculated under paragraph (b);

does not exceed the lesser of the following amounts:

(d) $20,000;

(e) 10% of the total of the net incomes of each of those trust estates of the year of income.

102AAZF Only resident partners, beneficiaries etc. liable to be assessed as a result of attribution

Section 460 applies to an amount included in the assessable income of a taxpayer under section 102AAZD in a corresponding way to the way in which section 460 applies to an amount included in the assessable income of a taxpayer under section 456 or 457 and, for the purposes of that corresponding application, references in sections 336, 338 and 460 to a Part X Australian resident are to be read as references to a resident within the meaning of section 6.

102AAZG Keeping of records

(1) Subject to this section, a person who is an attributable taxpayer:

(a) in relation to the year of income of the person commencing on 1 July 1990 or in relation to a subsequent year of income of the person; and

(b) in relation to a particular trust estate;

must keep records (in Australia or elsewhere) containing particulars of:

(c) the acts, transactions and other circumstances that resulted in the person being an attributable taxpayer in relation to that year of income and in relation to that trust estate; and

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(d) except where subsection 102AAZD(4) applies in relation to the trust estate and in relation to the year of income of the person—the basis of the calculation of the attributable income of the trust estate for each year of income of the trust estate any part of which occurred during the year of income of the person; and

(e) the basis of the calculation of the amounts (including nil amounts) included in the assessable income of the person of the year of income of the person under section 102AAZD.

Note: There is an administrative penalty if you do not keep or retain records as required by this section: see section 288-25 in Schedule 1 to the *Taxation Administration Act 1953*.

(2) A person who contravenes subsection(1) commits an offence punishable on conviction by a fine not exceeding 30 penalty units.

Note: See section 4AA of the *Crimes Act 1914* for the current value of a penalty unit.

(2A) An offence under subsection (2) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(3) A person who is required by this section to keep records must:

(a) keep the records in writing in the English language or so as to enable the records to be readily accessible and convertible into writing in the English language; and

(b) keep the records so as to enable the person's liability under this Act to be readily ascertained.

(4) This section does not require a person to keep a record of information if:

(a) the person did not know, and had no reasonable grounds to suspect, that the person was an attributable taxpayer of the kind mentioned in subsection (1); or

(b) the person did not know that, and made all reasonable efforts to ascertain whether, the person was an attributable taxpayer as mentioned in subsection (1); or

(c) the person did not know, and made all reasonable efforts to obtain, the information.

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Note: A defendant bears an evidential burden in relation to the matters in subsection (4), see subsection 13.3(3) of the *Criminal Code*.

(5) Subject to subsections (6) and (7), the following provisions apply to a partnership as if the partnership were a person:
  (a) subsections (1) to (4) (inclusive) of this section;
  (b) subsections 262A(4) and (5), in so far as those subsections apply to records kept under or for the purposes of this section;
  (c) Part III of the *Taxation Administration Act 1953*, in so far as that Part of that Act relates to the provisions covered by paragraph (a) or (b) of this subsection.

(6) Where, by virtue of subsection (5), an offence is taken to have been committed by a partnership, that offence is taken to have been committed by each of the partners.

(7) In a prosecution of a person for an offence by virtue of subsection (6), it is a defence if the person proves that the person:
  (a) did not aid, abet, counsel or procure the act or omission by virtue of which the offence was taken to have been committed; and
  (b) was not in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, an act or omission by virtue of which the offence is taken to have been committed.

Note 1: The defence under subsection (7) does not apply in relation to offences under Part 2.4 of the *Criminal Code*.

Note 2: A defendant bears a legal burden in relation to the matters in subsection (7), see section 13.4 of the *Criminal Code*.

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Division 6AA—Income of certain children

102AA Interpretation

(1) In this Division, unless the contrary intention appears:

agreement means any agreement, arrangement, understanding or scheme, whether formal or informal, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings.

occupation includes any office, employment, trade, business, profession, vocation or calling, but does not include a course of education at a school, college, university or similar institution.

property means property whether real or personal, and includes money.

(2) In this Division:
  (a) a reference to the derivation by a person of assessable income shall be read as including a reference to the inclusion of an amount in the assessable income of the person; and
  (b) a reference to the derivation by a person of any assessable income from particular property shall be read as including a reference to the inclusion of an amount in the assessable income of the person in respect of that property.

(3) In this Division, a reference to the share of a beneficiary of the net income of a trust estate shall be read as a reference to a share of the beneficiary of the net income of a trust estate:
  (a) that is included in the assessable income of the beneficiary under section 97 or 100; or
  (b) in respect of which the trustee of the trust estate is liable to be assessed and to pay tax in pursuance of section 98.

(4) A reference in this Division to income that is derived from particular property shall be read as including a reference to income

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that is derived from property that, in the opinion of the Commissioner, represents that property.

102AB Application of Division

This Division applies in relation to the year of income that commenced on 1 July 1979 and in relation to all subsequent years of income.

102AC Persons to whom Division applies

(1) For the purposes of this Division, a person is a prescribed person in relation to a year of income if:

(a) the person is less than 18 years of age on the last day of the year of income; and

(b) the person is not an excepted person in relation to the year of income.

(2) Subject to this section, a person (in this subsection referred to as the ***minor***) is an excepted person in relation to a year of income for the purposes of this Division if, and only if:

(b) the minor was engaged in a full-time occupation on the last day of the year of income;

(c) the minor is a person:

(i) in respect of whom a carer allowance under the *Social Security Act 1991* was payable in respect of a period that included the last day of the year of income; or

(ii) to whom a disability support pension under that Act was payable in respect of a period that included the last day of the year of income; or

(d) the Commissioner:

(i) has received a certificate issued by a legally qualified medical practitioner certifying that the minor is:

(A) a disabled child, or a disabled adult, within the meaning of Part 2.19 of the *Social Security Act 1991*; or

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(B) a person who has a continuing inability to work within the meaning of Part 2.3 of the *Social Security Act 1991* or is permanently blind; and

(ii) is satisfied that, on the last day of the year of income, the minor was a person of the kind mentioned in sub-subparagraph (i)(A) or (B);

(da) the minor is the principal beneficiary of a special disability trust;

(e) a double orphan pension was payable in respect of the minor under the *Social Security Act 1991* in respect of a period that included the last day of the year of income;

(f) but for section 1003 of the *Social Security Act 1991*, a double orphan pension would have been payable in respect of the minor under that Act in respect of a period that included the last day of the year of income; or

(g) the Commissioner:

(i) has received a certificate issued by a legally qualified medical practitioner certifying that the minor is a person who, by reason of a permanent disability, is unlikely to be able to engage in a full-time occupation; and

(ii) is satisfied that, on the last day of the year of income, the minor was such a person.

(3) Where:

(a) a double orphan pension was payable, or would, but for section 1003 of the *Social Security Act 1991*, have been payable, in respect of a person under that Act in respect of a period during a year of income, being a period that included the last day of the year of income; and

(b) during the whole of the period referred to in paragraph (a), the person was wholly or substantially dependent for support on a relative or relatives of the person;

that person shall not be taken by virtue of paragraph (2)(e) or (f) to be an excepted person in relation to the year of income.

(4) Where:

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(a) the Commissioner is of the opinion that, during a period during a year of income, being a period that included the last day of the year of income, a person was a person who, by reason of a permanent disability, was unlikely to be able to engage in a full-time occupation; and

(b) during the whole of the period referred to in paragraph (a), the person was wholly or substantially dependent for support on a relative or relatives of the person;

that person shall not be taken, by virtue of paragraph (2)(g), to be an excepted person in relation to the year of income.

(5) For the purposes of subsections (3) and (4), a person shall be taken to have been wholly or substantially dependent for support on a relative or relatives of the person during any period during which that person resided with a relative or relatives of the person unless the contrary is established to the satisfaction of the Commissioner.

(6) Subject to this section, a person shall be taken, for the purposes of subsection (2), to have been engaged in a full-time occupation on the last day of a year of income if, and only if:

(a) the person was, on the last day of the year of income, a person engaged in a full-time occupation; or

(b) in a case to which paragraph (a) does not apply—the person was engaged in a full-time occupation during the year of income for a period of not less than 3 months or for periods the aggregate of which is not less than 3 months.

(7) Where:

(a) during a period during a year of income, a person was engaged in a full-time occupation; and

(b) during the year of income and after the expiration of that period, the person was engaged in a course of full-time education at a school, college, university or similar institution;

no regard shall be had to that period in determining whether the person is to be taken, by virtue of paragraph (6)(b), to have been engaged in a full-time occupation on the last day of the year of income.

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(8) A person shall not be taken to have been engaged in a full-time occupation on the last day of a year of income unless the Commissioner is satisfied that, on that day:

(a) the person had the intention of engaging in a full-time occupation or full-time occupations during the whole or a substantial part of the next succeeding year of income; and

(b) the person did not have the intention of engaging in a course of full-time education at a school, college, university or similar institution at any time during the next succeeding year of income.

102AD Taxable income to which Division applies

The eligible taxable income of a year of income of a person who is a prescribed person in relation to the year of income is the amount (if any) remaining after deducting from the eligible assessable income of the person of the year of income:

(a) any deductions allowable to the person in relation to the year of income that relate exclusively to that eligible assessable income;

(b) so much of any other deductions (other than apportionable deductions) allowable to the person in relation to the year of income as, in the opinion of the Commissioner, may appropriately be related to that eligible assessable income; and

(c) the amount that bears to the apportionable deductions allowable to the person in relation to the year of income the same proportion as the amount that, but for this paragraph, would be the eligible taxable income of the person of the year of income bears to the sum of:

(i) the taxable income of the person of the year of income; and

(ii) the apportionable deductions allowable to the person in relation to the year of income.

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102AE Eligible assessable income

(1) For the purposes of this Division, the eligible assessable income of a year of income of a person is so much of the assessable income of the person of the year of income as is not excepted assessable income.

(2) Subject to this section, an amount included in the assessable income of a person (in this subsection referred to as the ***minor***) is excepted assessable income to the extent to which the amount:

(a) is employment income or business income;

(b) is derived by the minor from the investment of any property transferred to the minor:

(i) by way of, or in satisfaction of a claim for, damages in respect of:

(A) loss by the minor of parental support; or

(B) personal injury to the minor, any disease suffered by the minor or any impairment of the minor's physical or mental condition;

(ii) pursuant to any law relating to worker's compensation;

(iii) pursuant to any law relating to the payment of compensation in respect of criminal injuries;

(iv) directly as the result of the death of another person and under the terms of a life assurance policy;

(v) directly as the result of the death of another person and out of a provident, benefit, superannuation or retirement fund;

(vi) directly as the result of the death of another person by an employer of the deceased person;

(vii) out of a public fund established and maintained exclusively for the relief of persons in necessitous circumstances; or

(viii) as the result of a family breakdown (see section 102AGA);

(c) is derived by the minor from the investment of any property:

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(i) that devolved upon the minor from the estate of a deceased person;

(ii) that was transferred to the minor by another person out of property that devolved upon that other person from the estate of a deceased person and was so transferred within 3 years after the date of the death of the deceased person; or

(iii) that was acquired by the minor as the beneficial owner of a verifiable prize in a legally authorized and conducted lottery;

(d) not being business income, is included in the assessable income of the minor under section 92;

(e) is included in the assessable income of the minor under section 97 or 100; or

(f) is derived by the minor from the investment of any property that, in the opinion of the Commissioner, represents accumulations of:

(i) excepted assessable income derived by the minor during a year of income in relation to which this Division applies;

(ii) assessable income derived by the minor during a year of income in relation to which this Division does not apply, being assessable income that would, in the opinion of the Commissioner, have been excepted assessable income if this Division were applicable in relation to the year of income during which the assessable income was derived; or

(iii) exempt income derived by the minor to which subparagraph (i) or (ii) would, in the opinion of the Commissioner, apply if that exempt income had been assessable income.

(3) A reference in paragraph (2)(d) to an amount (not being business income) that is included in the assessable income of a person under section 92 in respect of the individual interest of the person in the net income of a partnership shall be read as a reference to so much of an amount so included in that assessable income as, in the

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opinion of the Commissioner, is attributable to so much of the assessable income of the partnership as would, in the opinion of the Commissioner, have been excepted assessable income if the assessable income of the partnership had been derived by that person.

(4) A reference in paragraph (2)(e) to an amount included in the assessable income of a person under section 97 or 100 shall be read as not including a reference to any part to which this Division applies of an amount included in that assessable income under either of those sections.

(5) Subject to subsections (6) and (7), a reference in paragraph (2)(a), in relation to a person (in this subsection referred to as the ***minor***), to business income shall, in relation to any business income derived by the minor during a year of income from the carrying on of a business, be read as a reference to:

(a) in a case where during the year of income, the business was carried on by the minor either alone or in partnership with another person who was, or other persons each of whom was, under the age of 18 years on the first day of the year of income—so much of that business income as the Commissioner considers fair and reasonable having regard to:

(i) the extent to which, during the year of income, the minor had the real and effective conduct and control of the business and participated in the operations and activities of the business;

(ii) the extent to which the minor had the real and effective control over the disposal of income derived by the minor from the business during the year of income;

(iii) the extent to which the capital of the business consisted of property contributed by the minor, being property the income from which would, in the opinion of the Commissioner, be excepted assessable income in relation to the minor; and

(iv) such other matters (if any) as the Commissioner thinks fit; and

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(b) in any other case—the amount that, in the opinion of the Commissioner, is reasonable remuneration by way of salary or wages for any services rendered by the minor during the year of income in the production of assessable income of the business increased by such amount (if any) as, in the opinion of the Commissioner, is reasonable, having regard to the extent to which the capital of the business consisted of property contributed by the minor the income from which would, in the opinion of the Commissioner, be excepted assessable income in relation to the minor.

(6) Subject to subsection (7), if any 2 or more parties to:

(a) the derivation of the excepted assessable income mentioned in subsection (2); or

(b) any act or transaction directly or indirectly connected with the derivation of that excepted assessable income;

were not dealing with each other at arm's length in relation to the derivation, or in relation to the act or transaction, the excepted assessable income is only so much (if any) of that income as would have been derived if they had been dealing with each other at arm's length in relation to the derivation, or in relation to the act or transaction.

(7) Subsection (2) does not apply in relation to assessable income derived by a person directly or indirectly under or as a result of an agreement that was entered into or carried out by any person (whether before or after the commencement of this subsection) for the purpose, or for purposes that included the purpose, of securing that that assessable income would not be eligible assessable income.

(8) In determining whether subsection (7) applies in relation to an agreement, no regard shall be had to a purpose that is a merely incidental purpose.

(9) Where:

(a) any assessable income is derived by a person from the investment of any property transferred to the person by way of, or in satisfaction of a claim for, damages in respect of:

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(i) loss by the person of parental support; or

(ii) personal injury to the person, any disease suffered by the person or any impairment of the person's physical or mental condition; and

(b) that property was transferred to that person otherwise than in pursuance of an order of a court;

paragraph (2)(b) applies only to so much (if any) of that assessable income as the Commissioner considers fair and reasonable.

(10) Where:

(a) the assessable income of a person (in this subsection referred to as the ***minor***) of a year of income:

(i) includes an amount derived by the minor from property that:

(A) was transferred to the minor by another person out of property that devolved upon that other person from the estate of a deceased person; and

(B) was so transferred within 3 years after the date of the death of the deceased person;

but does not include any amount that:

(C) was derived by the minor from property that devolved upon the minor from the estate of that deceased person; or

(D) is included in the assessable income of the minor under section 97 or 100 in respect of the share of the minor of the net income of a trust estate that resulted from a will or codicil of that deceased person, an order of a court that varied or modified the provisions of a will or codicil of that deceased person, a partial intestacy of that deceased person or an order of a court that varied or modified the application, in relation to the estate of that deceased person, of the provisions of the law relating to the distribution of the estates of persons who die intestate; or

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(ii) includes an amount derived by the minor from property that:

(A) was transferred to the minor by another person out of property that devolved upon that other person from the estate of a deceased person; and

(B) was so transferred within 3 years after the date of death of the deceased person;

and also includes an amount or amounts to which sub-subparagraph (i)(C) or (D) applies; and

(b) the amount to which subparagraph (a)(i) applies or the sum of the amounts to which subparagraph (a)(ii) applies, as the case may be, exceeds the amount that, in the opinion of the Commissioner, would have been included in the assessable income of the minor of the year of income in respect of an amount or amounts derived by the minor from property that, in the opinion of the Commissioner, would have devolved upon or for the benefit of the minor from the estate of that deceased person if that deceased person had died intestate;

the amount of the assessable income of the minor of the year of income that would, apart from this subsection, have been excepted assessable income by virtue of subparagraph (2)(c)(ii) shall be reduced by the amount of that excess.

102AF Employment income and business income

(1) A reference in this Division to employment income is to be read as a reference to:

(a) work and income support related withholding payments and benefits; and

(b) payments made for services rendered or to be rendered; and

(c) compensation, sickness or accident payments:

(i) made to an individual because of the individual's or another's incapacity for work; and

(ii) calculated at a periodical rate.

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(3) In this Division, a reference, in relation to a person in relation to a year of income, to business income shall be read as a reference to income derived by the person during the year of income from carrying on of a business either alone or together with another person or other persons.

102AG Trust income to which Division applies

(1) Where a beneficiary of a trust estate is a prescribed person in relation to a year of income, this Division applies to so much of the share of the beneficiary of the net income of the trust estate of the year of income as, in the opinion of the Commissioner, is attributable to assessable income of the trust estate that is not, in relation to that beneficiary, excepted trust income.

(2) Subject to this section, an amount included in the assessable income of a trust estate is excepted trust income in relation to a beneficiary of the trust estate to the extent to which the amount:

(a) is assessable income, of a kind covered by subsection (2AA), of a trust estate that resulted from:

(i) a will, codicil or an order of a court that varied or modified the provisions of a will or codicil; or

(ii) an intestacy or an order of a court that varied or modified the application, in relation to the estate of a deceased person, of the provisions of the law relating to the distribution of the estates of persons who die intestate;

(b) is employment income;

(c) is derived by the trustee of the trust estate from the investment of any property transferred to the trustee for the benefit of the beneficiary:

(i) by way of, or in satisfaction of a claim for, damages in respect of:

(A) loss by the beneficiary of parental support; or

(B) personal injury to the beneficiary, any disease suffered by the beneficiary or any impairment

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of the beneficiary's physical or mental condition;

(ii) pursuant to any law relating to worker's compensation;

(iii) pursuant to any law relating to the payment of compensation in respect of criminal injuries;

(iv) directly as the result of the death of a person and under the terms of a policy of life insurance;

(v) directly as the result of the death of a person and out of a provident, benefit, superannuation or retirement fund;

(vi) directly as the result of the death of a person by an employer of the deceased person;

(vii) out of a public fund established and maintained exclusively for the relief of persons in necessitous circumstances; or

(viii) as the result of a family breakdown (see section 102AGA);

(d) is derived by the trustee of the trust estate from the investment of any property:

(i) that devolved for the benefit of the beneficiary from the estate of a deceased person;

(ii) that was transferred to the trustee for the benefit of the beneficiary by another person out of property that devolved upon that other person from the estate of a deceased person and was so transferred within 3 years after the date of the death of the deceased person; or

(iii) being a verifiable prize in a legally authorized and conducted lottery and being a prize of which the beneficiary is the beneficial owner; or

(e) is derived by the trustee of the trust estate from the investment of any property that, in the opinion of the Commissioner, represents accumulations of:

(i) assessable income derived by the trustee during a year of income in relation to which this Division applies, being assessable income that, in relation to the beneficiary, is excepted trust income;

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(ii) assessable income derived by the trustee during a year of income in relation to which this Division does not apply, being assessable income that would, in the opinion of the Commissioner, have been excepted trust income in relation to the beneficiary if this Division were applicable in relation to the year of income during which the assessable income was derived; or

(iii) exempt income derived by the trustee to which subparagraph (i) or (ii) would, in the opinion of the Commissioner, apply if that exempt income had been assessable income.

(2AA) For the purposes of paragraph (2)(a), assessable income of a trust estate is of a kind covered by this subsection if:

(a) the assessable income is derived by the trustee of the trust estate from property; and

(b) the property satisfies any of the following requirements:

(i) the property was transferred to the trustee of the trust estate to benefit the beneficiary from the estate of the deceased person concerned, as a result of the will, codicil, intestacy or order of a court mentioned in paragraph (2)(a);

(ii) the property represents accumulations of income or capital from property that satisfies the requirement in subparagraph (i);

(iii) the property represents accumulations of income or capital from property that satisfies the requirement in subparagraph (ii), or (because of a previous operation of this subparagraph) the requirement in this subparagraph.

(2A) Paragraph (2)(c) or subparagraph (2)(d)(ii) does not apply unless the beneficiary of the trust concerned will, under the terms of the trust, acquire the trust property (other than as a trustee) when the trust ends.

(3) Subject to subsection (4), if any 2 or more parties to:

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(a) the derivation of the excepted trust income mentioned in subsection (2); or

(b) any act or transaction directly or indirectly connected with the derivation of that excepted trust income;

were not dealing with each other at arm's length in relation to the derivation, or in relation to the act or transaction, the excepted trust income is only so much (if any) of that income as would have been derived if they had been dealing with each other at arm's length in relation to the derivation, or in relation to the act or transaction.

(4) Subsection (2) does not apply in relation to assessable income derived by a trustee directly or indirectly under or as a result of an agreement that was entered into or carried out by any person (whether before or after the commencement of this subsection) for the purpose, or for purposes that included the purpose, of securing that that assessable income would be excepted trust income.

(5) In determining whether subsection (4) applies in relation to an agreement, no regard shall be had to a purpose that is a merely incidental purpose.

(5A) In the application of paragraph 102AF(1)(b) for the purposes of the application of paragraph (2)(b) of this section in relation to a beneficiary of a trust estate, payments made for services rendered or to be rendered shall not be taken to be employment income unless the services are rendered or to be rendered by the beneficiary.

(6) Where:

(a) any assessable income is derived by a trustee of a trust estate from the investment of any property transferred to the trustee for the benefit of a beneficiary of the trust estate by way of, or in satisfaction of a claim for, damages in respect of:

(i) loss by the beneficiary of parental support; or

(ii) personal injury to the beneficiary, any disease suffered by the beneficiary or any impairment of the beneficiary's physical or mental condition; and

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(b) that property was transferred to the trustee otherwise than in pursuance of an order of a court;

paragraph (2)(c) applies only to so much (if any) of that assessable income as the Commissioner considers fair and reasonable.

(7) Where:

(a) any assessable income is derived by a trustee of a trust estate from the investment of any property transferred to the trustee for the benefit of a beneficiary of the trust estate by another person out of property that devolved upon that other person from the estate of a deceased person and was so transferred to the trustee within 3 years after the date of death of the deceased person; and

(b) the amount referred to in paragraph (a) or, if the assessable income of that beneficiary of the year of income includes any amount that:

(i) was derived by the beneficiary from property that was transferred to the beneficiary by another person out of property that devolved upon that other person from the estate of that deceased person and was so transferred within 3 years after the date of death of that deceased person;

(ii) was derived by the beneficiary from property that devolved upon the beneficiary from the estate of that deceased person; or

(iii) is included in that assessable income under section 97 or 100 in respect of the share of that beneficiary of the net income of another trust estate, being a trust estate that resulted from a will or codicil of that deceased person, an order of a court that varied or modified the provisions of a will or codicil of that deceased person, a partial intestacy of that deceased person or an order of a court that varied or modified the application, in relation to the estate of that deceased person, of the provisions of the law relating to the distribution of estates of persons who die intestate;

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the sum of the amount referred to in paragraph (a) and the amount or amounts applicable by virtue of subparagraphs (i), (ii) and (iii) of this paragraph, exceeds the amount that, in the opinion of the Commissioner, would have been included in the assessable income of the beneficiary of the year of income in respect of an amount or amounts derived by the beneficiary from property that, in the opinion of the Commissioner, would have devolved directly upon that beneficiary if that deceased person had died intestate;

the amount of the assessable income of the trust estate that would, apart from this subsection, have been excepted trust income in relation to that beneficiary by virtue of subparagraph (2)(d)(ii) shall be reduced by the amount of that excess.

(8) For the purposes of this section, where:

(a) any property is transferred to the trustee of a trust estate; and

(b) the trustee has a discretion to pay or apply the income derived from that property to or for the benefit of specified beneficiaries or beneficiaries included in a specified class of beneficiaries;

that property shall be taken to have been transferred to the trustee for the benefit of each of those specified beneficiaries or for each of the beneficiaries in that specified class of beneficiaries, as the case may be.

102AGA Transfer of property as the result of a family breakdown

(1) For the purposes of subparagraph 102AE(2)(b)(viii) or 102AG(2)(c)(viii), the transfer of property (the ***subject property***) by a person (the ***transferor***):

(a) to the minor mentioned in subparagraph 102AE(2)(b)(viii); or

(b) to the trustee mentioned in subparagraph 102AG(2)(c)(viii) for the benefit of the beneficiary mentioned in that subparagraph;

is ***as the result of a family breakdown*** if the requirements of subsection (2) or (3) of this section are met.

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(2) The transfer will be as the result of a family breakdown if:

(a) a person ceases to live with another person as the spouse of that person; and

(b) at least one of the persons:

(i) is the parent; or

(iv) has legal custody or guardianship;

of the minor or the beneficiary; and

(c) an order, determination or assessment of a court, person or body (whether or not in Australia) is made wholly or partly because the person has ceased to live as the spouse of the other person; and

(d) the effect of the order, determination or assessment is that a person (whether one of the spouses, the transferor or any other person) becomes subject to a legal obligation to maintain, transfer property to, or do some other thing for the benefit of, the minor or beneficiary or one of the spouses; and

(e) the transferor transfers the subject property to the minor, or to the trustee for the benefit of the beneficiary, in giving effect to the legal obligation (including in discharging the legal obligation if it falls on someone else, and whether or not the legal obligation could have been given effect in some other way).

(3) The transfer will also be as a result of a family breakdown if:

(a) when the minor or beneficiary is born, his or her parents are not living together as spouses; and

(b) an order, determination or assessment of a court, person or body (whether or not in Australia) is made wholly or partly because the parents are not living together as mentioned in paragraph (a); and

(c) the effect of the order, determination or assessment is that a person (whether one of the parents, the transferor or any other person) becomes subject to a legal obligation to maintain, transfer property to, or do some other thing for the benefit of, the minor or beneficiary or one of the parents of the minor or beneficiary; and

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(d) the transferor transfers the subject property to the minor, or to the trustee for the benefit of the beneficiary, in giving effect to the legal obligation (including in discharging the legal obligation if it falls on someone else, and whether or not the legal obligation could have been given effect in some other way).

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Division 6A—Alienation of income

102A Interpretation

(1) In this Division:

associate, in relation to a person, means any person who is an associate, within the meaning of section 318, in relation to the person.

interest, in relation to property, means any legal or equitable estate or interest in the property.

property means any property whether real or personal.

right to receive income from property means a right to have income that will or may be derived from property paid to, or applied or accumulated for the benefit of, the person owning the right.

the prescribed date, in relation to a person who transfers to another person a right to receive income from property, means the day preceding the seventh anniversary of the date on which income from the property is first paid to, or applied or accumulated for the benefit of, the other person by reason of the transfer.

(2) A reference in this Division to a transfer of an interest in property or of a right to receive income from property shall be read as a reference to any such transfer, whether made for valuable consideration or not.

(3) For the purposes of this Division, any income that will or may be derived by a trust estate from a business carried on by the trustee of the trust estate shall be deemed to be income that will or may be derived from property.

(4) For the purposes of this Division:
(a) where a person:

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(i) declares that he or she holds a right to receive income from property upon trust for another person; or

(ii) transfers such a right to a trustee to be held upon trust for another person;

the right shall be deemed to be transferred to that other person; and

(b) where a person:

(i) declares that he or she holds a right to receive income from property upon trust for 2 or more other persons in succession; or

(ii) transfers such a right to, or to a trustee to be held upon trust for, 2 or more other persons in succession;

the right shall be deemed to be separately transferred to each of those other persons for the respective periods for which the right is held upon trust for, or transferred to, those persons.

(5) Where an interest in property or a right to receive income from property is transferred by 2 or more persons jointly, each of those persons shall, for the purposes of this Division, be deemed to have transferred an interest in that property or a right to receive income from that property, as the case may be.

(6) In this Division, unless the contrary intention appears:

(a) a reference to the arm's length consideration in respect of a transfer of a right to receive income from property is a reference to the consideration that might reasonably be expected to have been received or receivable in respect of the transfer if the right had been transferred under an agreement between independent parties dealing at arm's length with each other in relation to the agreement and transfer; and

(b) a reference to the amount of consideration is, in a case where consideration is paid or given otherwise than in cash, a reference to the money value of the consideration.

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102B Certain income transferred for short periods to be included in assessable income of transferor

(1) Subject to this section, where a right to receive income from property is transferred, otherwise than by a will or codicil, by a person (in this subsection referred to as the ***transferor***) to an associate of the transferor for a period that will, or may for any reason other than the death of any person or the associate becoming under a legal disability, terminate before the prescribed date, any income that:

(a) is derived from the property;

(b) is paid to, or applied or accumulated for the benefit of:

(i) the associate; or

(ii) any other associate of the transferor to whom a right to receive income from the property has been transferred (whether by the first-mentioned associate or any other person) after the first-mentioned transfer; and

(c) would, if the first-mentioned transfer had not been made, have been included in the assessable income of the transferor;

shall be treated for the purposes of this Act as if the first-mentioned transfer had not been made.

(2) Subsection (1) (other than subparagraph (1)(b)(ii)) does not apply in relation to a transfer of a right to receive income from property where:

(a) the right was not a right that arose from the ownership by the transferor of an interest in the property;

(b) the right arose from the ownership by the transferor of an interest in the property and, before or at the time of the first-mentioned transfer, the transferor transferred that interest to the transferee or another person; or

(c) consideration has been received or is receivable in respect of the transfer and the amount of that consideration is not less than the arm's length consideration in respect of the transfer.

(3) Where, on a particular day, a person who has transferred to another person a right to receive income from property:

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(a) in any case—transfers to the other person or to a third person an interest in the property, being the interest from the ownership of which by the transferor the right arose;
(b) in the case of a natural person—dies; or
(c) in the case of a company—ceases to exist;

subsection (1) (other than subparagraph (1)(b)(ii)) does not apply, in relation to the transfer of the right to receive income, in relation to income that is derived from the property after that day.

(4) Subsection (1) does not apply in relation to income derived by a person in pursuance of a transfer to that person of a right to receive income from property where, by reason of subsection 51-50(3) of the *Income Tax Assessment Act 1997*, the income so derived by the person is not exempt from tax under section 51-30 of that Act.

(4A) Where:
(a) subsection (1) (other than subparagraph (1)(b)(ii)) applies in relation to a transfer by a person of a right to receive income from property; and
(b) consideration has been received or is receivable in respect of the transfer;

then, notwithstanding any other provision of this Act (other than a provision of Part IVA), the amount of the consideration shall not be included in the assessable income of the person of a year of income.

(5) Nothing in any other provision of this Act prevents the amendment of an assessment at any time for the purpose of excluding from the assessable income of a person income that is, by virtue of subsection (1), to be included in the assessable income of another person.

(6) Where there is excluded from the assessable income of a person an amount that, in pursuance of subsection (1) was previously treated as assessable income of that person, nothing in any other provision of this Act prevents the amendment of any assessment at any time to give effect to the inclusion in the assessable income of another

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person of an amount that, in pursuance of that subsection, was treated as not being so included for the purposes of the assessment.

102C Effect of certain transfers of rights to receive income from property

Where:

(a) any income is paid to, or applied or accumulated for the benefit of, a person (in this section referred to as ***the transferee***) by reason of the transfer to the person of a right to receive income from property; and

(b) the income so paid, applied or accumulated is, by virtue of section 102B, to be included in the assessable income of another person (in this section referred to as ***the transferor***);

then:

(c) for the purposes of the application of this Act other than this Division in relation to the transferor, an amount equal to the income so paid, applied or accumulated:

(i) shall be deemed to have been paid by the transferor to the transferee at the time at which the income was paid to, or applied or accumulated for the benefit of, the transferee; and

(ii) shall be deemed to have been so paid for the purpose for which the right was transferred; and

(d) where, if the right had not been transferred, but the transferor had paid to the transferee, at the time at which the income was so paid to, or applied or accumulated for the benefit of, the transferee and for the purpose for which the right was transferred, an amount (in this paragraph referred to as ***the notional amount***) equal to the amount of the income so paid, applied or accumulated, the notional amount or a part of the notional amount would have been included in the assessable income of the transferee—there shall be included in that assessable income an amount equal to the notional amount or that part of the notional amount, as the case may be.

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102CA Consideration in respect of transfer to be included in assessable income of transferor in certain cases

(1) Subject to this section, where:

(a) a right to receive income from property is transferred, otherwise than by a will or codicil, by a person to another person;

(b) consideration has been received or is receivable in respect of the transfer; and

(c) immediately after the transfer, subsection 102B(1) (other than subparagraph 102B(1)(b)(ii)) does not apply in relation to the transfer;

the assessable income of the transferor of the year of income in which the right is transferred shall include the amount of the consideration.

(2) Subsection (1) does not apply in relation to a transfer of a right to receive income from property where:

(a) the right was not a right that arose from the ownership by the transferor of an interest in the property; or

(b) the right arose from the ownership by the transferor of an interest in the property and, before or at the time of the first-mentioned transfer, the transferor transferred that interest to the transferee; or

(c) the right is, or is part of, a Division 230 financial arrangement (within the meaning of the *Income Tax Assessment Act 1997*).

(3) Where, by reason of subsection 51-50(3) of the *Income Tax Assessment Act 1997*, income derived by a person pursuant to a transfer to the person of a right to receive income from property is not exempt from tax under section 51-30 of that Act, subsection (1) does not apply in relation to the transfer.

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Division 6C—Income of certain public trading trusts

102M Interpretation

In this Division, unless the contrary intention appears:

arrangement has the same meaning as in the *Income Tax Assessment Act 1997*.

eligible investment business means one or more of:

(a) investing in land for the purpose, or primarily for the purpose, of deriving rent; or

(b) investing or trading in any or all of the following:

(i) secured or unsecured loans (including deposits with a bank or other financial institution);

(ii) bonds, debentures, stock or other securities;

(iii) shares in a company, including shares in a foreign hybrid company (as defined in the *Income Tax Assessment Act 1997*);

(iv) units in a unit trust;

(v) futures contracts;

(vi) forward contracts;

(vii) interest rate swap contracts;

(viii) currency swap contracts;

(ix) forward exchange rate contracts;

(x) forward interest rate contracts;

(xi) life assurance policies;

(xii) a right or option in respect of such a loan, security, share, unit, contract or policy;

(xiii) any similar financial instruments; or

(c) investing or trading in financial instruments (not covered by paragraph (b)) that arise under financial arrangements, other than arrangements excepted by section 102MA.

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excluded rent means rent worked out by reference to the profits or receipts of an entity that uses any of the relevant land under an arrangement that is designed to result in the transfer of all, or substantially all, of what would otherwise be the profits of the entity to another party to the arrangement.

financial arrangement has the same meaning as in the *Income Tax Assessment Act 1997*.

land includes an interest in land and fixtures on land.

net income, in relation to a public trading trust, means the total assessable income of the trust calculated under this Act as if the trustee were a taxpayer in respect of that income and were a resident, less all allowable deductions.

A public trading trust may be required to work out its net income in a special way by Division 266 or 267 in Schedule 2F.

prescribed trust estate means a trust estate that is, or has been, a public trading trust in relation to any year of income.

property includes a chose in action and also includes any estate, interest, right or power, whether at law or in equity, in or over property.

relevant year of income means the year of income that commenced on 1 July 1985 or a subsequent year of income.

trading business means a business that does not consist wholly of eligible investment business.

unit, in relation to a prescribed trust estate, includes a beneficial interest, however described, in any of the income or property of the trust estate.

unitholder, in relation to a prescribed trust estate, means the holder of a unit or units in the prescribed trust estate.

unit trust dividend means:

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(a) any distribution made by the trustee of a prescribed trust estate, whether in money or in other property, to a unitholder; and

(b) any amount credited by the trustee of a prescribed trust estate to a unitholder as a unitholder;

but does not include:

(c) money paid or credited, or property distributed, by the trustee of a prescribed trust estate to the extent to which the money or property is attributable to profits arising during a year of income in relation to which the prescribed trust estate was not a public trading trust; or

(d) money paid or credited, or property distributed, by the trustee of a prescribed trust estate in respect of the cancellation, extinguishment or redemption of a unit to the extent to which:

(i) the money paid or credited or the property distributed represents money paid to, or property transferred to, the trustee for the purpose of the creation or issue of that unit; and

(ii) the amount of the money paid or credited or the value of the property distributed, as the case may be, does not exceed the amount of the money paid to the trustee, or the value, at the time of transfer, of the property transferred to the trustee, for the purpose of the creation or issue of that unit.

102MA Arrangements not covered

(1) For the purposes of paragraph (c) of the definition of ***eligible investment business*** in section 102M, the excepted arrangements are those specified in this section.

Note: This section does not affect an arrangement that satisfies paragraph (a) or (b) of that definition.

Leasing or property arrangement

(2) A right or obligation arising under:

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(b) an arrangement to which Division 240 of the *Income Tax Assessment Act 1997* (about arrangements treated as a sale and loan) applies; or

(ba) an arrangement to which Division 242 (about leases of luxury cars) of the *Income Tax Assessment Act 1997* applies; or

(c) a financial arrangement in the form of a loan that is taken to exist by subsection 250-155(1) of the *Income Tax Assessment Act 1997*; or

(d) an arrangement that, in substance or effect, depends on the use of a specific asset that is:

(i) real property; or

(ii) goods or a personal chattel (other than money or a money equivalent); or

(iii) intellectual property;

and gives a right to control the use of the asset; or

(e) an arrangement that is a licence to use:

(i) real property; or

(ii) goods or a personal chattel (other than money or a money equivalent); or

(iii) intellectual property.

Interest in partnership or trust estate

(3) A right carried by an interest in a partnership or a trust estate, or an obligation that corresponds to such a right, if:

(a) there is only one class of interest in the partnership or trust estate; or

(b) the interest is an equity interest in the partnership or trust estate; or

(c) for a right or obligation relating to a trust estate—the trust estate is managed by a funds manager or custodian, or a responsible entity (as defined in the *Corporations Act 2001*) of a registered scheme (as so defined).

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General insurance policies

(4) A right or obligation under a general insurance policy.

Guarantees and indemnities

(5) A right or obligation under a guarantee or indemnity unless:
  (a) the financial arrangement is one where:
    (i) its value changes in response to changes in a specified variable or variables (such as an interest rate, foreign exchange rate, credit rating, index or commodity or financial instrument price); and
    (ii) there is no requirement for a net investment, or there is such a requirement but the net investment is smaller than would be required for other types of financial arrangement that would be expected to have a similar response to changes in market factors; or
  (b) the guarantee or indemnity is given or entered into in relation to a financial arrangement.

Superannuation and pension income

(6) A right to receive, or an obligation to provide, a financial benefit (as defined in the *Income Tax Assessment Act 1997*) if the right or obligation arises from a person's membership of a superannuation or pension scheme.

Retirement village arrangements

(7) A right or obligation arising under:
  (a) a contract that gives rise to a right to occupy residential premises in a retirement village (as defined in the *A New Tax System (Goods and Services Tax) Act 1999*); or
  (b) a contract under which a resident of such a retirement village is provided with general or personal services in the retirement village.

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102MB Investing in land

Moveable property

(1) For the purposes of this Division, investments in moveable property, being property that is:
  (a) incidental to and relevant to the renting of land; and
  (b) customarily supplied or provided in connection with the renting of land; and
  (c) ancillary to the ownership and use of land;

are taken to be investments in land.

Safe harbour rule

(2) For the purposes of this Division, an entity's investments in land are taken to be for the purpose, or primarily for the purpose, of deriving rent during a year of income if:
  (a) each of those investments is for purposes (other than the purpose of trading) that include a purpose of deriving rent; and
  (b) at least 75% of the gross revenue from those investments for the year of income consists of rent (except excluded rent); and
  (c) none of the remaining gross revenue from those investments for the year of income is:
    (i) excluded rent; or
    (ii) from the carrying on of a business that is not incidental and relevant to the renting of the land.

(3) In working out the gross revenue referred to in paragraph (2)(b), payments for the provision of services that:
  (a) are incidental to and relevant to the renting of land; and
  (b) are ancillary to the ownership and use of the land;

are taken to be rent derived from the land.

Example: Payments as reimbursement for expenses incurred by the lessor in providing security services for a shopping centre would be covered by this subsection.

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(4) In working out the gross revenue referred to in subsection (2), disregard any capital gains and capital losses from a CGT event arising from a disposal or other realisation of ownership of land.

Meaning of entity

(5) In this section:

entity has the same meaning as in the *Income Tax Assessment Act 1997*.

102MC When trading business not carried on

A trustee of a unit trust that would, apart from this section, carry on a trading business at a time during a year of income is taken for the purposes of this Division not to carry on a trading business at a time during that year if, for that year, not more than 2% of the gross revenue of the trustee (as trustee of the unit trust) was income from things other than eligible investment business (except from the carrying on of a business that is not incidental and relevant to the eligible investment business).

102MD Exempt institution that is eligible for a refund not treated as exempt entity

For the purposes of this Division, treat an entity as not being an exempt entity if:

(a) the entity is an exempt institution that is eligible for a refund (within the meaning of the *Income Tax Assessment Act 1997*); or

(b) the entity is treated as such an exempt institution that is eligible for a refund.

Example: The Future Fund Board is treated as an exempt institution that is eligible for a refund for the purposes of the *Income Tax Assessment Act 1997* (see section 84B of the *Future Fund Act 2006*).

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102N Trading trusts

(1) For the purposes of this Division, a unit trust is a trading trust in relation to a year of income if, at any time during the year of income, the trustee:

(a) carried on a trading business; or

(b) controlled, or was able to control, directly or indirectly, the affairs or operations of another person in respect of the carrying on by that other person of a trading business.

(2) Despite paragraph (1)(b), a unit trust is not a trading trust only because it has acquired ownership interests (including a controlling interest) in, or controls:

(a) a foreign entity whose business, when considered together with the businesses of entities that the foreign entity controls or is able to control, directly or indirectly, consists primarily of investing in land outside Australia for the purpose, or primarily for the purpose, of deriving rent; or

(b) a foreign entity controlled, or able to be controlled, directly or indirectly, by an entity covered by paragraph (a).

(3) In this section:

entity has the same meaning as in the *Income Tax Assessment Act 1997*.

102NA Certain interposed trusts not trading trusts

(1) A unit trust is not a trading trust for the purposes of this Division in relation to a year of income if:

(a) the trust is an interposed trust in relation to a scheme for reorganising the affairs of stapled entities referred to in Subdivision 124-Q of the *Income Tax Assessment Act 1997* in relation to the year of income or an earlier year of income; and

(b) a roll-over was obtained by any entity under that Subdivision of that Act in relation to the scheme for the year of income or that earlier year of income; and

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(c) the condition in subsection (2) is satisfied.

(2) The trustee of the trust must not, at any time during the year of income:

(a) carry on a trading business; or

(b) control, or be able to control, directly or indirectly, the affairs or operations of another entity that carries on a trading business, other than:

(i) a company that was, before the scheme was completed, one of the stapled entities referred to in Subdivision 124-Q of the *Income Tax Assessment Act 1997*; or

(ii) a subsidiary of one of those stapled entities that is a company, or an entity that is controlled or able to be controlled, directly or indirectly, by that company; or

(iii) a trust whose trustee was, before the scheme was completed, assessed and liable to pay tax under this Division (or under former Division 6B, before its repeal by the *Tax Laws Amendment (New Tax System for Managed Investment Trusts) Act 2016* and that was, before the scheme was completed, one of those stapled entities; or

(iv) an entity that is controlled or able to be controlled, directly or indirectly, by the trust referred to in subparagraph (iii);

in relation to the year of income or an earlier year of income.

(3) In this section:

entity has the same meaning as in the *Income Tax Assessment Act 1997*.

102P Public unit trusts

(1) For the purposes of this Division, but subject to the succeeding provisions of this section, a unit trust is a public unit trust in relation to a year of income if, at any time during the year of income:

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(a) any of the units in the unit trust were listed for quotation in the official list of a stock exchange in Australia or elsewhere;
(b) any of the units in the unit trust were offered to the public; or
(c) the units in the unit trust were held by not fewer than 50 persons.

(2) For the purposes of this Division, but subject to the succeeding provisions of this section, a unit trust is also a public unit trust in relation to a year of income if:
(a) at any time during the year of income, an exempt entity or exempt entities held, or had the right to acquire or become the holder or holders of, a unit or units in the unit trust that entitled the holder or holders to not less than 20% of:
(i) the beneficial interests in the income of the unit trust; or
(ii) the beneficial interests in the property of the unit trust;
(b) not less than 20% of the total of money paid or credited by the trustee of the unit trust during the year of income to unitholders as unitholders was paid or credited to an exempt entity or exempt entities; or
(c) by reason of:
(i) any provision in the instrument by which the trust was created, or any contract agreement or instrument authorising the variation or abrogation of the rights attaching to any of the units in the unit trust or relating to the conversion, cancellation, extinguishment or redemption of any such units;
(ii) any contract, agreement, option or instrument under which a person has power to acquire a unit or units in the unit trust; or
(iii) any power, authority or discretion in a person in relation to the rights attaching to any of the units in the unit trust;
the rights attaching to any of the units in the unit trust were, at any time during the year of income, capable of being varied or abrogated in such a manner (notwithstanding that they were not in fact varied or abrogated in that manner) that:

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(iv) units in the unit trust that entitled the holder or holders to not less than 20% of:

(A) the beneficial interests in the income of the unit trust; or

(B) the beneficial interests in the property of the unit trust;

would have been held by an exempt entity or exempt entities;

(v) not less than 20% of the total of money paid or credited by the trustee of the unit trust during the year of income to unitholders as unitholders would have been paid or credited to an exempt entity or exempt entities; or

(vi) in the case where no money was paid or credited by the trustee of the unit trust during the year of income to unitholders as unitholders—if money had been so paid or credited by the trustee of the unit trust during the year of income, not less than 20% of the amount of that money would have been paid or credited to an exempt entity or exempt entities.

(3) A unit trust shall not be taken to be a public unit trust in relation to a year of income by reason that units in the unit trust were offered to the public at any time during the year of income if the Commissioner is of the opinion that any of those units were offered to the public for the purpose, or for purposes that included the purpose, of enabling the unit trust to be treated as a public unit trust for the purposes of this Division in relation to the year of income.

(4) Subject to subsection (5), a unit trust that, but for this subsection and subsection (7), would be a public unit trust in relation to a year of income by virtue only of subsection (1) shall be deemed not to be a public unit trust in relation to the year of income if, at any time during the year of income, one person or persons not more than 20 in number held, or had the right to acquire or become the holder or holders of, a unit or units in the unit trust that entitled the holder or holders thereof to not less than 75% of:

(a) the beneficial interests in the income of the unit trust; or

(b) the beneficial interests in the property of the unit trust.

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(5) Subject to subsection (7), where by virtue of subsection (4), a unit trust would, but for this subsection, be deemed not to be a public unit trust in relation to a year of income by reason that, at any time during the year of income, one person or persons not more than 20 in number held, or had the right to acquire or become the holder or holders of, the unit or units referred to in subsection (4) and the Commissioner is of the opinion that, having regard to:

(a) the length of the period or the aggregate of the lengths of the periods in the year of income during which one person or persons not more than 20 in number held, or had the right to acquire or become the holder or holders of, the unit or units referred to in subsection (4); and

(b) any other matters that the Commissioner considers relevant;

it is reasonable that the unit trust should be treated as a public unit trust in relation to the year of income, the unit trust shall be deemed to be a public unit trust in relation to the year of income.

(6) For the purposes of subsections (4) and (5), a person (in this subsection referred to as the ***transferee***) to whom a right to acquire or become the holder of a unit in a unit trust is granted or transferred shall be deemed not to have such a right if the Commissioner is of the opinion, having regard to the financial circumstances of the transferee and to any other matters that the Commissioner considers relevant, that it was not intended by the person who granted or transferred the right to the transferee that the right would be exercised by the transferee.

(7) Subject to subsection (8), a unit trust that, but for this subsection, would be a public unit trust in relation to a year of income by virtue only of subsection (1), shall be deemed not to be a public unit trust in relation to that year of income if:

(a) not less than 75% of the total of money paid or credited by the trustee of the unit trust during the year of income to unitholders as unitholders was paid or credited to one person or persons not more than 20 in number; or

(b) by reason of:

(i) any provision in the instrument by which the trust was created, or any contract, agreement or instrument

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authorising the variation or abrogation of the rights attaching to any of the units in the unit trust or relating to the conversion, cancellation, extinguishment or redemption of any such units;

(ii) any contract, agreement, option or instrument under which a person has power to acquire a unit or units in the unit trust; or

(iii) any power, authority or discretion in a person in relation to the rights attaching to any of the units in the unit trust;

the rights attaching to any of the units in the unit trust were, at any time during the year of income, capable of being varied or abrogated in such a manner (notwithstanding that they were not in fact varied or abrogated in that manner) that:

(iv) units in the unit trust that entitled the holder or holders thereof to not less than 75% of:

(A) the beneficial interests in the income of the unit trust; or

(B) the beneficial interests in the property of the unit trust;

would have been held by one person or persons not more than 20 in number;

(v) not less than 75% of the total of money paid or credited by the trustee of the unit trust during the year of income to unitholders as unitholders would have been paid or credited to one person or persons not more than 20 in number; or

(vi) in the case where no money was paid or credited by the trustee of the unit trust during the year of income to unitholders as unitholders—if money had been so paid or credited by the trustee of the unit trust during the year of income, not less than 75% of the amount of that money would have been paid or credited to one person or persons not more than 20 in number.

(8) A unit trust shall not be deemed by subsection (7) not to be a public unit trust in relation to a year of income by reason that rights

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attaching to any of the units in the unit trust were, at any time during the year of income, capable of being varied in the manner mentioned in paragraph (7)(b) if the Commissioner is of the opinion that the person or persons who were able to vary the rights in that manner intended not to vary the rights in that manner during the year of income.

(9) For the purposes of subsections (1) and (3), units in a unit trust shall be taken to be offered to the public if and only if:

(a) an offer is made to the public or to a section of the public to subscribe for or purchase the units; or

(b) an invitation is issued to the public or to a section of the public to make offers to subscribe for or purchase the units.

(10) For the purposes of this section, where any units in a unit trust (except a foreign entity to which subsection 102N(2) applies) are held by the trustee of another trust estate, a person who has a beneficial interest in property of that other trust estate that consists of those units (whether or not that beneficial interest is deemed to be held by virtue of the application of this subsection) shall be deemed to hold those units.

(10A) Subsection (10) does not apply in relation to units in a unit trust that are held by the trustee of another trust estate if the other trust estate is a complying superannuation entity (within the meaning of the *Income Tax Assessment Act 1997*).

(11) For the purposes of this section, a distribution of property of a unit trust to a unitholder shall be taken to be a payment of money to the unitholder of an amount equal to the value of the property.

(12) For the purposes of this section:

(a) a person, whether or not he or she holds units in the unit trust concerned;

(b) his or her relatives; and

(c) in relation to any units in respect of which they are such nominees, his or her nominees and the nominees of any of his or her relatives;

shall be deemed to be one person.

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102Q Resident unit trusts

For the purposes of this Division, a unit trust is a resident unit trust in relation to a year of income if, at any time during the year of income:

(a) either of the following conditions was satisfied:
  (i) any property of the unit trust was situated in Australia;
  (ii) the trustee of the unit trust carried on business in Australia; and

(b) either of the following conditions was satisfied:
  (i) the central management and control of the unit trust was in Australia;
  (ii) a person who was a resident or persons who were residents held more than 50% of:
    (A) the beneficial interests in the income of the unit trust; or
    (B) the beneficial interests in the property of the unit trust.

102R Public trading trusts

(1) A unit trust is a public trading trust in relation to a relevant year of income if:

(a) where the relevant year of income is the year of income that commenced on 1 July 1985, the year of income commencing on 1 July 1986 or the year of income commencing on 1 July 1987:
  (i) the unit trust was established after 19 September 1985;
  (ii) the unit trust is a public unit trust in relation to the relevant year of income;
  (iii) the unit trust is a trading trust in relation to the relevant year of income;
  (iv) either of the following conditions is satisfied:
    (A) the unit trust is a resident unit trust in relation to the relevant year of income;

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(B) the unit trust was a public trading trust in relation to a year of income preceding the relevant year of income; or

(b) where the relevant year of income is the year of income commencing on 1 July 1988 or a subsequent year of income:

(i) the unit trust is a public unit trust in relation to the relevant year of income;

(ii) the unit trust is a trading trust in relation to the relevant year of income;

(iii) either of the following conditions is satisfied:

(A) the unit trust is a resident unit trust in relation to the relevant year of income;

(B) the unit trust was a public trading trust in relation to a year of income preceding the relevant year of income.

(2) Where:

(a) a unit trust would, but for this subsection, be a unit trust established on or before 19 September 1985;

(b) the unit trust was not a trading trust on 19 September 1985; and

(c) the unit trust became a trading trust on a day after 19 September 1985;

the unit trust shall be taken, for the purposes of this section, to have been established after 19 September 1985.

(3) For the purposes of subsection (2), a unit trust is a trading trust on a particular day if, on that day, the trustee:

(a) carries on a trading business; or

(b) controls or is able to control, directly or indirectly, the affairs or operations of another person in respect of the carrying on by that other person of a trading business.

(4) Where:

(a) a unit trust would, but for this subsection, be a unit trust established on or before 19 September 1985;

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(b) if the year of income in which 19 September 1985 occurred had ended on that date, the unit trust would not have been a public unit trust in relation to that year of income; and

(c) the Commissioner is satisfied that, at no time on or before that date, was it the intention of the trustee of the unit trust that the unit trust would become a public unit trust in relation to a year of income;

the unit trust shall be taken, for the purposes of this section, to have been established after 19 September 1985.

(5) In determining whether a unit trust is a public trading trust under this section, disregard any interest that the trust has that is disregarded under subsection 275-10(4A) of the *Income Tax Assessment Act 1997*.

102S Taxation of net income of public trading trust

The trustee of a unit trust that is a public trading trust in relation to a relevant year of income shall be assessed and is liable to pay tax on the net income of the public trading trust of the relevant year of income at the rate declared by the Parliament for the purposes of this section.

102T Modified application of Act in relation to certain unit trusts

(1) For the purpose of the application of this Act in relation to the imposition, assessment and collection of tax in respect of:

(a) the net income of a public trading trust; and

(b) the income or assessable income of a unitholder in a prescribed trust estate;

the following provisions of this section have effect.

Note: Under Subdivision 713-C of the *Income Tax Assessment Act 1997*, this Act applies differently in relation to a public trading trust that chooses to form a consolidated group.

(3) For the purposes of the application of sections 46A and 46B in accordance with subsection (2), the Commissioner may be satisfied, in relation to a unit trust dividend, that a transaction,

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operation, undertaking, scheme or arrangement was by way of dividend stripping or similar to a transaction, operation, undertaking, scheme or arrangement by way of dividend stripping if the Commissioner would have been satisfied, had the unit trust dividend been a dividend paid by a company, that the transaction, operation, undertaking, scheme or arrangement would have been a transaction, operation, undertaking, scheme or arrangement by way of dividend stripping or, as the case requires, would have been similar to a transaction, operation, undertaking, scheme or arrangement by way of dividend stripping.

(6) For the purposes of the application of the definition of ***year of income*** in subsection 6(1), the reference in that definition to a company (except a company in the capacity of a trustee) shall be read as including a reference to a public trading trust or, as the context requires, to the trustee of a public trading trust.

(7) A reference in the definition of ***person*** in subsection 6(1) to a company shall be read as including a reference to a public trading trust or, as the context requires, to the trustee of a public trading trust.

(8) The reference in section 158 to the taxable income of a company except income in respect of which it is assessable as trustee shall be read as including a reference to the net income of a public trading trust.

(9) A reference in section 355-35 of the *Income Tax Assessment Act 1997* to a body corporate is to be read as including a reference to a body corporate acting in its capacity as trustee of a public trading trust.

(11) A reference in subsection 44(1) or section 128B of this Act, in subsection 840-805(3) of the *Income Tax Assessment Act 1997*, in Subdivision 12-F in Schedule 1 to the *Taxation Administration Act 1953* (except section 12-225) or in subsection 12-390(10) in that Schedule, to a company or to a company that is a resident shall be read as including a reference to a prescribed trust estate or, as the context requires, to the trustee of a prescribed trust estate.

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(12) A reference in the definition of ***paid*** in subsection 6(1) or 44(1), or in section 128A or 128B, of this Act, or in Subdivision 12-F in Schedule 1 to the *Taxation Administration Act 1953* (except section 12-225), to a dividend shall be read as including a reference to a unit trust dividend.

(13A) Subdivision 12-F in Schedule 1 to the *Taxation Administration Act 1953* applies in respect of units in a prescribed trust estate in the same way as it applies in respect of shares.

(14) A reference in subsection 44(1) to a shareholder in relation to a company shall be read as including a reference to a unitholder in a prescribed trust estate.

(16) A reference in section 6B, Division 6 or subsection 128A(3) or 157(3) of this Act, Division 275 or Subdivision 840-M of the *Income Tax Assessment Act 1997* or Subdivision 12-H in Schedule 1 to the *Taxation Administration Act 1953* to a trust estate or to a trustee shall be read as not including a reference to a trust estate that is a public trading trust or to the trustee of a public trading trust, as the case may be.

(19) For the purposes of subsection 44(1), a unit trust dividend paid by the trustee of a prescribed trust estate out of corpus of the trust estate shall, to the extent to which the unit trust dividend is attributable to profits derived by the trustee, be taken to be paid out of those profits.

(20) For the purposes of section 128B, a unit trust dividend paid to a unitholder in a prescribed trust estate shall be deemed to be income derived by the unitholder at the time at which the unit trust dividend is paid.

Non-unit dividend

(21) Subsections (2), (3), (4) and (20) apply as if references in those subsections to a unit trust dividend included a reference to a non-unit dividend.

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(22) For the purposes of subsection 44(1), a non-unit dividend paid by the trustee of a prescribed trust estate out of corpus of the trust estate is taken, to the extent to which the non-unit dividend is attributable to a source in Australia, to be derived from a source in Australia.

(22A) For the purposes of subsection 44(1), a non-unit dividend paid by the trustee of a prescribed trust estate out of corpus of the trust estate is taken, to the extent to which the non-unit dividend is attributable to a source outside Australia, to be derived from a source outside Australia.

(23) If a provision of this Act that applies to a dividend:

(a) is taken under this section to apply to a unit trust dividend; and

(b) applies to a non-share dividend in the same way as it applies to a dividend;

that provision also applies to a non-unit dividend in the same way as it applies to a dividend.

Non-unit equity interest

(24) If a provision of this Act that applies to a share:

(a) is taken under this section to apply to a unit in a prescribed trust estate; and

(b) applies to a non-share equity interest in a company in the same way as it applies to a share;

that provision also applies to a non-unit equity interest in a prescribed trust estate in the same way as it applies to a share.

Equity holder

(25) Subsections (1), (2), (18) and (20) apply as if references in those subsections to a unitholder included a reference to an equity holder who is not a unitholder.

(26) If a provision of this Act that applies to a shareholder:

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(a) is taken because of this section to apply to a unitholder in a prescribed trust estate; and
(b) applies to an equity holder in a company who is not a shareholder in the same way as it applies to a shareholder;

that provision also applies to an equity holder in a prescribed trust estate who is not a unitholder in the same way as it applies to a shareholder.

Definitions

(27) In this section:

equity holder in a prescribed trust estate means the holder of an equity interest in the prescribed trust estate.

equity interest in a prescribed trust estate means:
(a) a unit in the prescribed trust estate; or
(b) any other interest that would be an equity interest in the prescribed trust estate if references in Division 974 of the *Income Tax Assessment Act 1997* to a company included references to a prescribed trust estate or, as the context requires, to the trustee of a prescribed trust estate.

non-unit dividend means a unit trust distribution that is not a unit trust dividend.

non-unit equity interest in a prescribed trust estate means an equity interest in the prescribed trust estate that is not a unit in the prescribed trust estate.

unit trust distribution means a distribution, or an amount credited, that would be a unit trust dividend if references in the definition of ***unit trust dividend*** in section 102M to a unitholder were references to an equity holder.

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Division 6D—Provisions relating to certain closely held trusts

Subdivision A—Overview

102UA What this Division is about

(1) The main purpose of this Division is to ensure that the trustee of a closely held trust with one or more trustee beneficiaries that are presently entitled to a share of the income or of a tax-preferred amount of the trust advises the Commissioner soon after the end of the year of income of certain details about those trustee beneficiaries. This will allow the Commissioner to check whether the assessable income of the trustee beneficiaries includes the correct share of net income, and whether the net assets of the trustee beneficiaries reflect the receipt of the tax-preferred amounts.

(2) To achieve this purpose, the Division:

(a) provides for the trustee to correctly identify the trustee beneficiaries within a specified period after the end of the year of income; and

(b) if the trustee fails to do so, provides for taxation at a penalty rate (in the case of net income) or offences under the *Taxation Administration Act 1953* (in the case of tax-preferred amounts).

(3) This Division also provides that, where the trustee of the closely held trust becomes presently entitled to an amount that is reasonably attributable to the whole or a part of the share of the net income of the closely held trust, there will also be taxation at a penalty rate.

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Subdivision B—Interpretation

102UB Definitions—general

In this Division:

closely held trust has the meaning given by subsection 102UC(1).

correct TB statement has the meaning given by section 102UG.

present entitlement has a meaning affected by section 102UJ.

tax offset has the same meaning as in the *Income Tax Assessment Act 1997*.

tax-preferred amount has the meaning given by section 102UI.

TB statement period has the meaning given by section 102UH.

trustee beneficiary has the meaning given by section 102UD.

trustee beneficiary non-disclosure tax means tax payable under paragraph 102UK(2)(a) or 102UM(2)(a).

untaxed part, of a share of the net income of a closely held trust, has the meaning given by section 102UE.

102UC Closely held trust

(1) A ***closely held trust*** is:

(a) a trust where an individual has, or up to 20 individuals have between them, directly or indirectly, and for their own benefit, fixed entitlements to a 75% or greater share of the income, or a 75% or greater share of the capital, of the trust; or

(b) a discretionary trust;

except where the trust is an excluded trust.

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Trustees of discretionary trusts treated as individuals

(2) For the purposes of paragraph (1)(a), if:

(a) a trustee of a discretionary trust holds a fixed entitlement to a share of the income or capital of the trust mentioned in that paragraph directly or indirectly; and

(b) no person holds that fixed entitlement directly or indirectly through the discretionary trust;

the trustee is taken to hold that fixed entitlement directly or indirectly as an individual and for the individual's own benefit.

Individuals treated as single individual

(3) For the purposes of paragraph (1)(a), all of the following are taken to be a single individual:

(a) an individual, whether or not the individual holds fixed entitlements directly in the trust mentioned in that paragraph;

(b) the individual's relatives;

(c) in relation to any fixed entitlements in respect of which other individuals are nominees of the individual or of the individual's relatives—those other individuals.

Definitions

(4) In this section:

discretionary trust means a trust that is not a fixed trust within the meaning of section 272-65 in Schedule 2F.

excluded trust means:

(a) a trust to which paragraph (b), (c) or (d) of the definition of ***excepted trust*** in section 272-100 in Schedule 2F applies; or

(b) a unit trust whose units are listed on the stock market operated by ASX Limited.

fixed entitlement has the meaning given by sections 272-5, 272-10, 272-15 and 272-40 in Schedule 2F.

indirectly has the meaning given by section 272-20 in Schedule 2F.

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102UD Trustee beneficiary

A person is a ***trustee beneficiary*** of a closely held trust if the person is a beneficiary of the trust in the capacity of trustee of another trust.

102UE Meaning of *untaxed part*

(1) The ***untaxed part*** of a share of the net income of a closely held trust is so much of that share as is not covered by subsection (2).

(2) The share of the net income of the closely held trust is covered by this subsection to the extent that:

(a) the trustee of the closely held trust is assessed and liable to pay tax under subsection 98(4) in respect of the share; or

(b) the share is reasonably attributable to a part of the net income of another trust estate in respect of which the trustee of the other trust estate is assessed and liable to pay tax under subsection 98(4); or

(c) the share is represented by or reasonably attributable to an amount from which an entity was required to withhold an amount under Subdivision 12-H in Schedule 1 to the *Taxation Administration Act 1953*; or

(d) the share is reasonably attributable to a part of the net income of another trust estate in respect of which the trustee of the other trust estate was liable to pay trustee beneficiary non-disclosure tax.

102UG Correct TB statement

Share of net income case

(1) This section applies if a share of the net income of a closely held trust for a year of income is included in the assessable income of a trustee beneficiary of the trust under section 97 and the share comprises or includes an untaxed part.

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Tax-preferred amount case

(2) This section also applies if a trustee beneficiary of a closely held trust is presently entitled at the end of a year of income to a share of a tax-preferred amount of the trust.

Correct TB statement

(3) If this section applies, the trustee of the closely held trust makes a ***correct TB statement*** about the share if the trustee correctly states, in the approved form:

(a) if the trustee beneficiary is a resident at the end of the year of income:

(i) the name and tax file number of the trustee beneficiary; and

(ii) the amount of the untaxed part of the share or the amount of the share of the tax-preferred amount; and

(b) if the trustee beneficiary is a non-resident at the end of the year of income:

(i) the name and address of the trustee beneficiary; and

(ii) the amount of the untaxed part of the share or the amount of the share of the tax-preferred amount.

Note: If a closely held trust has multiple trustee beneficiaries, the requirements in subsection (3) will have to be met for each of them for the trustee of the closely held trust to avoid paying any trustee beneficiary non-disclosure tax.

102UH TB statement period

The ***TB statement period***, for the trustee of a trust in relation to a year of income, is the period from the end of the year of income until the end of:

(a) the period within which the trustee is required to give to the Commissioner the trust's return of income for the year of income; or

(b) such further period as the Commissioner allows.

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102UI Tax-preferred amount

The expression "tax-preferred amount" of a trust means:

(a) income of the trust that is not included in its assessable income in working out its net income; or

(b) capital of the trust.

102UJ Extended concept of present entitlement to capital of a trust

For the purposes of this Division, section 95A applies in relation to capital of a trust in the same way as it applies to income of the trust.

Subdivision C—Trustee beneficiary non-disclosure tax on share of net income

102UK Trustee beneficiary non-disclosure tax where no correct TB statement

(1) Subject to subsection (2A), this section applies if:

(a) a share of the net income of a closely held trust for a year of income is included in the assessable income of a trustee beneficiary of the trust under section 97; and

(b) the share comprises or includes an untaxed part; and

(c) the trustee of the closely held trust is not covered by a determination under subsection (1A) for the year of income; and

(ca) the closely held trust is none of the following:

(i) a family trust (within the meaning of section 272-75 in Schedule 2F);

(ii) a trust in relation to which an interposed entity election has been made and is in force in accordance with section 272-85 in Schedule 2F;

(iii) a trust covered by subsection 272-90(5) in Schedule 2F; and

(d) during the TB statement period in relation to the year of income, the trustee of the closely held trust does not make

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and give to the Commissioner a correct TB statement about the share.

Determination that a class of trustees is not required to give a correct TB statement

(1A) The Commissioner may, by legislative instrument, determine that a specified class of trustees is not required to make a correct TB statement for a year of income.

(1B) A determination under subsection (1A):

(a) may be expressed to be subject to conditions; and

(b) may be for one or more years of income.

Consequences of section applying

(2) If this section applies:

(a) either:

(i) if the trustee of the closely held trust is the only person in the trustee group (see subsection (3))—the trustee is liable to pay tax; or

(ii) if the trustee of the closely held trust is not the only person in the trustee group—the persons in the trustee group are jointly and severally liable to pay tax;

as imposed by the *Taxation (Trustee Beneficiary Non-disclosure Tax) Act (No. 1) 2007*, on the untaxed part; and

(b) except for the purposes of sections 99, 99A and 99B and this Division, the untaxed part is not included in the assessable income of the trustee beneficiary under section 97.

Note: Provisions dealing with the payment etc. of the tax under paragraph (a) (known as trustee beneficiary non-disclosure tax) are set out in Subdivision D.

Amendment of incorrect statement

(2A) If:

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(a) during the TB statement period in relation to a year of income, the trustee of a closely held trust makes and gives to the Commissioner a statement, that the trustee believes on reasonable grounds is a correct TB statement, about a share of the net income of the trust; and

(b) the statement is not a correct TB statement about the share, with the result that, apart from this subsection, this section applies; and

(c) either:

(i) the trustee could not reasonably have foreseen the event that caused the statement not to be a correct TB statement; or

(ii) the statement is not a correct TB statement because of an inadvertent error; and

(d) either:

(i) before any trustee beneficiary non-disclosure tax becomes due and payable on the untaxed part as a result of this section applying; or

(ii) before the end of 4 years after any such tax becomes due and payable;

the trustee advises the Commissioner in writing of any change that is necessary to make the statement a correct TB statement about the share;

this section does not apply, and is taken never to have applied, to the untaxed part.

Trustee group

(3) The ***trustee group*** consists of the following:

(a) the trustee of the closely held trust;

(b) if the trustee of the closely held trust is a company—the directors of the company.

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102UL Exclusion of directors of closely held trust from liability to pay tax

(1) This section applies if a director of a company that is the trustee of the closely held trust is included in the trustee group under section 102UK.

Director not taking part in statement decision because of illness or other good reason

(2) If, because of illness or for some other good reason, the director did not take part in any decision not to make the correct TB statement, the director is not included in the trustee group.

Director otherwise not taking part in statement decision

(3) If:

(a) the director did not take part in any decision not to make the correct TB statement; and

(b) either:

(i) the director was not aware of the proposal to make such a decision; or

(ii) the director was aware and took reasonable steps to prevent the making of the decision;

the director is not included in the trustee group.

Director taking part in statement decision

(4) If:

(a) the director took part in any decision not to make a correct TB statement; and

(b) the director voted against, or otherwise disagreed with the decision; and

(c) the director took reasonable steps to ensure that a correct TB statement would be made;

the director is not included in the trustee group.

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Where no statement decision

(5) If:

(a) no decision was made not to make a correct TB statement; and

(b) either:

(i) the director, because of illness or for some other good reason, was not involved in the management of the company during the TB statement period in relation to the year of income; or

(ii) the director took reasonable steps to ensure that a correct TB statement would be made;

the director is not included in the trustee group.

102UM Trustee beneficiary non-disclosure tax where share is distributed to trustee of closely held trust

(1) This section applies if:

(a) a share of the net income of a closely held trust for a year of income is included in the assessable income of a trustee beneficiary of the trust under section 97; and

(b) the trustee of the closely held trust becomes presently entitled to an amount that is reasonably attributable to the whole or a part of the untaxed part of the share; and

(c) trustee beneficiary non-disclosure tax is not payable by the trustee of the closely held trust on the untaxed part under paragraph 102UK(2)(a).

Consequences of section applying

(2) If this section applies:

(a) either:

(i) if the trustee of the closely held trust is the only person in the trustee group (see subsection (3))—the trustee is liable to pay tax; or

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(ii) if the trustee of the closely held trust is not the only person in the trustee group—the persons in the trustee group are jointly and severally liable to pay tax;

as imposed by the *Taxation (Trustee Beneficiary Non-disclosure Tax) Act (No. 2) 2007*, on the whole or that part of the untaxed part; and

(b) except for the purposes of sections 99, 99A and 99B and this Division, the whole or that part of the untaxed part is not included in the assessable income of the trustee beneficiary under section 97.

Note: Provisions dealing with the payment etc. of the tax under paragraph (a) (known as trustee beneficiary non-disclosure tax) are set out in Subdivision D.

Trustee group

(3) The ***trustee group*** consists of the following:

(a) the trustee of the closely held trust;

(b) if the trustee of the closely held trust is a company—the directors of the company.

Subdivision D—Payment etc. of trustee beneficiary non-disclosure tax

102UN Amount of trustee beneficiary non-disclosure tax reduced by notional tax offset

(1) This section applies to trustee beneficiary non-disclosure tax that a trustee group would otherwise be liable to pay on the whole or part of a share of the net income of a closely held trust.

(2) The amount of the trustee beneficiary non-disclosure tax is reduced by the amount of any tax offset to which the trustee of the closely held trust would be entitled in an assessment under section 99A if it were assumed that the trustee were assessed and liable to pay tax under that section on the whole or the part of the share of the net income.

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102UO Payment of trustee beneficiary non-disclosure tax

Due date

(1) Trustee beneficiary non-disclosure tax is due and payable at the end of:

(a) 21 days after the TB statement period concerned ends; or

(b) such later day as the Commissioner, in special circumstances, allows.

Debt due

(2) Trustee beneficiary non-disclosure tax, when it becomes due and payable, is a debt due to the Commonwealth and payable to the Commissioner.

(3) Any unpaid trustee beneficiary non-disclosure tax may be sued for and recovered in a court of competent jurisdiction by the Commissioner suing in his or her official name.

Application

(4) Subsections (2) and (3) do not apply in relation to any trustee beneficiary non-disclosure tax that becomes due and payable on or after 1 July 2000.

Note: For provisions about collection and recovery of trustee beneficiary non-disclosure tax and other amounts on or after 1 July 2000, see Part 4-15 in Schedule 1 to the *Taxation Administration Act 1953*.

102UP Late payment of trustee beneficiary non-disclosure tax

If any of the trustee beneficiary non-disclosure tax which a person is liable to pay remains unpaid 60 days after the day by which it is due to be paid, the person is liable to pay the general interest charge on the unpaid amount for each day in the period that:

(a) started at the beginning of the 60th day after the day by which the trustee beneficiary non-disclosure tax was due to be paid; and

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(b) finishes at the end of the last day on which, at the end of the day, any of the following remains unpaid:

(i) the trustee beneficiary non-disclosure tax;

(ii) general interest charge on any of the trustee beneficiary non-disclosure tax.

Note: The general interest charge is worked out under Part IIA of the *Taxation Administration Act 1953*.

102UR Notice of liability

(1) The Commissioner may give a person or persons, by post or otherwise, a notice specifying:

(a) the amount of any trustee beneficiary non-disclosure tax that the Commissioner has ascertained is payable by the person or persons; and

(b) the day on which that tax became or will become due and payable.

Effect of notice on liability etc.

(2) The amount of the liability of a person or persons to trustee beneficiary non-disclosure tax, and the due date for payment of the tax, are not dependent on, or in any way affected by, the giving of a notice.

Amendment of notice

(3) The Commissioner may at any time amend a notice. An amended notice is a notice for the purposes of this section.

Inconsistency between notices

(4) If there is an inconsistency between notices that relate to the same subject matter, the later notice prevails to the extent of the inconsistency.

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Objections

(5) A person who is or persons who are dissatisfied with a notice made in relation to the person or persons may object against it in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

102URA Request for notice of liability

(1) A person or persons may make a written request to the Commissioner to be given a notice under subsection 102UR(1) in respect of specified circumstances in which trustee beneficiary non-disclosure tax may be payable.

Compliance with request

(2) The Commissioner must, subject to subsection (3) of this section, comply with the request.

Further information

(3) If the Commissioner considers that the notice cannot be given unless the person or persons give the Commissioner further information, the Commissioner must request the person or persons to give the Commissioner the information.

Failure to give information

(4) If the person or persons do not give the information, the Commissioner is not required to comply with the request to give the notice.

102USA Recovery of trustee beneficiary non-disclosure tax from trustee beneficiaries providing incorrect information etc. to head trustee

(1) This section applies if the requirements in subsections (2) and (3) are satisfied.

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Requirement for payment of trustee beneficiary non-disclosure tax

(2) A requirement for this section to apply is that:

(a) the trustee of a closely held trust does not make a correct TB statement about a share of the net income of the trust of a year of income during the TB statement period in relation to the year of income; and

(b) as a result, the trustee becomes liable, or the persons in the trustee group become jointly and severally liable, under section 102UK to pay trustee beneficiary non-disclosure tax; and

(c) the trustee or any of the persons in the trustee group pays an amount (the ***recoverable amount***), being some or all of the tax or any general interest charge under section 102UP in relation to the tax.

Requirement for refusal etc. to provide information or for incorrect statement

(3) A requirement for this section to apply is that:

(a) either:

(i) the trustee of the closely held trust was unable to make a correct TB statement about the share of the net income during the TB statement period because the trustee beneficiary in whose assessable income the share is included under section 97, when requested to do so, refused or failed to give information to the trustee; or

(ii) the trustee of the closely held trust purported to make a correct TB statement about the share of the net income during the TB statement period but the statement was not a correct TB statement because it contained incorrect information given to the trustee of the closely held trust by the trustee beneficiary in whose assessable income the share is included under section 97, and the trustee honestly believed on reasonable grounds that the information was correct; and

(b) the trustee of the closely held trust distributed to the trustee beneficiary an amount representing some or all of the share

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of the net income without withholding an amount under section 254 in respect of the recoverable amount.

Consequences of section applying

(4) If this section applies, the trustee or the person in the trustee group mentioned in paragraph (2)(c) may, in a court of competent jurisdiction, sue for the recoverable amount and recover it from the trustee beneficiary.

Subdivision E—Making correct TB statement about trustee beneficiaries of tax-preferred amounts

102UT Requirement to make correct TB statement about trustee beneficiaries of tax-preferred amounts

(1) If, at the end of a year of income:

(a) a trustee beneficiary of a closely held trust is presently entitled to a share of a tax-preferred amount of the trust; and

(b) the trustee of the closely held trust is not covered by a determination under subsection 102UK(1A) for the year of income; and

(c) the closely held trust is none of the following:

(i) a family trust (within the meaning of section 272-75 in Schedule 2F);

(ii) a trust in relation to which an interposed entity election has been made and is in force in accordance with section 272-85 in Schedule 2F;

(iii) a trust covered by subsection 272-90(5) in Schedule 2F;

the trustee of the closely held trust must, during the TB statement period, make and send to the Commissioner a correct TB statement covering the share.

(2) For the purposes of the *Taxation Administration Act 1953*, if the trustee contravenes the requirement in subsection (1) of this section to make and send a statement to the Commissioner, then, subject to

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subsection (3) of this section, the trustee commits an offence against section 8C of that Act.

(3) The trustee does not commit an offence against section 8C of the *Taxation Administration Act 1953* as a result of a contravention of the requirement if:

(a) the trustee did not know all the information required to be included in the statement; and

(b) the trustee had taken reasonable steps to ascertain the information that he or she did not know; and

(c) if the trustee did know some of the information, he or she included it in a statement that he or she sent to the Commissioner during the TB statement period.

(4) The only burden of proof that the trustee bears in respect of subsection (3) is the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter in question existed.

Subdivision F—Special provisions about tax file numbers

102UU Trustee beneficiary may quote tax file number to trustee of closely held trust

A trustee beneficiary in respect of:

(a) a share of the net income of a closely held trust for a year of income that is included in the assessable income of the trustee beneficiary of the trust under section 97; or

(b) a share of a tax-preferred amount of a closely held trust to which the trustee beneficiary of the trust is presently entitled at the end of a year of income;

may quote his or her tax file number to the trustee of the closely held trust in connection with that trustee making a correct TB statement about that share.

Note: Section 8WA of the *Taxation Administration Act 1953* makes it an offence for a person to require or request another person to quote the other person's tax file number unless provision is made by a taxation law for the other person to quote the number.

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102UV Trustee of closely held trust may record etc. tax file number

(1) This section applies if a trustee beneficiary in respect of:

(a) a share of the net income of a closely held trust for a year of income that is included in the assessable income of the trustee beneficiary of the trust under section 97; or

(b) a share of a tax-preferred amount of a closely held trust to which the trustee beneficiary of the trust is presently entitled at the end of a year of income;

quotes his or her tax file number to the trustee of the closely held trust in connection with that trustee making a correct TB statement about that share.

(2) Section 8WB of the *Taxation Administration Act 1953* does not prohibit the trustee of the closely held trust from:

(a) recording the tax file number or maintaining such a record; or

(b) using the tax file number in a manner connecting it with the identity of the trustee beneficiary; or

(c) divulging or communicating the tax file number to a third person;

in connection with that trustee making a correct TB statement about that share.

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Division 6E—Adjustment of Division 6 assessable amount in relation to capital gains, franked distributions and franking credits

102UW Application of Division

This Division applies if:

(a) the net income of a trust estate exceeds nil; and

(b) any of the following things are taken into account in working out the net income of the trust estate:

(i) a capital gain (to the extent that an amount of the capital gain remained after applying steps 1 to 4 of the method statement in subsection 102-5(1) of the *Income Tax Assessment Act 1997*);

(ii) a franked distribution (to the extent that an amount of the franked distribution remained after reducing it by deductions that were directly relevant to it);

(iii) a franking credit.

102UX Adjustment of Division 6 assessable amount in relation to capital gains, franked distributions and franking credits

(1) Make the assumptions in the following subsections for the purposes of working out in accordance with Division 6 an amount:

(a) included in the assessable income of a beneficiary of a trust estate under section 97, 98A or 100; or

(b) in respect of which a trustee of a trust estate is liable to pay tax under section 98, in relation to a beneficiary of the trust estate; or

(c) in respect of which a trustee of a trust estate is liable to pay tax under section 99 or 99A.

Note: Those assumptions are made only for the purposes of working out the amounts mentioned in paragraphs (a), (b) and (c). They are not made for any other purposes (for example, determining the income of a trust estate, the net income of a trust estate, or the amount of a present

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entitlement of a beneficiary of a trust estate to the income of the trust estate).

(2) Assume that the income of the trust estate were equal to the Division 6E income of the trust estate.

(3) Assume that the net income of the trust estate were equal to the Division 6E net income of the trust estate.

(4) Assume that the amount of a present entitlement of a beneficiary of the trust estate to the income of the trust estate were equal to the amount of the beneficiary's Division 6E present entitlement to the income of the trust estate.

102UY Interpretation

(1) Expressions used in this Division have the same meaning as in Division 6.

(2) The ***Division 6E income***, of the trust estate, is the income of the trust estate worked out on the assumption that amounts attributable to the things mentioned in paragraph 102UW(b) were disregarded. The Division 6E income of the trust estate cannot be less than nil.

(3) The ***Division 6E net income***, of the trust estate, is the net income of the trust estate worked out on the assumption that the things mentioned in paragraph 102UW(b) were disregarded. The Division 6E net income of the trust estate cannot be less than nil.

(4) A beneficiary of the trust estate has an amount of a ***Division 6E present entitlement to the income of the trust estate*** that is equal to the amount of the beneficiary's present entitlement to the income of the trust estate, decreased by:

(a) for each capital gain taken into account as mentioned in paragraph 102UW(b)—so much of the beneficiary's share of the capital gain as was included in the income of the trust estate; and

(b) for each franked distribution taken into account as mentioned in paragraph 102UW(b)—so much of the beneficiary's share

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of the franked distribution as was included in the income of the trust estate.

(5) The following expressions in this Division have the same meaning as in the *Income Tax Assessment Act 1997*:

(a) ***share*** of a capital gain (see section 115-227 of that Act);

(b) ***share*** of a franked distribution (see section 207-55 of that Act).

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Division 7—Private companies

102V Application of Division to non-share dividends

(1) This Division:

(a) applies to a non-share equity interest in the same way as it applies to a share; and

(b) applies to an equity holder in the same way as it applies to a shareholder; and

(c) applies to a non-share dividend in the same way as it applies to a dividend.

(2) Subsection (1) does not apply to section 103A.

103 Interpretation

(1) In this Division, unless the contrary intention appears:

the relevant holding company or holding companies, in relation to another company in relation to a year of income of that other company, means:

(a) if the other company would, apart from subsection 103A(4D), be a subsidiary of a public company for the purposes of section 103A in relation to that year of income by virtue of subsection 103A(4)—the public company or public companies referred to in paragraph 103A(4)(a); or

(b) if the other company would, apart from subsection 103A(4D), be a subsidiary of a public company for the purposes of section 103A in relation to that year of income by virtue of subsection 103A(4B)—the listed company or listed companies referred to in paragraphs 103A(4B)(a) and (b).

(2) For the purposes of this Division, a person is the nominee of another person in relation to shares if that first-mentioned person may be required to exercise his or her voting power in relation to those shares at the direction of, or holds those shares directly or

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indirectly on behalf of or for the benefit of, that second-mentioned person.

(3) For the purposes of this Division, shares in a company shall be deemed to be held indirectly on behalf of or for the benefit of a person (not being a private company, trustee or partnership) if, in the event of the payment of a dividend on those shares, that person would, otherwise than as a shareholder of the company, receive the whole or a part of that dividend if there were successive distributions of the relative parts of that dividend to and by each of any private companies, trustees or partnerships interposed between the company paying the dividend and that person.

(4) For the purposes of this Division, a company shall be taken to have been a listed company during a period that was included in a year of income of another company (in this subsection referred to as ***the relevant year of income***) where:

(a) if the period was included in the year of income of the first-mentioned company (in this subsection referred to as ***the corresponding year of income***) that corresponded with the relevant year of income—the first-mentioned company was by virtue of paragraph 103A(2)(a), a public company for the purposes of subsection 103A(1) in relation to the corresponding year of income; or

(b) if the period was included in the year of income of the first-mentioned company that immediately preceded or immediately followed the corresponding year of income—the first-mentioned company was, by virtue of paragraph 103A(2)(a), a public company for the purposes of subsection 103A(1) in relation to that preceding or following year of income, as the case may be.

(5) A reference in this Division to a right, power, option, agreement or instrument shall be read as including a reference to a right, power, option, agreement or instrument that is not enforceable by legal proceedings whether or not it was intended to be so enforceable.

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(6) For the purposes of this Division, an arrangement or understanding, whether formal or informal and whether express or implied, shall be deemed to be an agreement.

103A Private companies

(1) For the purposes of this Division, a company is a private company in relation to the year of income if the company is not a public company in relation to the year of income.

(2) For the purposes of subsection (1), a company is, subject to the succeeding provisions of this section, a public company in relation to the year of income if:

(a) shares in the company, not being shares entitled to a fixed rate of dividend whether with or without a further right to participate in profits, were listed for quotation in the official list of a stock exchange, being a stock exchange in Australia or elsewhere, as at the last day of the year of income;

(b) at all times during the year of income, the company was a co-operative company as defined by section 117;

(c) the company has not, at any time since its formation, been carried on for the purposes of profit or gain to its individual members and was, at all times during the year of income, prohibited by the terms of its constituent document from making any distribution, whether in money, property or otherwise, to its members or to relatives of its members; or

(d) the company is:

(i) a mutual life assurance company;

(ii) a friendly society dispensary;

(iii) a body constituted by a law of the Commonwealth or of a State or Territory and established for public purposes, not being a company within the meaning of the law in force in a State or Territory relating to companies;

(iv) a company in which a Government or a body referred to in subparagraph (iii) had a controlling interest on the last day of the year of income; or

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(v) in relation to the year of income, a subsidiary of a public company.

(3) Subject to subsection (5), a company is not, by virtue of paragraph (2)(a) or (b), a public company for the purposes of subsection (1) in relation to the year of income where:

(a) at any time during the year of income, one person or persons not more than 20 in number held, or had the right to acquire or become the holder or holders of, shares representing not less than three-quarters of the value of the shares in the company, other than shares entitled to a fixed rate of dividend only;

(b) at any time during the year of income, not less than three-quarters of the voting power in the company was capable of being exercised by one person or by persons not more than 20 in number;

(c) not less than three-quarters of:

(i) the amount of any dividend paid by the company during the year of income; or

(ii) if more than one dividend was paid by the company during the year of income—the total amount of all the dividends paid by the company during the year of income;

was paid to one person or to persons not more than 20 in number; or

(d) a dividend was not paid by the company during the year of income but the Commissioner is of the opinion that, if a dividend had been paid by the company at any time during the year of income, not less than three-quarters of the amount of that dividend would have been paid to one person or to persons not more than 20 in number.

(3A) Subject to subsection (3B), a company shall not be taken for the purposes of subsection (1) to be a public company in relation to a year of income by reason that a body constituted and established as mentioned in subparagraph (2)(d)(iii) (in this subsection referred to as the ***public body***) had a controlling interest in the company on the last day of the year of income if:

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(a) by reason of:

(i) any of the provisions contained in the constituent document of the company as in force on the last day of the year of income; or

(ii) any right, power, option or agreement in existence on the last day of the year of income that related to the management or conduct of the affairs of the company, including any right, power, option or agreement that related to the issue, allotment or redemption of shares, or the grant, withdrawal or variation of rights in respect of shares;

the exercise by the public body of any right or power in connexion with the company (being a right or power relating to the exercise by the public body of a controlling interest in the company), whether on the last day of the year of income or at any later time, could have been prevented;

(b) rights or powers of the public body in connexion with the company were exercised during the year of income otherwise than for the benefit of the public body or were not exercised in circumstances where it might reasonably have been expected that they would have been exercised;

(c) any shares in the company that were held by the public body on the last day of the year of income were acquired by the public body for no consideration or for a consideration that, in the ordinary course of commercial dealing, would be considered inadequate;

(d) in pursuance of any agreement entered into before the end of the year of income, the public body agreed to dispose of all or any of the shares in the company that were held by the public body on the last day of the year of income, being a disposal that was to take place at any time after the last day of the year of income;

(e) a dividend was paid by the company at a time during the year of income when the public body had a controlling interest in the company, and less than one-half of the amount of that dividend was paid to the public body; or

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(f) a dividend was not paid by the company at a time during the year of income when the public body had a controlling interest in the company but the Commissioner is of the opinion that, if a dividend had been paid by the company at such a time, less than one-half of the amount of the dividend would have been paid to the public body.

(3B) Subsection (3A) does not apply in relation to a company in relation to a year of income if the Commissioner is satisfied that no shares in the company that were held by the public body referred to in that subsection on the last day of the year of income were allotted or transferred to the public body for the purpose, or for purposes that included the purpose, of enabling the company to be treated as a public company in relation to the year of income for the purposes of subsection (1), or in pursuance of an agreement entered into, or a course of conduct engaged in, for the purpose, or for purposes that included the purpose, of enabling the company to be so treated.

(3C) Paragraph (3A)(c) does not apply to an acquisition that is taken by section 70-30 or 70-110 of the *Income Tax Assessment Act 1997* to have occurred.

(4) Subject to subsection (4D), a company is, for the purposes of this section, a subsidiary of a public company in relation to the year of income if:

(a) at all times during the year of income all the shares in the first-mentioned company were beneficially owned by a company which, or companies each of which, is a public company for the purposes of subsection (1) in relation to the year of income of that company (in this subsection referred to as ***the corresponding year of income***) that corresponds with the first-mentioned year of income but which is not, or none of which is:

(i) a company to which paragraph (2)(c) applies in relation to the corresponding year of income; or

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(ii) a subsidiary of a public company for the purposes of this section in relation to the corresponding year of income by reason of subsection (4B);

(b) the corresponding year of income, or each of the corresponding years of income, referred to in paragraph (a) ended on the same day as the year of income first-mentioned in that paragraph;

(c) at no time during the year of income was a person or were 2 or more persons in a position to affect rights of the relevant holding company or holding companies in connexion with the first-mentioned company so as to prevent the relevant holding company or holding companies from exercising for its or their own benefit the whole of the voting power in the first-mentioned company or from receiving for its or their own benefit the whole of any dividends that might be paid by the first-mentioned company or of any distribution that might be made of capital of the first-mentioned company; and

(d) no agreement was entered into before or during the year of income by virtue of which a person or 2 or more persons would be in a position after the year of income so to affect rights of the relevant holding company or holding companies in connexion with the first-mentioned company.

(4A) For the purposes of paragraphs 4(c) and (d), a person shall be taken to have been, or to be, in a position at a particular time to affect any rights of the relevant holding company or holding companies in connexion with the company first-mentioned in subsection (4) (in this subsection referred to as ***the first-mentioned company***) if at that time that person had or has a right, power or option (whether by virtue of any provision in the constituent document of the first-mentioned company or by virtue of any agreement or instrument or otherwise) to acquire those rights or to do an act or thing that would prevent the relevant holding company or holding companies from exercising those rights for its or their own benefit or receiving any benefits accruing by reason of those rights.

(4B) Subject to subsection (4D), a company that is not, by virtue of subsection (4), a subsidiary of a public company for the purposes

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of this section in relation to the year of income is, for the purposes of this section, a subsidiary of a public company in relation to the year of income if:

(a) at all times during the year of income the voting power in the first-mentioned company was controlled, or was capable of being controlled, by a listed company or listed companies, either directly or through one or more companies, trustees or partnerships interposed between the first-mentioned company and the listed company or listed companies;

(b) at all times during the year of income a listed company or listed companies had a right to receive, either directly or through one or more companies, trustees or partnerships interposed between the first-mentioned company and the listed company or listed companies, more than one-half of any dividends that might be paid by the first-mentioned company and more than one-half of any distribution that might be made of capital of the first-mentioned company;

(c) at no time during the year of income was a person or were 2 or more persons in a position to affect rights of the listed company or listed companies in connexion with the first-mentioned company so as to prevent the listed company or listed companies from exercising for its or their own benefit control of the voting power in the first-mentioned company or from receiving for its or their own benefit more than one-half of any dividends that might be paid by the first-mentioned company or of any distribution that might be made of capital of the first-mentioned company; and

(d) no agreement was entered into before or during the year of income by virtue of which a person or 2 or more persons would be in a position after the year of income so to affect rights of the listed company or listed companies in connexion with the first-mentioned company.

(4C) For the purposes of paragraphs (4B)(c) and (d), a person shall be taken to have been, or to be, in a position at a particular time to affect any rights of a listed company or listed companies in connexion with another company if at that time that person had, or has, a right, power or option (whether by virtue of any provision in

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the constituent document of the other company or of any company interposed between the listed company or listed companies and the other company or by virtue of any agreement or instrument or otherwise) to acquire those rights or to do an act or thing that would prevent the listed company or listed companies from exercising those rights for its or their own benefit or receiving any benefits accruing by reason of those rights.

(4D) A company (in this subsection and subsection (4E) referred to as ***the company concerned***) that would, apart from this subsection, be a subsidiary of a public company for the purposes of this section in relation to the year of income shall be deemed, for the purposes of this section, not to be a subsidiary of a public company in relation to the year of income if the Commissioner is satisfied that:

(a) where the company concerned would, apart from this subsection, be such a subsidiary in relation to the year of income by virtue of subsection (4)—the affairs of the company concerned were managed or conducted in the year of income in the interests of persons other than the relevant holding company or holding companies; or

(b) where the company concerned would, apart from this subsection, be such a subsidiary in relation to the year of income by virtue of subsection (4B)—the affairs of the company concerned were managed or conducted in the year of income without proper regard to the interests of the relevant holding company or holding companies.

(4E) In considering whether the affairs of the company concerned were managed or conducted in the year of income as mentioned in subsection (4D), the Commissioner shall have regard to:

(a) the circumstances in which the relevant holding company or holding companies acquired a direct or indirect beneficial interest or interests in shares in the company concerned (whether the interest was, or the interests were, acquired before or during the year of income) and, in particular, whether those circumstances were capable of explanation by reference to ordinary commercial dealing;

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(b) the provisions of the constituent document of the company concerned as in force during the year of income that related to the management or conduct of the affairs of that company, including the provisions of the constituent document that related to the appointment or removal of directors, the issue, allotment or redemption of shares, the grant, withdrawal or variation of rights in respect of shares, the payment of dividends and the investment or other application of moneys of that company;

(c) the nature and extent of any right, power, option or agreement in existence during the year of income that related to the management or conduct of the affairs of the company concerned, including any right, power, option or agreement that related to the appointment or removal of directors, the issue, allotment or redemption of shares, the grant, withdrawal or variation of rights in respect of shares, the payment of dividends and the investment or other application of moneys of that company;

(d) whether rights of the relevant holding company or holding companies in connexion with the company concerned were exercised during the year of income otherwise than for the benefit of the relevant holding company or holding companies or were not exercised in circumstances where it might reasonably have been expected that they would have been exercised;

(e) the nature and source of the income derived by the company concerned during the year of income and whether the derivation by that company of that income was capable of explanation by reference to ordinary commercial dealing;

(f) the manner in which the moneys of the company concerned were applied during the year of income and, in particular, whether they were lent to, or invested or otherwise made available for the use or benefit of, a person or persons other than the relevant holding company or holding companies and, if any such moneys were so lent, invested or made available:

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(i) the terms and conditions upon which the moneys were so lent, invested or made available;

(ii) whether the lending, investment or making available of those moneys was capable of explanation by reference to ordinary commercial dealing; and

(iii) the connexion (if any) between that person or those persons, the directors of the company concerned and the directors of, or the beneficial owners of the shares in, the company from which the company concerned received dividends before or during the year of income;

(g) the respective amounts of any dividends in respect of shares in the company concerned that were paid during the year of income or might reasonably be expected to be paid after that year by that company and the circumstances in which those dividends were, or might be expected to be, paid; and

(h) any other relevant matters.

(5) Where a company would not, under the preceding provisions of this section, be a public company for the purposes of subsection (1) in relation to the year of income but the Commissioner is of the opinion that, having regard to:

(a) the number of persons who were, at any time during the year of income, capable of controlling the company and whether any of those persons was a public company;

(b) the market value of the shares issued by the company before the end of the year of income;

(c) the number of persons who beneficially owned shares in the company at the end of the year of income; and

(d) any other matters that the Commissioner thinks relevant;

it is reasonable that the company should be treated as a public company for the purposes of subsection (1) in relation to the year of income, the company shall be deemed to be a public company for those purposes in relation to the year of income.

(5A) The Commissioner may, under subsection (5), form an opinion that it is reasonable that a company should be treated as a public company for the purposes of subsection (1) in relation to a year of

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income notwithstanding that the forming of such an opinion by the Commissioner would impose on the company a liability to pay a greater amount of income tax than the company would otherwise be liable to pay.

(6) Notwithstanding anything in the preceding provisions of this section, the Commissioner may treat a company as not being, by virtue of paragraph (2)(a) or (b), a public company for the purposes of subsection (1) in relation to the year of income if the Commissioner is of the opinion that, by reason of:

(a) any provisions in the company's constituent document, or in any contract, agreement or instrument, authorizing the variation or abrogation of the voting rights or rights to dividends in respect of any shares in the company or relating to the conversion, exchange or redemption of any such shares;

(b) any contract, agreement, option or instrument under which a person has power to acquire shares in the company; or

(c) any power or authority in a person in relation to the voting rights or rights to dividends in respect of any shares in the company;

the voting rights or rights to dividends in respect of any shares in the company were, at any time during the year of income, capable of being varied or abrogated in such a manner (notwithstanding that they were not in fact varied or abrogated in that manner) that:

(d) not less than three-quarters of the voting power in the company would have been capable of being exercised by one person or by persons not more than 20 in number;

(e) not less than three-quarters of:

(i) the amount of any dividend paid by the company during the year of income; or

(ii) if more than one dividend was paid by the company during the year of income—the total amount of all the dividends paid by the company during the year of income;

would have been paid to one person or to persons not more than 20 in number; or

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(f) in the case where the company did not pay a dividend during the year of income—if a dividend had been paid by the company at any time during the year of income, not less than three-quarters of the amount of that dividend would have been paid to one person or to persons not more than 20 in number.

(7) For the purposes of this section:

(a) a person, whether or not he or she holds shares in the company concerned;

(b) his or her relatives; and

(c) in relation to any shares in respect of which they are such nominees, his or her nominees and the nominees of any of his or her relatives;

shall be deemed to be one person.

109 Excessive payments to shareholders, directors and associates deemed to be dividends

(1) If a private company pays or credits to an associated person an amount (in this subsection called the ***excessive amount***) that is, or purports to be:

(a) remuneration for services rendered by the associated person; or

(b) an allowance, gratuity or compensation in consequence of the retirement of the associated person from an office or employment held by the associated person in the company, or upon the termination of any such office or employment;

so much (if any) of the excessive amount as exceeds an amount that, in the opinion of the Commissioner, is reasonable:

(c) is not an allowable deduction; and

(d) shall, for the purposes of this Act other than Division 11A of Part III, be deemed to be a dividend paid by the company:

(i) to the associated person as a shareholder in the company;

(ii) out of profits derived by the company; and

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(iii) on the last day of the year of income of the company in which the excessive payment or credit is made.

Note: This section does not apply to an amount if the amount is paid to a CGT concession stakeholder under subsection 152-325(1) of the *Income Tax Assessment Act 1997* (see subsection 152-325(11)).

(2) For the purposes of this section:

(a) a transfer of property shall be deemed to be the payment of an amount equal to the value of the property; and

(b) a reference to an associated person, in relation to a company, is a reference to:

(i) a person who is, or has been, a shareholder in, or director of, the company; or

(ii) a person who is an associate, within the meaning of section 318, of a person who is, or has been, a shareholder in, or director of, the company.

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Division 7A—Distributions to entities connected with a private company

Subdivision A—Overview of this Division

109B Simplified outline of this Division

The following is a simplified outline of this Division:

This Division treats 3 kinds of amounts as dividends paid by a private company:

- amounts paid by the company to a shareholder or shareholder's associate (see section 109C);
- amounts lent by the company to a shareholder or shareholder's associate (see sections 109D and 109E);
- amounts of debts owed by a shareholder or shareholder's associate to the company that the company forgives (see section 109F).

This treatment makes the amounts assessable income of the shareholder or associate (under section 44).

However, some payments, loans and forgiven debts are not treated as dividends. (See Subdivisions C and D.) Also, this Division does not apply to demerger dividends. (See Subdivision DA.)

An amount may be treated as a dividend even if it is paid or lent by the company to the shareholder or associate through one or more interposed entities. (See Subdivision E.)

An amount may also be included in the assessable income of a shareholder or shareholder's associate if:

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(a) a company has an unpaid present entitlement to income of a trust; and

(b) the trustee makes a payment or loan to, or forgives a debt of, the shareholder or associate.

(See Subdivisions EA and EB.)

If the total of the amounts is more than the company's distributable surplus, only the part of the total equal to the distributable surplus is treated as dividends. (See section 109Y.)

This Division applies to non-share equity interests and non-share dividends in the same way it applies to shares and dividends.

Subdivision AA—Application of Division

109BA Application of Division to non-share dividends

This Division:

(a) applies to a non-share equity interest in the same way as it applies to a share; and

(b) applies to an equity holder in the same way as it applies to a shareholder; and

(c) applies to a non-share dividend in the same way as it applies to a dividend.

109BB Application of Division to closely-held corporate limited partnerships

This Division applies to a corporate limited partnership in relation to a year of income in the same way as it applies to a private company in relation to a year of income, if, any time during the year of income:

(a) the partnership has fewer than 50 members; or

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(b) any entity has, directly or indirectly, and for the entity's own benefit, an entitlement to a 75% or greater share of the income or capital of the partnership.

Example: Michael has an entitlement to an 80% share of the income of 2 fixed trusts. The 2 fixed trusts have, between them, an entitlement to 100% of the income of a corporate limited partnership. For the purposes of paragraph (b), Michael has, indirectly, and for his own benefit, an entitlement to a 75% or greater share of the income of the partnership.

109BC Application of Division to non-resident companies

(1) This Division applies, in relation to a payment, loan or debt forgiveness, in relation to a private company that is a non-resident as if:

(a) references in this Division to a year of income of the company were references to a tax accounting period in relation to the company in relation to a foreign tax imposed by a tax law of:

(i) if the company is a resident of only one foreign country—that foreign country; or

(ii) otherwise—the foreign country to which subsection (2) applies; and

(b) references in this Division to the lodgment day for the year of income were references to the due date for lodgment of the company's return of income for the tax accounting period under that tax law.

(2) For the purposes of subparagraph (1)(a)(ii), this subsection applies to a foreign country (the ***relevant country***) if:

(a) the company is a resident of the relevant country; and

(b) of all the tax accounting periods:

(i) in relation to the company in relation to the foreign taxes imposed by the tax laws of the foreign countries of which the company is resident; and

(ii) during which the payment, loan or debt forgiveness is made;

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the tax accounting period under the tax law of the relevant country ends first; and

(c) if more than one of the tax accounting periods mentioned in paragraph (b) end first—the due date for lodgment of the company's return of income for the tax accounting period under the tax law of the relevant country is not later than the due date for lodgment for any of the other tax accounting periods that end first.

(3) In this section:

tax accounting period has the meaning given by section 317.

tax law has the meaning given by section 317.

Note: Section 109L prevents amounts from being included in assessable income under this Division if the amounts are included in, or excluded from, assessable income under another provision of this Act, such as the rules relating to CFCs and FIFs.

Subdivision B—Private company payments, loans and debt forgiveness are treated as dividends

109C Payments treated as dividends

When private company is taken to pay a dividend

(1) A private company is taken to pay a dividend to an entity at the end of the private company's year of income if the private company pays an amount to the entity during the year and either:

(a) the payment is made when the entity is a shareholder in the private company or an associate of such a shareholder; or

(b) a reasonable person would conclude (having regard to all the circumstances) that the payment is made because the entity has been such a shareholder or associate at some time.

Note 1: Some payments do not give rise to dividends under Subdivision D. This section also does not give rise to a dividend if the amount is paid to a CGT concession stakeholder under subsection 152-325(1) of the *Income Tax Assessment Act 1997* (see subsection 152-325(11)).

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Note 2: A private company is treated as making a payment to a shareholder or shareholder's associate if an interposed entity makes a payment to the shareholder or associate. See Subdivision E.

Amount of dividend

(2) The dividend is taken to equal the amount paid, subject to section 109Y.

Note: Section 109Y limits the total amount of dividends taken to have been paid by a private company under this Division to the company's distributable surplus.

What is a payment to an entity?

(3) In this Division, ***payment*** to an entity means:

(a) a payment to the extent that it is to the entity, on behalf of the entity or for the benefit of the entity; and

(b) a credit of an amount to the extent that it is:

(i) to the entity; or

(ii) on behalf of the entity; or

(iii) for the benefit of the entity; and

(c) a transfer of property to the entity.

Note: See also section 109CA (***Payment*** includes provision of asset).

Loans are not payments

(3A) However, a loan to an entity is not a payment to the entity.

Note: Payments converted to loans before the private company's lodgment day are treated as loans (see subsection 109D(4A)).

Value of payment by transfer of property

(4) The amount of a payment consisting of a transfer of property is the amount that would have been paid for the transfer by parties dealing at arm's length less any consideration given by the transferee for the transfer. (The amount of a payment is nil if the consideration given by the transferee equals or exceeds the amount that would have been paid at arm's length for the transfer.)

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109CA *Payment* includes provision of asset

(1) In this Division, ***payment*** to an entity includes the provision of an asset for use by the entity.

Note: This includes provision under a lease or licence.

Example: Yacht builder Mainbrace Enterprises Pty Ltd owns a yacht for the purpose of sales demonstrations. With the private company's permission, one of its shareholders uses the yacht on weekends. The company has made a ***payment*** to the shareholder, unless one of the exceptions to subsection (1) applies.

(2) The time the payment is made is the time the entity first:

(a) uses the asset with the permission of the provider of the asset; or

(b) has a right to use the asset (whether alone or together with other entities), at a time when the provider of the asset does not have a right:

(i) to use the asset; or

(ii) to provide the asset for use by another entity.

Example: Paragraph (a) could apply if a shareholder were driving a company car with the company's permission. Paragraph (b) could apply if the shareholder had the car parked at his or her house or at another place of his or her choosing.

(3) However, if the use or right continues into another income year of the entity, treat the provision of the asset for use in the other income year as being a separate payment made at the start of that year.

Exceptions

(4) Subsection (1) does not apply if the provision of the asset would, if done in respect of the employment of an employee, be a minor benefit under section 58P of the *Fringe Benefits Tax Assessment Act 1986*.

(5) Subsection (1) does not apply to the extent that, if the entity had incurred and paid expenditure in respect of the provision of the

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asset, a once-only deduction would have been allowable to the entity in respect of the expenditure, ignoring:

(a) section 82A (Deductions for expenses of self-education); and

(b) Divisions 28 (Car expenses) and 900 (Substantiation rules) of the *Income Tax Assessment Act 1997*.

(6) Subsection (1) does not apply to the provision of a dwelling, if:

(a) the entity, or an associate of the entity, carries on a business; and

(b) the entity or associate:

(i) uses; or

(ii) is granted or has a lease, licence or other right to use;

land, water or a building for the purpose of carrying on the business; and

(c) the provision of the dwelling to the entity is connected with that use or with that lease, licence or other right.

Note: For the meaning of ***land***, see section 2B of the *Acts Interpretation Act 1901*.

(7) Subsection (1) does not apply to the provision of a dwelling, if:

(a) the dwelling is the main residence of the entity; and

(b) the provider of the dwelling is a private company; and

(c) the private company acquired the dwelling before 1 July 2009; and

(d) the private company would meet the conditions in section 165-12 of the *Income Tax Assessment Act 1997* (which is about the company maintaining the same owners) if, despite subsection 165-12(1), the ***ownership test period*** were the period:

(i) starting on the start of 1 July 2009; and

(ii) ending at the time of payment, worked out under subsection (2) of this section.

(7A) Subsection (1) does not apply to the provision of a dwelling to the entity if:

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(a) the dwelling is a flat or home unit that is part of a complex of 2 or more flats or home units; and

(b) the provider of the dwelling is a company that owns a legal or equitable interest in the land on which the complex is erected; and

(c) there is more than one share in the company, and each share (whether singly or as part of a parcel of shares) gives the relevant shareholder the right to occupy a flat or home unit in the complex; and

(d) each flat or home unit in the complex is covered by a share, or a parcel of shares, in the company; and

(e) the dwelling is provided to the entity because a shareholder holds such a share, or parcel of shares; and

(f) the company does not have legal or equitable interests in any assets other than legal or equitable interests in:

(i) the complex, and the land on which it is erected; and

(ii) any related land and buildings; and

(iii) any related plant, machinery, equipment, furniture or fittings; and

(iv) any assets relating to the matters mentioned in paragraph (g); and

(g) the assessable income of the company is derived predominantly from:

(i) managing and maintaining the complex (including the assets mentioned in subparagraphs (f)(i), (ii) and (iii)); and

(ii) interest and dividends relating to income derived from managing and maintaining the complex (including the assets mentioned in those subparagraphs).

(7B) Subsection (7A) does not apply in a case to which Subdivision E (about interposed entities) applies, if the company mentioned in that subsection is interposed between:

(a) a private company; and

(b) a shareholder, or an associate of a shareholder, of the private company.

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(8) Section 118-120 of the *Income Tax Assessment Act 1997* (Extension to adjacent land) applies in relation to subsections (6) to (7A) of this section in the same way as it applies in relation to Subdivision 118-B of that Act.

(9) Subsection (1) does not apply if the provision of the asset to the entity is a transfer of property to the entity.

Note: For transfers of property, see paragraph 109C(3)(c).

Value of payment

(10) Subject to subsection (11), the amount of the payment is:
(a) the amount that would have been paid for the provision of the asset by the parties dealing at arm's length; less
(b) any consideration given for the provision of the asset by the entity.

(11) The amount of the payment is nil if the consideration given by the entity equals or exceeds the amount that would have been paid at arm's length for the provision of the asset.

109D Loans treated as dividends

Loans treated as dividends in year of making

(1) A private company is taken to pay a dividend to an entity at the end of one of the private company's years of income (the ***current year***) if:
(a) the private company makes a loan to the entity during the current year; and
(b) the loan is not fully repaid before the lodgment day for the current year; and
(c) Subdivision D does not prevent the private company from being taken to pay a dividend because of the loan at the end of the current year; and
(d) either:

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(i) the entity is a shareholder in the private company, or an associate of such a shareholder, when the loan is made; or

(ii) a reasonable person would conclude (having regard to all the circumstances) that the loan is made because the entity has been such a shareholder or associate at some time.

Note 1: Some repayments cannot be counted for the purpose of this subsection. See section 109R.

Note 2: A private company is treated as making a loan to a shareholder or shareholder's associate if an interposed entity makes a loan to the shareholder or associate. See Subdivision E.

Amount of dividend

(1AA) The amount of the dividend taken under subsection (1) to have been paid is the amount of the loan that has not been repaid before the lodgment day for the current year, subject to section 109Y.

Note: Section 109Y limits the total amount of dividends taken to have been paid by a private company under this Division to the company's distributable surplus.

Loans treated as dividends in year following that of making

(1A) A private company is taken to pay a dividend to an entity at the end of the private company's year of income (the ***current year***) if:

(a) the private company made a loan to the entity during the previous year of income; and

(b) it made the loan in the course of a winding-up of the private company by a liquidator; and

(c) the loan is not fully repaid by the end of the current year; and

(d) either:

(i) the entity is a shareholder in the private company, or an associate of such a shareholder, when the loan is made; or

(ii) a reasonable person would conclude (having regard to all the circumstances) that the loan is made because the

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entity has been such a shareholder or associate at some time.

Subdivision D (other than section 109R) does not apply to loans covered by this subsection.

Amount of dividend

(2) The amount of the dividend taken under subsection (1A) to have been paid is the amount of the loan that has not been repaid at the end of the current year, subject to section 109Y.

Note: Section 109Y limits the total amount of dividends taken to have been paid by a private company under this Division to the company's distributable surplus.

What is a loan?

(3) In this Division, ***loan*** includes:

(a) an advance of money; and

(b) a provision of credit or any other form of financial accommodation; and

(c) a payment of an amount for, on account of, on behalf of or at the request of, an entity, if there is an express or implied obligation to repay the amount; and

(d) a transaction (whatever its terms or form) which in substance effects a loan of money.

In which year of income is a loan made?

(4) For the purposes of this Division, a loan is made to an entity at the time the amount of the loan is paid to the entity by way of loan or anything described in subsection (3) is done in relation to the entity.

Payment converted to loan before lodgment day

(4A) If:

(a) a private company makes a payment to an entity at a time in a year of income; and

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(b) the payment is converted to a loan before the end of the private company's lodgment day for the year of income;

for the purposes of this Division, treat the events mentioned in paragraphs (a) and (b) as the private company making a loan to the entity at the time mentioned in paragraph (a).

Loans made before 4 December 1997

(5) If the terms of a loan made before 4 December 1997 are varied on or after that day by extending the term of the loan or increasing its amount, this Division applies to the loan as if it were made on the new terms when the variation occurred.

When is the lodgment day?

(6) In this Division, the ***lodgment day*** for a private company's year of income is the earlier of:

(a) the due date for lodgment of the private company's return of income for the year of income; and

(b) the date of lodgment of the private company's return of income for the year of income.

Note: For the lodgment day for a private company that is a non-resident, see section 109BC.

109E Amalgamated loan from a previous year treated as dividend if minimum repayment not made

Amalgamated loan treated as dividend in first year in which payment is less than minimum yearly repayment

(1) A private company is taken to pay a dividend to an entity at the end of one of the private company's years of income (the ***current year***) if:

(a) the private company made an amalgamated loan to the entity in an earlier year of income; and

(b) the amalgamated loan is not repaid at the end of the current year; and

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(c) the amount (if any) paid to the private company during the current year in relation to the amalgamated loan falls short of the minimum yearly repayment of the amalgamated loan worked out under subsection (5) for the current year; and

(d) section 109Q does not apply in relation to the current year.

Note: The amalgamated loan does not give rise to a dividend for that year if the minimum yearly repayment is not made and the entity satisfies the Commissioner that treating the loan as a dividend would cause hardship. See section 109Q.

Amount of dividend

(2) The amount of the dividend is taken to be the amount of the shortfall mentioned in paragraph (1)(c), subject to section 109Y.

Note: Section 109Y limits the total amount of dividends taken to have been paid by a private company under this Division to the company's distributable surplus.

What is an amalgamated loan?

(3) For the purposes of this Division, a private company is taken to make a loan (the ***amalgamated loan***) to a single entity during a year of income if the private company makes one or more loans (***constituent loans***) to the entity during the year, each of which:

(a) is not fully repaid before the lodgment day for the year; and

(b) would cause the company to be taken under section 109D to pay a dividend to the entity at the end of the year, apart from section 109N; and

(c) has the same maximum term for the purposes of that section.

The amount of the amalgamated loan is the sum of the amounts of the constituent loans that have not been repaid before the lodgment day for the year of income in which the amalgamated loan is made.

(3A) Subsection (3B) applies if:

(a) a private company is taken to have made an amalgamated loan (the ***old amalgamated loan***) during a year of income (the ***original year of income***); and

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(b) the maximum term of the old amalgamated loan under subsection 109N(3) was 7 years; and

(c) in a later year of income (the ***later year of income***):

(i) a constituent loan taken account of by the old amalgamated loan becomes secured by a mortgage over real property; and

(ii) the term of the constituent loan is extended; and

(d) as a result of the mortgage, the maximum term of the constituent loan under subsection 109N(3) is 25 years; and

(e) the term of the constituent loan after the extension (including the period before the extension during which the constituent loan was in existence) does not exceed 25 years.

(3B) For the purposes of this Division in relation to the later year of income and subsequent years of income:

(a) treat the constituent loan as a new amalgamated loan that takes account of that constituent loan; and

(b) treat the new amalgamated loan as having been made just before the start of the later year of income; and

(c) treat the amount of the new amalgamated loan just before the start of the later year of income as the amount of the constituent loan that had not been repaid at that time; and

(d) unless paragraph (e) applies—reduce the amount of the old amalgamated loan just before the start of the later year of income by the amount of the new amalgamated loan at that time; and

(e) if the constituent loan was the only constituent loan taken account of by the old amalgamated loan—disregard the old amalgamated loan.

Payments in relation to constituent loans treated as payments in relation to amalgamated loan

(4) For the purposes of this Division, a payment to the private company in relation to a constituent loan in a year of income after the one in which the constituent loan was made is taken to be a

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payment in relation to the amalgamated loan that takes account of the constituent loan.

Minimum yearly repayment

(5) The minimum yearly repayment of an amalgamated loan for a year of income is the amount worked out using the formula in subsection (6). However, the minimum yearly repayment of an amalgamated loan for a year of income is the amount worked out under the regulations, if they provide for working it out.

Formula for minimum yearly repayment

(6) The formula for the minimum yearly repayment for a year of income is:

$$\frac{\text{Amount of the loan not repaid by the end of the previous year of income} \times \text{Current year's benchmark interest rate}}{1 - \left(\frac{1}{1 + \text{Current year's benchmark interest rate}} \right)^{\text{Remaining term}}}$$

where:

current year's benchmark interest rate is the benchmark interest rate for the year of income for which the minimum yearly repayment is being worked out.

remaining term is the difference between:

(a) the number of years in the longest term of any of the constituent loans that the amalgamated loan takes account of; and

(b) the number of years between the end of the private company's year of income in which the loan was made and the end of the private company's year of income before the year of income for which the minimum yearly repayment is being worked out;

rounded up to the next higher whole number if the difference is not already a whole number.

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Note: Section 109R provides that certain payments relating to a loan are not to be taken into account for the purposes of working out the minimum yearly repayment.

Benchmark interest rate used to work out how much of a payment relating to amalgamated loan is a repayment

(7) Work out the amount of an amalgamated loan repaid by the end of a year of income on the basis that interest is payable on the balance of the loan from time to time in a year of income at a rate equal to the benchmark interest rate for the year of income.

109F Forgiven debts treated as dividends

Forgiven debt treated as dividend

(1) A private company is taken to pay a dividend to an entity at the end of the private company's year of income if all or part of a debt the entity owed the private company is forgiven in that year and either:
  (a) the amount is forgiven when the entity is a shareholder in the private company, or an associate of such a shareholder; or
  (b) a reasonable person would conclude (having regard to all the circumstances) that the amount is forgiven because the entity has been such a shareholder or associate at some time.

Note: In some cases forgiving a debt does not give rise to a dividend. See section 109G.

Amount of dividend

(2) The amount of the dividend equals the amount of debt forgiven, subject to section 109Y.

Note: Section 109Y limits the total amount of dividends taken to have been paid by a private company under this Division to the company's distributable surplus.

When is a debt forgiven?

(3) An amount of a debt is ***forgiven*** for the purposes of this Division if and when the amount would be forgiven under section 245-35 or 245-37 of the *Income Tax Assessment Act 1997*, assuming the

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amount were a debt to which Subdivisions 245-C to 245-G of that Act apply.

Note: Division 245 of the *Income Tax Assessment Act 1997* applies to forgiveness of certain commercial debts.

Discharge of debt by transfer of property is not forgiveness

(4) Despite subsection (3), an amount of debt is not forgiven for the purposes of this Division if the obligation to pay the amount is discharged by a payment to the creditor consisting of a transfer of property.

Note: Subsection 109C(4) explains how to work out the value of a payment consisting of a transfer of property.

Debt forgiveness by debt parking

(5) An amount of debt an entity (the ***debtor***) owes a private company is also ***forgiven*** for the purposes of this Division if:

(a) the private company assigns the right to receive payment of the amount to another entity (the ***new creditor***) who is either:

(i) an associate of the debtor; or

(ii) a party to an arrangement with the debtor about the assignment; and

(b) a reasonable person would conclude (having regard to all the circumstances) that the new creditor will not exercise the assigned right.

Debt forgiveness by failure to rely on obligation to pay

(6) An amount of debt an entity (the ***debtor***) owes a private company is also ***forgiven*** for the purposes of this Division if a reasonable person would conclude (having regard to all the circumstances) that the private company will not insist on the entity paying the amount or rely on the entity's obligation to pay the amount. (The amount is forgiven when a reasonable person would first reach that conclusion.)

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Forgiveness of amalgamated loan debt

(7) If a private company forgives an amount of debt resulting from a constituent loan taken into account in working out the amount of an amalgamated loan under subsection 109E(3), the private company is taken to forgive the same amount of the debt resulting from the amalgamated loan.

This section operates on only the earliest debt forgiveness

(8) If the same debt is forgiven for the purposes of this Division at different times under different provisions of this section, this section operates on the first forgiveness only.

Example: Subsection (3) of this section provides that a debt is forgiven if it has not been paid by the time a statute of limitations prevents recovery of the debt. (It does this by applying paragraph 245-35(b) of the *Income Tax Assessment Act 1997*.) The debt might already have been forgiven under subsection (6) of this section (because a reasonable person would have concluded earlier that the private company was not going to insist on payment). This section would apply to the forgiveness under subsection (6) but not the forgiveness under subsection (3).

Subdivision C—Forgiven debts that are not treated as dividends

109G Debt forgiveness that does not give rise to a dividend

Forgiveness of debt owed by company generally not treated as dividend

(1) A private company is not taken under this Division to pay a dividend because a debt owed to it by another company is forgiven.

Note: This does not apply to a debt owed by a company as trustee. (See section 109ZE.)

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Forgiveness of debts under Bankruptcy Act not treated as dividends

(2) A private company is not taken under this Division to pay a dividend because a debt is forgiven because the debtor becomes a bankrupt or because of Part X of the *Bankruptcy Act 1966*.

Forgiveness of loan debt does not give rise to dividend if loan gives rise to dividend under section 109D

(3) A private company is not taken under section 109F to pay a dividend at the end of a year of income because of the forgiveness of an amount of a debt resulting from a loan if, because of the loan, the private company is taken:

(a) under section 109D to pay a dividend at the end of that year or an earlier one; or

(b) under former subsection 108(1) to pay a dividend on the last day of that year or an earlier one.

Reduced dividend for forgiveness of loan debt if loan causes dividend under section 109E

(3A) Subsection (3B) applies if:

(a) a private company is taken under section 109F to pay a dividend at the end of a year of income because of the forgiveness of an amount of a debt resulting from a loan; and

(b) the private company is taken under section 109E to pay a dividend at the end of an earlier year of income in relation to the loan.

(3B) The amount of the dividend mentioned in paragraph (3A)(a) is reduced by the amount of the dividend mentioned in paragraph (3A)(b) (but not below zero).

Note: There may be more than one reduction under this subsection if the private company has been taken under section 109E to pay more than one dividend in relation to the loan.

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Commissioner may treat forgiveness as not giving rise to dividend

(4) A private company is not taken under this Division to pay a dividend because of the forgiveness of a debt owed by an entity if the Commissioner is satisfied that:

(a) the debt was forgiven because payment of the debt would have caused the entity undue hardship; and

(b) when the entity incurred the debt, the entity had the capacity to pay the debt; and

(c) the entity lost the ability to pay the debt in the foreseeable future as a result of circumstances beyond the entity's control.

Subdivision D—Payments and loans that are not treated as dividends

109H Simplified outline of this Subdivision

The following is a simplified outline of this Subdivision:

This Subdivision sets out rules about payments and loans that are not treated as dividends.

The following sorts of payments are not treated as dividends:

- payments of genuine debts (section 109J);
- payments to other companies (section 109K);
- payments that are otherwise assessable or that are specifically excluded from assessable income (section 109L).

The following sorts of loans are not treated as dividends:

- loans to other companies (section 109K);

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- loans that are otherwise assessable (section 109L);
- loans made in the ordinary course of business on ordinary commercial terms (section 109M);
- loans that meet criteria for minimum interest rate and maximum term (section 109N);
- certain loans and distributions by liquidators (section 109NA);
- loans that are for the purpose of funding the purchase of certain ESS interests under an employee share scheme (section 109NB).

An amalgamated loan may not be treated as a dividend if the Commissioner is satisfied that doing so would cause undue hardship. (See section 109Q.)

This Subdivision also provides for some loan repayments and interest payments to private companies to be disregarded if they are made with the intention of borrowing a similar amount from a private company later. (See section 109R.)

109J Payments discharging pecuniary obligations not treated as dividends

A private company is not taken under section 109C to pay a dividend because of the payment of an amount, to the extent that the payment:

(a) discharges an obligation of the private company to pay money to the entity; and

(b) is not more than would have been required to discharge the obligation had the private company and entity been dealing with each other at arm's length.

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109K Inter-company payments and loans not treated as dividends

A private company is not taken under section 109C or 109D to pay a dividend because of a payment or loan the private company makes to another company.

Note: This does not apply to a payment or loan to a company in its capacity as trustee. (See section 109ZE.)

109L Certain payments and loans not treated as dividends

(1) A private company is not taken under section 109C or 109D to pay a dividend because of a payment or loan the private company makes to an entity, to the extent that the payment or loan would be included in the entity's assessable income apart from this Division (as it operates in conjunction with section 44).

(2) In addition, a private company is not taken under section 109C or 109D to pay a dividend because of a payment or loan that the private company made to an entity to the extent that a provision of this Act (other than this Division) has the effect that the payment or loan is not included in the entity's assessable income even though it would otherwise be included.

109M Loans made in the ordinary course of business on arm's length terms not treated as dividends

A private company is not taken under section 109D to pay a dividend because of a loan made:

(a) in the ordinary course of the private company's business; and

(b) on the usual terms on which the private company makes similar loans to parties at arm's length.

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109N Loans meeting criteria for minimum interest rate and maximum term not treated as dividends

Criteria

(1) A private company that makes a loan to an entity in one of the private company's years of income is not taken under section 109D to pay a dividend at the end of the year of income because of the loan if, before the lodgment day for the year of income:

(a) the agreement that the loan was made under is in writing; and

(b) the rate of interest payable on the loan for years of income after the year in which the loan is made equals or exceeds the benchmark interest rate for the year; and

(c) the term of the loan does not exceed the term (the ***maximum term***) for that kind of loan worked out under subsection (3).

Benchmark interest rate

(2) The ***benchmark interest rate*** for the year of income is the Indicator Lending Rates—Bank variable housing loans interest rate last published by the Reserve Bank of Australia before the start of the year of income. However, the benchmark interest rate is the rate worked out under the regulations, if they provide for working it out.

Maximum term

(3) The maximum term is:

(a) 25 years for a loan if:

(i) 100% of the value of the loan is secured by a mortgage over real property that has been registered in accordance with a law of a State or Territory; and

(ii) when the loan is first made, the market value of that real property (less the amounts of any other liabilities secured over that property in priority to the loan) is at least 110% of the amount of the loan; and

(b) 7 years for any other loan.

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However, the maximum term for a loan is the period worked out under the regulations, if they provide for working out the maximum term for that kind of loan.

(3A) Reduce the maximum term under paragraph (3)(a) for a loan (the ***new loan***) in accordance with subsection (3B) if:

(a) the new loan results from the refinancing of another loan (the ***old loan***); and

(b) the maximum term of the old loan under subsection (3) was 7 years; and

(c) the maximum term of the new loan under subsection (3) is 25 years (disregarding this subsection).

(3B) The amount of the reduction is equal to the length of the period:

(a) starting when the old loan was made; and

(b) ending when the old loan was refinanced.

(3C) Reduce the maximum term under paragraph (3)(b) for a loan (the ***new loan***) in accordance with subsection (3D) if:

(a) the new loan results from the refinancing of another loan (the ***old loan***); and

(b) the maximum term of the old loan under subsection (3) was 25 years; and

(c) the maximum term of the new loan under subsection (3) is 7 years (disregarding this subsection); and

(d) the length of the period:

(i) starting when the old loan was made; and

(ii) ending when the old loan was refinanced;

exceeds 18 years.

(3D) The amount of the reduction is the excess mentioned in paragraph (3C)(d).

Regulations may adopt rate as published from time to time

(4) Regulations made for the purposes of subsection (2) may apply, adopt or incorporate a rate published in an instrument after they are

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made or take effect, or a rate contained in an instrument from time to time despite any other Act.

109NA Certain liquidator's distributions and loans not treated as dividends

A private company is not taken under section 109C or subsection 109D(1) to pay a dividend because of a distribution or loan made in the course of the winding-up of the company by a liquidator.

Note: However, if such a loan is not fully repaid by the end of the following year of income, the company will be taken to have paid a dividend under subsection 109D(1A).

109NB Loans to purchase shares under employee share schemes not treated as dividends

A private company is not taken under section 109D to pay a dividend because of a loan made solely for the purpose of enabling the shareholder, or an associate of the shareholder, to acquire an ESS interest under an employee share scheme (within the meaning of the *Income Tax Assessment Act 1997*) to which:

(a) Subdivision 83A-B, and the provisions referred to in paragraphs 83A-33(1)(a) to (c), of that Act apply; or

(aa) Subdivision 83A-B, and the provisions referred to in paragraphs 83A-35(1)(a) and (b), of that Act apply; or

(b) Subdivision 83A-C of that Act applies.

109P Amalgamated loans not treated as dividends in the year they are made

A private company is not taken under section 109D to pay a dividend because of an amalgamated loan it makes.

Note: A shortfall in a minimum yearly repayment of an amalgamated loan may be treated as a dividend under section 109E.

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109Q Commissioner may allow amalgamated loan not to be treated as dividend

(1) A private company is not taken under section 109E to pay a dividend at the end of one of its years of income (the ***current year***) because of an amalgamated loan to an entity if:

(a) the amount paid to the private company by the entity in the current year in relation to the loan is less than the minimum yearly repayment of the loan for the current year worked out under subsection 109E(5); and

(b) the entity satisfies the Commissioner that:

(i) that amount was less than the minimum yearly repayment because of circumstances beyond the entity's control; and

(ii) the entity would suffer undue hardship if the private company were taken under section 109E to pay a dividend to the entity at the end of the current year because of the loan.

(2) In deciding whether he or she is satisfied, the Commissioner must consider:

(a) the entity's capacity, at the end of the year of income in which the amalgamated loan was made, to repay the loan; and

(b) any circumstances that have reduced the entity's capacity to repay the loan; and

(c) whether the entity took all reasonable steps to make payments relating to the amalgamated loan during the current year equal to the minimum yearly repayment of the loan for the current year; and

(d) whether the entity has made payments relating to the loan as soon as possible after the current year equalling the difference between:

(i) the minimum yearly repayment for the current year; and

(ii) the amount of payments made during the current year relating to the loan.

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109R Some payments relating to loans not taken into account

(1) This section provides for some payments to a private company in relation to a loan the private company made to an entity not to be taken into account for the purpose of working out:

(a) how much of the loan has been repaid for the purposes of sections 109D and 109E (which treat amounts of loans that have not been repaid as dividends); or

(b) the minimum yearly repayment for the loan under subsection 109E(5).

(2) A payment must not be taken into account if:

(a) a reasonable person would conclude (having regard to all the circumstances) that, when the payment was made, the entity intended to obtain a loan or loans from the private company of a total amount similar to, or larger than, the payment; or

(b) both of the following subparagraphs apply:

(i) the entity obtained, before the payment was made, a loan or loans from the private company of a total amount similar to, or larger than, the amount of the payment;

(ii) a reasonable person would conclude (having regard to all the circumstances) that the entity obtained the loan or loans in order to make the payment.

(3) Subsection (2) does not apply to a payment made by setting off against an amount payable in relation to the loan:

(a) a dividend payable by the private company to the entity; or

(b) work and income support related withholding payments and benefits payable by the private company to the entity; or

(ba) payments covered by section 12-55 in Schedule 1 to the *Taxation Administration Act 1953*; or

(c) if the entity has transferred property to the private company—an amount equalling the difference between:

(i) the amount that a party at arm's length from the entity would have paid for the transfer of the property to the party; and

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(ii) the amount that the private company has already paid the entity (by way of set-off or otherwise) for the transfer.

(4) Nor does subsection (2) apply to a payment made on behalf of the entity (the ***borrower***) by another entity paying to the private company an amount that:

(a) is payable by the other entity to the borrower; and

(b) is assessable income of the borrower for the year of income in which the payment was made or an earlier year of income.

(5) Subsection (2) does not apply to a payment if:

(a) the payment is made to refinance the loan mentioned in subsection (1) (the ***old loan***); and

(b) the entity to which the old loan was made has another loan (the ***primary*** loan) from another entity; and

(c) the old loan becomes subordinated to the primary loan; and

(d) the refinancing of the old loan mentioned in paragraph (a) took place in connection with that subordination; and

(e) that subordination arose as a result of circumstances beyond the control of the entity to which the old loan was made; and

(f) the entity to which the old loan was made and the other entity dealt with each other at arm's length in relation to that subordination; and

(g) the private company and the other entity dealt with each other at arm's length in relation to that subordination.

(6) Subsection (2) does not apply to a payment if:

(a) the payment is made to refinance the loan mentioned in subsection (1) (the ***old loan***); and

(b) the refinancing results in another loan (the ***new loan***); and

(c) the maximum term of the old loan under subsection 109N(3) was 7 years; and

(d) the maximum term of the new loan under subsection 109N(3) is 25 years (reduced in accordance with subsection 109N(3B)).

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(7) Subsection (2) does not apply to a payment if:
  (a) the payment is made to refinance the loan mentioned in subsection (1) (the ***old loan***); and
  (b) the refinancing results in another loan (the ***new loan***); and
  (c) the maximum term of the old loan under subsection 109N(3) was 25 years; and
  (d) the maximum term of the new loan under subsection 109N(3) is:
    (i) unless subparagraph (ii) applies—7 years; or
    (ii) if subsection 109N(3D) applies—7 years reduced in accordance with that subsection.

Subdivision DA—Demerger dividends not treated as dividends

109RA Demerger dividends not treated as dividends

This Division does not apply to a demerger dividend to which section 45B does not apply.

Subdivision DB—Other exceptions

109RB Commissioner may disregard operation of Division or allow dividend to be franked

(1) The Commissioner may make a decision under subsection (2) if:
  (a) this Division (disregarding this section) operates with the result that:
    (i) a private company is taken to pay a particular dividend to a particular entity (the ***recipient***) under this Division; or
    (ii) a particular amount is included, as if it were a dividend, in the assessable income of a particular entity (also the ***recipient***) in relation to a private company under Subdivision EA; and

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(b) the result mentioned in paragraph (a) arises because of an honest mistake or inadvertent omission by any of the following entities:
  (i) the recipient;
  (ii) the private company;
  (iii) any other entity whose conduct contributed to that result.

(2) The Commissioner may decide in writing that:
  (a) the result mentioned in paragraph (1)(a) should be disregarded (see subsection (4)); or
  (b) the dividend mentioned in subparagraph (1)(a)(i) may be franked in accordance with Part 3-6 of the *Income Tax Assessment Act 1997* (see subsection (6)).

(3) In making a decision under subsection (2) (or refusing to make such a decision), the Commissioner must have regard to the following:
  (a) the circumstances that led to the mistake or omission mentioned in paragraph (1)(b);
  (b) the extent to which any of the entities mentioned in paragraph (1)(b) have taken action to try to correct the mistake or omission and if so, how quickly that action was taken;
  (c) whether this Division has operated previously in relation to any of the entities mentioned in paragraph (1)(b), and if so, the circumstances in which this occurred;
  (d) any other matters that the Commissioner considers relevant.

(4) The Commissioner may make a decision under subsection (2) subject to any of the following kinds of condition:
  (a) a condition that the recipient or another entity must make specified payments to the private company or another entity within a specified time;
  (b) a condition that a specified requirement in this Division must be met within a specified time.

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(5) This Division is taken not to operate with the result mentioned in paragraph (1)(a) if:
  (a) the Commissioner makes a decision under paragraph (2)(a); and
  (b) if the Commissioner makes the decision subject to a condition under subsection (4)—the condition is satisfied.

(6) If the Commissioner makes a decision under paragraph (2)(b), subparagraph 202-45(g)(i) of the *Income Tax Assessment Act 1997* does not make the dividend mentioned in subparagraph (1)(a)(i) unfrankable.

(7) Despite subsection 33(3A) of the *Acts Interpretation Act 1901*, each decision made under subsection (2) must relate only to one amount that would (disregarding this section):
  (a) be taken to be a dividend paid by the private company; or
  (b) be included, as if it were a dividend, in the assessable income of an entity.

109RC Dividend may be franked if taken to be paid because of family law obligation

(1) This section applies if a dividend is taken to be paid under this Division because of a family law obligation.

(2) Subparagraph 202-45(g)(i) of the *Income Tax Assessment Act 1997* does not make the amount of the dividend unfrankable.

(3) The dividend can be franked in accordance with Part 3-6 of the *Income Tax Assessment Act 1997* only if:
  (a) the dividend is franked at the private company's benchmark franking percentage for the franking period in which the dividend is taken to be paid; or
  (b) if the private company does not have a benchmark franking percentage for the period—the dividend is franked at a franking percentage of 100%.

(4) For the purposes of subsection (3), if the recipient of the dividend is not a member of the private company for the purposes of

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Part 3-6 of the *Income Tax Assessment Act 1997*, treat that recipient as such a member.

109RD Commissioner may extend period for repayments of amalgamated loan

(1) The Commissioner may make a decision under subsection (2) if:
  (a) section 109E operates with the result that a private company is taken to pay a particular dividend to a particular entity (the ***recipient***); and
  (b) the shortfall mentioned in paragraph 109E(1)(c) arises because the recipient is unable to pay the private company the minimum yearly repayment mentioned in that paragraph because of circumstances beyond the recipient's control.

(2) The Commissioner may decide in writing that the result mentioned in paragraph (1)(a) should be disregarded (see subsection (4)) if the recipient pays the private company the amount of the shortfall within a specified time.

(3) In making a decision under subsection (2) (or refusing to make such a decision), the Commissioner must have regard to the following:
  (a) the nature of the circumstances mentioned in paragraph (1)(b);
  (b) any other matters that the Commissioner considers relevant.

(4) This Division is taken not to operate with the result mentioned in paragraph (1)(a) if:
  (a) the Commissioner makes a decision under subsection (2); and
  (b) the recipient pays the private company the amount of the shortfall within the specified time.

(5) Despite subsection 33(3A) of the *Acts Interpretation Act 1901*, each decision made under subsection (2) must relate only to one amount that would be taken to be a dividend paid by the private company (disregarding this section).

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Subdivision E—Payments and loans through interposed entities

109S Simplified outline of this Subdivision

The following is a simplified outline of this Subdivision:

This Subdivision allows a private company to be taken under Subdivision B to pay a dividend to an entity (the ***target entity***) if an entity interposed between the private company and the target entity makes a payment or loan to the target entity under an arrangement involving the private company.

This result is achieved by treating the private company as making a payment or loan of an amount determined by the Commissioner to the target entity (according to whether the interposed entity made a payment or loan to the target entity). (See sections 109V (for payments) and 109W (for loans).)

The arrangement must involve the private company and one or more interposed entities in making payments or loans or giving loan guarantees for the purpose of the target entity receiving a payment or loan from an interposed entity. (See sections 109T, 109U and 109UA.)

If the target entity repays a fraction of the loan made by the interposed entity, the target entity is treated as repaying the same fraction of the loan taken to have been made by the private company. (See subsection 109W(3).)

Some provisions that prevent payments or loans from giving rise to dividends do not apply to payments or loans this Subdivision treats a private company as making. (See section 109X.)

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109T Payments and loans by a private company to an entity through one or more interposed entities

(1) This Division operates as if a private company makes a payment or loan to an entity (the ***target entity***) as described in section 109V or 109W if:

(a) the private company makes a payment or loan to another entity (the ***first interposed entity***) that is interposed between the private company and the target entity; and

(b) a reasonable person would conclude (having regard to all the circumstances) that the private company made the payment or loan solely or mainly as part of an arrangement involving a payment or loan to the target entity; and

(c) either:

(i) the first interposed entity makes a payment or loan to the target entity; or

(ii) another entity interposed between the private company and the target entity makes a payment or loan to the target entity.

This section operates regardless of certain factors

(2) For the purposes of this section, it does not matter:

(a) whether the interposed entity made the payment or loan to the target entity before, after or at the same time as the first interposed entity received the payment or loan from the private company; or

(b) whether or not the interposed entity paid or lent the target entity the same amount as the private company paid or lent the first interposed entity.

This section does not operate if the payment or loan to the first interposed entity is treated as a dividend

(3) This Division does not operate as described in subsection (1) (and sections 109V and 109W) if the private company is taken under Subdivision B (as it applies apart from this Subdivision) to pay a

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dividend as a result of the payment or loan to the first interposed entity.

109U Payments and loans through interposed entities relying on guarantees

(1) This Division operates as if a private company makes a payment to an entity (the ***target entity***) as described in section 109V if:

(a) during a year of income the private company guarantees a loan made by another entity (the ***first interposed entity***); and

(b) a reasonable person would conclude (having regard to all the circumstances) that the private company gave the guarantee solely or mainly as part of an arrangement involving a payment or loan to the target entity; and

(c) either:

(i) the first interposed entity that is a private company makes a loan to the target entity; or

(ii) another entity that is a private company interposed between the private company and the target entity makes a payment or loan to the target entity; and

(d) the amount of the payment or the loan is greater than the amount worked out using the formula:

Distributable surplus − Subsection 109Y(3) amount

(2) The amount of the payment from the private company to the target entity (as worked out under section 109V) is to be reduced by the amount worked out using the formula:

Distributable surplus − Subsection 109Y(3) amount

(3) In the formulas in paragraph (1)(d) and subsection (2):

distributable surplus means the distributable surplus (worked out under subsection 109Y(2)) for the interposed entity that made the payment or loan to the target entity for the year of income.

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subsection 109Y(3) amount means the total of any amounts calculated under subsection 109Y(3) in relation to that interposed entity for the year of income (apart from as a result of the operation of this section).

This section operates regardless of certain factors

(4) For the purposes of this section, it does not matter:
   (a) whether the interposed entity made the payment or loan to the target entity before, after or at the same time as the first interposed entity received the guarantee from the private company; or
   (b) whether or not the interposed entity paid or lent the target entity the same amount as the private company guaranteed.

109UA Certain liabilities under guarantees treated as payments

(1) Section 109T operates as if one entity (the ***first entity***) makes a payment to a second entity if the first entity guarantees a loan the second entity makes to a third entity (the ***target entity***) and, as a result of the guarantee, the first entity has a liability (other than a contingent liability) to make a payment to the second entity.

Example: A private company guarantees a loan that a bank makes to a shareholder in the private company and the shareholder defaults on the loan. As a result, the company has a presently existing liability to make a payment to the bank. Section 109T operates as if the private company had made a payment to the bank, so the company is treated by section 109V as making a payment to the shareholder (because the bank is interposed between company and shareholder).

(2) The amount of the payment (as worked out under section 109V) is to be reduced by any amount treated as a dividend as a result of the operation of section 109U in relation to the payment or loan made by the interposed entity to the target entity.

(3) A private company is not taken under this Division to pay a dividend because of the operation of subsection (1) in relation to a guarantee if the Commissioner is satisfied that:

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(a) the target entity would suffer undue hardship if the private company were taken to pay a dividend to the entity because of the liability; and
(b) when the target entity entered into the loan, the entity had the capacity to pay the loan.

(4) This section does not the limit the operation of section 109T.

(5) Subsection (1) does not apply if:
(a) as a result of the first entity's liability mentioned in that subsection, the target entity has a liability (other than a contingent liability) to make a payment to the first entity; and
(b) because of section 109N, the liability to make a payment to the first entity is not treated under this Division as giving rise to a dividend paid to the first entity.

109V Amount of private company's payment to target entity through one or more interposed entities

Private company taken to pay if target entity is paid

(1) If the target entity is paid an amount by the interposed entity, this Division operates as if the private company had paid the amount (if any) determined by the Commissioner to the target entity when the interposed entity paid the target entity.

Determining the amount of the private company's payment

(2) In determining the amount of the payment the private company is taken to have made, the Commissioner must take account of:
(a) the amount the interposed entity paid the target entity; and
(b) how much (if any) of that amount the Commissioner believes represented consideration payable to the target entity by the private company or any of the interposed entities for anything (assuming that the consideration payable equals that for similar transactions at arm's length).

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109W Private company's loan to target entity through one or more interposed entities

Private company taken to lend if target entity receives loan

(1) If the target entity is lent an amount by the interposed entity, this Division operates as if the private company had made a loan (the ***notional loan***) of the amount (if any) determined by the Commissioner to the target entity when the interposed entity made the loan to the target entity.

Note: Subsection 109D(4) specifies the time at which a loan is made.

How big is the notional loan?

(2) In determining the amount of the notional loan, the Commissioner must take account of:

(a) the amount the interposed entity lent the target entity; and

(b) how much (if any) of that amount the Commissioner believes represented consideration payable to the target entity by the private company or any of the interposed entities for anything (assuming that the consideration payable equals that for similar transactions at arm's length).

Notional repayments of notional loan

(3) When working out whether the private company is taken under section 109D to pay a dividend as a result of the notional loan, and the amount of any such dividend, assume that the target entity repays an amount of the notional loan equal to the amount worked out using the formula:

$$\text{Repayment made by target entity to lender} \times \frac{\text{Amount of notional loan}}{\text{Amount actually lent to target entity}}$$

where:

amount actually lent to target entity is the amount the interposed entity lent to the target entity.

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repayment made by target entity to lender is the amount of any repayment made by the target entity of the loan the interposed entity made to the target entity.

109X Operation of Subdivision D in relation to payment or loan

Payment or loan not affected by being made through interposed entity

(1) Despite sections 109K and 109L, a private company may be taken under section 109C or 109D to pay a dividend as a result of this Subdivision treating the private company as making a payment or loan to an entity (the ***target entity***), even if:

(a) the private company is treated that way because it makes a payment or loan to an entity that is a company interposed between the private company and the target entity; or

(b) some or all of the amount paid or lent by a private company to an entity interposed between the private company and the target entity is included in the interposed entity's assessable income for a year of income.

(2) Subsections (3) and (4) apply if a notional loan arises under section 109W because an entity interposed between the private company and the target entity makes a loan (the ***actual loan***) to the target entity.

(3) For the purposes of section 109N, treat the agreement under which the actual loan was made as the agreement under which the notional loan was made.

(4) For the purposes of section 109E:

(a) treat the notional loan as an amalgamated loan from the private company to the target entity; and

(b) treat the amount of the notional loan worked out under subsection 109W(1) as the amount of the amalgamated loan; and

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(c) treat the agreement under which the actual loan was made as the agreement under which the amalgamated loan was made; and

(d) treat repayments by the target entity of the amount of the notional loan worked out under subsection 109W(3) as payments by the target entity to the private company in relation to the amalgamated loan.

Subdivision EA—Unpaid present entitlements

109XA Payments, loans and debt forgiveness by a trustee in favour of a shareholder etc. of a private company with an unpaid present entitlement

Payments

(1) Section 109XB applies if:

(a) a trustee makes a payment (including a payment through an interposed entity as described in section 109XF) to a shareholder or an associate of a shareholder of a private company (except a shareholder or associate that is a company) (the ***actual transaction***); and

(b) the payment is a discharge of or a reduction in a present entitlement of the shareholder or associate that is wholly or partly attributable to an amount that is an unrealised gain; and

(c) either:

(i) the company is presently entitled to an amount from the net income of the trust estate at the time the actual transaction takes place, and the whole of that amount has not been paid to the company before the earlier of the due date for lodgment and the date of lodgment of the trustee's return of income for the trust for the year of income of the trust in which the actual transaction takes place; or

(ii) the company becomes presently entitled to an amount from the net income of the trust estate after the actual

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transaction takes place, but before the earlier of the due date for lodgment and the date of lodgment of the trustee's return of income for the trust for the year of income of the trust in which the actual transaction takes place, and the whole of the amount has not been paid to the company before the earlier of those dates.

Note: For entitlements through interposed trusts, see section 109XI.

Loan repayments

(1A) Disregard paragraph (1)(b) if:

(a) subsection (1) has previously applied because the trustee made a payment (the ***original transaction***) to the shareholder, or to an associate of the shareholder, during a previous year of income; and

(b) the shareholder, or an associate of the shareholder, makes a loan or loans to the trustee on or after 1 July 2009; and

(c) either:

(i) a reasonable person would conclude (having regard to all the circumstances) that at the time the original transaction took place the shareholder, or an associate of the shareholder, intended to make the loan or loans to the trustee; or

(ii) the shareholder, or an associate of the shareholder, made the loan or loans to the trustee before the time the original transaction took place and a reasonable person would conclude (having regard to all the circumstances) that the trustee obtained the loan or loans in order to make the payment; and

(d) the actual transaction is applied to repay all or a part of the loan or loans.

(1B) For the purposes of applying section 109XB in a case covered by subsections (1) and (1A) of this section, disregard section 109J (Payments discharging pecuniary obligations not treated as dividends).

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Loans

(2) Section 109XB applies if:

(a) a trustee makes a loan (including a loan through an interposed entity as described in section 109XG) to a shareholder or an associate of a shareholder of a private company (except a shareholder or associate that is a company) (the ***actual transaction***); and

(b) either:

(i) the company is presently entitled to an amount from the net income of the trust estate at the time the actual transaction takes place, and the whole of that amount has not been paid to the company before the earlier of the due date for lodgment and the date of lodgment of the trustee's return of income for the trust for the year of income of the trust in which the actual transaction takes place; or

(ii) the company becomes presently entitled to an amount from the net income of the trust estate after the actual transaction takes place, but before the earlier of the due date for lodgment and the date of lodgment of the trustee's return of income for the trust for the year of income of the trust in which the actual transaction takes place, and the whole of the amount has not been paid to the company before the earlier of those dates.

Note: For entitlements through interposed trusts, see section 109XI.

Forgiven debts

(3) Section 109XB applies if:

(a) all or part of a debt owed to a trustee by a shareholder or an associate of a shareholder of a private company is forgiven (except where the shareholder or associate is a company) (the ***actual transaction***); and

(b) either:

(i) the company is presently entitled to an amount from the net income of the trust estate at the time the actual

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transaction takes place, and the whole of that amount has not been paid to the company before the earlier of the due date for lodgment and the date of lodgment of the trustee's return of income for the trust for the year of income of the trust in which the actual transaction takes place; or

(ii) the company becomes presently entitled to an amount from the net income of the trust estate after the actual transaction takes place, but before the earlier of the due date for lodgment and the date of lodgment of the trustee's return of income for the trust for the year of income of the trust in which the actual transaction takes place, and the whole of the amount has not been paid to the company before the earlier of those dates.

Note: For entitlements through interposed trusts, see section 109XI.

Amount involved in the actual transaction

(4) The amount involved in the actual transaction is the lesser of:

(a) the amount actually involved in the actual transaction; and

(b) the amount worked out using the formula:

Unpaid present entitlement – Previous transactions

where:

previous transactions means the sum of:

(a) the amounts that, because of previous applications of section 109UB (as in force before the commencement of this section) have been taken to be loans; and

(b) the amounts that, because of previous applications of this Subdivision, have been included in an entity's assessable income;

in relation to the unpaid present entitlement.

unpaid present entitlement means:

(a) in a case mentioned in subparagraph (1)(c)(i), (2)(b)(i) or (3)(b)(i)—the amount of the present entitlement that

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remained unpaid on the earlier of the dates mentioned in that subparagraph; and

(b) in a case mentioned in subparagraph (1)(c)(ii), (2)(b)(ii) or (3)(b)(ii)—the amount of the present entitlement that remained unpaid on the earlier of the dates mentioned in that subparagraph.

The amount of the actual transaction where the entitlement is only partly attributable to an unrealised gain

(5) For the purposes of subsection (4), where the actual transaction was a payment and that payment was only partly attributable to an amount that is an unrealised gain, the amount of the actual transaction is taken to be the amount of the payment that was attributable to the amount that is the unrealised gain.

Creation of a present entitlement is not a payment

(6) The creation of a present entitlement to the capital or income of a trust estate is not, of itself, a payment for the purposes of this Subdivision.

*Meaning of **unrealised gain***

(7) In this section:

unrealised gain, in relation to a trust estate and an actual payment, means any unrealised gain, whether of a capital or income nature, but does not include an unrealised gain to the extent that it has been or would be included in the assessable income of the trust, apart from this Division, for:

(a) a year of income before the year in which the actual payment was made; or

(b) the year of income in which the actual payment was made; or

(c) the year of income following the year in which the actual payment was made.

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109XB Amounts included in assessable income

(1) An amount is included, as if it were a dividend paid by the company at the end of the year of income of the company in which the actual transaction took place, in the assessable income of the shareholder or associate referred to in subsection 109XA(1), (2) or (3) if:

(a) had the actual transaction been done by a private company (the ***notional company***); and

(b) had the shareholder or associate been a shareholder of the notional company at the time the actual transaction took place;

an amount (the ***Division 7A amount***) would have been included in the shareholder's or associate's assessable income because of a provision of this Division outside this Subdivision.

(2) Subject to section 109Y, the amount that is included under subsection (1) is the Division 7A amount.

Note: There are some modifications of this Division for the purposes of working out the Division 7A amount: see section 109XC.

109XC Modifications

Modifications for this Subdivision only

(1) The modifications in this section have effect for the purposes of the operation of this Subdivision.

General modifications

(2) This Division (but not this Subdivision) applies to an actual transaction done by a trustee of a trust estate with these modifications:

(a) a reference (except in section 109Y) to an amount paid to a private company has effect as a reference to an amount paid to the trustee; and

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(b) a reference to a year of income of a private company has effect as a reference to the corresponding year of income of the trust estate; and

(c) a reference to the ordinary course of a private company's business has effect as a reference to the ordinary course of the trust estate's business.

Modified operation of section 109J

(4) Section 109J does not apply to a payment to the extent that it is a discharge of or a reduction in a present entitlement.

Modified operation of section 109R

(6) For the purposes of applying section 109R to an actual transaction:

(a) a reference in that section to obtaining a loan from a private company has effect as a reference to obtaining a loan from the trustee; and

(b) a reference in that section to property transferred to a private company has effect as a reference to property transferred to the trustee; and

(c) a reference in that section to an amount paid by a private company for a transfer of property has effect as a reference to an amount paid by the trustee for a transfer of property.

Modified operation of section 109Y

(7) Section 109Y applies to the Division 7A amount in this way:

(a) assume that the private company referred to in subsection 109XA(1), (2) or (3) had been taken to have paid a dividend to the shareholder or associate referred to in that subsection equal to the Division 7A amount; and

(b) assume that the dividend was taken to have been paid at the end of the year of income of the company in which the actual transaction took place; and

(c) a reference in that section to a private company's distributable surplus has effect as a reference to the

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distributable surplus of the private company referred to in paragraph (a).

Certain provisions do not apply

(8) Subsection 109D(1A), sections 109K, 109NA and 109NB and paragraph 109R(3)(a) do not apply to an actual transaction.

109XD Forgiveness of loan debt does not give rise to assessable income if loan gives rise to assessable income

An amount is not included in the assessable income for a year of income of the shareholder or associate referred to in subsection 109XA(3) because of the forgiveness of an amount of a debt resulting from a loan if, because of the loan, an amount was included in the assessable income of the shareholder or associate under section 109XB (or former section 109UB) in that or an earlier year of income.

Subdivision EB—Unpaid present entitlements—interposed entities

109XE Simplified outline of this Subdivision

The following is a simplified outline of this Subdivision:

Payments and loans

This Subdivision allows an amount to be included in an entity's (the ***target entity's***) assessable income under Subdivision EA if an entity interposed between a trustee and the target entity makes a payment or loan to the target entity under an arrangement involving the trustee.

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This result is achieved by treating the trustee as making a payment or loan of an amount determined by the Commissioner to the target entity.

The arrangement must involve the trustee and one or more interposed entities in making payments or loans for the purpose of the target entity receiving a payment or loan from an interposed entity.

If the target entity repays a fraction of the loan made by the interposed entity, the target entity is treated as repaying the same fraction of the loan taken to have been made by the trustee.

Some provisions that prevent payments or loans from giving rise to assessable income do not apply to payments or loans this Subdivision treats a trustee as making.

Present entitlements

This Subdivision similarly allows an amount to be included in an entity's assessable income under Subdivision EA if a private company is or becomes presently entitled to an amount from the net income of a trust estate interposed between the private company and another trust estate (the ***target trust***) under an arrangement involving the target trust.

109XF Payments through interposed entities

(1) For the purposes of paragraphs 109XA(1)(a) and (1A)(a), a trustee is taken to have made a payment to a shareholder, or to an associate of a shareholder, (the ***target entity***) of a private company if:

(a) the trustee makes a payment or loan to another entity (the ***first interposed entity***) that is interposed between:

(i) the trustee; and

(ii) the target entity; and

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(b) a reasonable person would conclude (having regard to all the circumstances) that the trustee made the payment or loan solely or mainly as part of an arrangement involving a payment to the target entity; and

(c) either:

(i) the first interposed entity makes a payment to the target entity; or

(ii) another entity interposed between the trustee and the target entity makes a payment to the target entity.

(2) For the purposes of this section, it does not matter:

(a) whether the interposed entity made the payment to the target entity before, after or at the same time as the first interposed entity received the payment or loan from the trustee; or

(b) whether or not the interposed entity paid the target entity the same amount as the trustee paid or lent the first interposed entity.

(3) Treat the reference in paragraph 109XA(1)(b) to a payment as being a reference to the payment to the target entity mentioned in paragraph (1)(c) of this section.

109XG Loans through interposed entities

Loans by a trustee through interposed entities

(1) For the purposes of paragraph 109XA(2)(a), a trustee is taken to have made a loan (the ***notional loan***) to a shareholder, or to an associate of a shareholder, (the ***target entity***) of a private company if:

(a) the trustee makes a payment or loan to another entity (the ***first interposed entity***) that is interposed between:

(i) the trustee; and

(ii) the target entity; and

(b) a reasonable person would conclude (having regard to all the circumstances) that the trustee made the payment or loan

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solely or mainly as part of an arrangement involving a loan to the target entity; and

(c) either:

(i) the first interposed entity makes a loan to the target entity; or

(ii) another entity interposed between the trustee and the target entity makes a loan to the target entity.

(2) For the purposes of this section, it does not matter:

(a) whether the interposed entity made the loan to the target entity before, after or at the same time as the first interposed entity received the payment or loan from the trustee; or

(b) whether or not the interposed entity lent the target entity the same amount as the trustee paid or lent the first interposed entity.

Notional loans

(3) When working out whether an amount is included in the assessable income of the target entity under section 109XB as a result of the notional loan under subsection (1) of this section, and the amount included in assessable income, assume that the target entity repays an amount of the notional loan equal to the amount worked out using the formula:

$$\text{Repayment made by target entity to lender} \times \frac{\text{Amount of notional loan}}{\text{Amount actually lent to target entity}}$$

where:

amount actually lent to target entity is the amount the interposed entity lent to the target entity.

repayment made by target entity to lender is the amount of any repayment made by the target entity of the loan the interposed entity made to the target entity.

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(4) For the purposes of section 109E (Amalgamated loan from a previous year treated as dividend if minimum repayment not made):

(a) treat the notional loan as an amalgamated loan from the private company to the target entity; and

(b) treat the amount of the notional loan worked out under section 109XH as the amount of the amalgamated loan; and

(c) treat the agreement under which the actual loan was made as the agreement under which the amalgamated loan was made; and

(d) treat repayments by the target entity of the amount of the notional loan worked out under subsection (3) of this section as payments by the target entity to the private company in relation to the amalgamated loan.

(5) For the purposes of section 109N (about certain loans not being treated as dividends), treat the agreement under which the actual loan was made as the agreement under which the notional loan was made.

109XH Amount and timing of payment or loan through interposed entities

Amount of payment or loan

(1) The amount the trustee is taken under section 109XF or 109XG to have paid or lent the target entity is the amount (if any) determined by the Commissioner.

(2) In determining the amount of the payment or loan, the Commissioner must take account of:

(a) the amount the interposed entity paid or lent the target entity; and

(b) how much (if any) of that amount the Commissioner believes represented consideration payable to the target entity by:

(i) the trustee; or

(ii) any of the interposed entities;

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for anything (assuming that the consideration payable equals that for similar transactions at arm's length).

(3) The total of the amounts determined under subsection (1) for payments and loans in relation to which section 109XB applies because of the same present entitlement mentioned in paragraph 109XA(1)(c), (2)(b) or (3)(b) must not exceed the unpaid present entitlement mentioned in subsection 109XA(4).

Timing of payment or loan

(4) The trustee is taken under section 109XF or 109XG to have made the payment or loan at the time the interposed entity made the payment or loan mentioned in paragraph 109XF(1)(c) or 109XG(1)(c) to the target entity.

109XI Entitlements to trust income through interposed trusts

Entitlements through interposed trusts

(1) For the purposes of paragraphs 109XA(1)(c), (2)(b) and (3)(b), a private company is taken to be or to become entitled to an amount from the net income of a trust estate (the ***target trust***) if:

(a) the company is or becomes presently entitled to an amount from the net income of another trust estate (the ***first interposed trust***) that is interposed between the target trust and the company; and

(b) a reasonable person would conclude (having regard to all the circumstances) that the company is or becomes so entitled solely or mainly as part of an arrangement involving an entitlement to an amount from the target trust; and

(c) either:

(i) the first interposed trust is or becomes presently entitled to an amount from the net income of the target trust; or

(ii) another trust interposed between the target trust and the company is or becomes presently entitled to an amount from the net income of the target trust.

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This section operates regardless of certain factors

(2) For the purposes of this section, it does not matter:

(a) whether the company became or becomes entitled to the amount from the net income of the first interposed trust before, after or at the same time as the interposed trust became or becomes presently entitled to an amount from the net income of the target trust; or

(b) whether or not the company became presently entitled to the same amount as the amount to which the interposed trust become entitled.

This section does not operate to the extent Subdivision EA would otherwise apply

(3) Subsection (1) does not apply to the extent that an amount is included in the assessable income of a shareholder, or an associate of a shareholder, of the company under Subdivision EA (as it applies apart from this section) as a result of the present entitlement of any interposed trust.

Amount of entitlement

(4) The amount the private company is taken to be or to become entitled to from the net income of the target trust is the amount (if any) determined by the Commissioner.

(5) The total amount determined under subsection (4) for present entitlements to which that subsection applies because of the same present entitlement to an amount from the net income of the target trust mentioned in paragraph (1)(c) must not exceed that amount.

(6) In determining the amount of the entitlement, the Commissioner must take account of:

(a) the amount the private company is or becomes entitled to from the net income of the first interposed trust; and

(b) how much (if any) of that amount the Commissioner believes represented consideration payable to the private company by:

(i) the target trust; or

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(ii) any of the interposed trusts;

for anything (assuming that the consideration payable equals that for similar transactions at arm's length).

Timing of entitlement

(7) The company is taken to be or to become entitled to the amount from the net income of the target trust at the time the company is or becomes entitled to the amount from the net income of the first interposed trust mentioned in paragraph (1)(a).

Subdivision F—General rules applying to all amounts treated as dividends

109Y Proportional reduction of dividends so they do not exceed distributable surplus

Reduction of amounts of dividends

(1) If, apart from this section, the sum of all the dividends a private company is taken under this Division to pay at the end of the year of income would be more than the company's distributable surplus for that year, the amount of each of those dividends is the amount worked out under subsection (3).

Distributable surplus

(2) A private company's ***distributable surplus*** for its year of income is the amount worked out using the formula:

$$\text{Net assets} + \text{Division 7A amounts} - \text{Non-commercial loans} - \text{Paid-up share value} - \text{Repayments of non-commercial loans}$$

where:

Division 7A amounts is the total of any amounts the company is taken under section 109C or 109F to have paid as dividends in the year of income apart from this section.

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net assets means the amount (if any), at the end of the company's year of income, by which the company's assets (according to the company's accounting records) exceed the sum of:

(a) the present legal obligations of the company to persons other than the company; and

(b) the following provisions (according to the company's accounting records):

(i) provisions for depreciation;

(ii) provisions for annual leave and long service leave;

(iii) provisions for amortisation of intellectual property and trade marks;

(iv) other provisions prescribed under regulations made for the purposes of this subparagraph.

If the Commissioner considers that the company's accounting records significantly undervalue or overvalue its assets or undervalue or overvalue its provisions, the Commissioner may substitute a value that the Commissioner considers is appropriate.

non-commercial loans means the total of:

(a) any amounts that:

(i) the company is taken under former section 108, or section 109D or 109E, to have paid as dividends in earlier years of income; and

(ii) are shown as assets in the company's accounting records at the end of year of income; and

(b) any amounts that are included in the assessable income of shareholders, or associates of shareholders, of the company under section 109XB as if the amounts were dividends paid by the company in earlier years of income.

Note: The total amount worked out under paragraph (b) might be reduced under subsection (2A).

paid-up share value is the paid-up share capital of the company at the end of its year of income.

repayments of non-commercial loans means the total of:

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(a) any repayments to the company of loans or amounts that have been taken by former section 108, or section 109D or 109E, to be dividends; and

(b) amounts set off against loans that have been taken by former section 108, or section 109D or 109E, to be dividends, other than such amounts that are set off as a result of:

(i) a dividend (being a later dividend for the purposes of section 109ZC or a subsequent dividend for the purposes of former subsection 108(2)) being paid by the company to the extent of the unfranked part of the dividend; or

(ii) a loan, or a part of a loan, being forgiven.

(2A) Reduce the total of the amounts worked out under paragraph (b) of the definition of ***non-commercial loans*** in subsection (2) by the total of the unfranked parts of any dividends:

(a) that are distributed by the company; and

(b) to which section 109ZCA applies.

(3) The amount of a dividend that a private company is taken under this Division to pay is worked out using the formula:

$$\text{Provisional dividend} \times \frac{\text{Distributable surplus for year of income}}{\text{Total of provisional dividends}}$$

where:

provisional dividend is the amount of the dividend that the private company would be taken to pay apart from this section.

total of provisional dividends is the sum of all the dividends the private company is taken under this Division to pay at the end of the year of income apart from this section.

Requirement for private company to provide statement

(4) If this section sets the amount of a dividend taken under this Division to be paid by a private company to an entity at the end of a year of income, the private company must give the entity a

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written statement as soon as possible after the end of the year of income.

What the statement must contain

(5) The statement must set out:

(a) the private company's distributable surplus for the year of income; and

(b) the total amount the company would be taken under this Division to pay as dividends in the year of income apart from this section.

109Z Characteristics of dividends taken to be paid under this Division

If a private company is taken under this Division to have paid a dividend to an entity, the dividend is taken for the purposes of this Act to be paid:

(a) to the entity as a shareholder in the private company; and

(b) out of the private company's profits.

109ZA No dividend taken to be paid for withholding tax purposes

If a private company is taken under this Division to have paid a dividend to an entity, disregard the dividend for the purposes of:

(a) Division 11A of Part III (which deals with withholding tax on dividends paid to non-residents and some other people); and

(c) Subdivision 12-F in Schedule 1 to the *Taxation Administration Act 1953* (which deals with PAYG withholding).

109ZB Amount treated as dividend is not a fringe benefit

(1) This Division applies to a loan of an amount to an entity by a private company, even if the loan is made:

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(a) to the entity in its capacity as an employee (as defined in the *Fringe Benefits Tax Assessment Act 1986*) or an associate of such an employee; or

(b) in respect of the employment of an employee (as defined in that Act).

Note: This helps ensure that a loan is not a fringe benefit for the purposes of that Act.

(2) This Division applies to a private company's forgiveness of a debt owed by an entity to the private company, even if:

(a) the entity owed the debt in its capacity as an employee (as defined in the *Fringe Benefits Tax Assessment Act 1986*) or an associate of such an employee; or

(b) the forgiveness occurs in respect of the employment of an employee (as defined in that Act).

Note: This helps ensure that the forgiveness of a debt is not a fringe benefit for the purposes of that Act.

(3) However, this Division does not apply to a payment made to a shareholder, or an associate of a shareholder, in their capacity as an employee (as defined in the *Fringe Benefits Tax Assessment Act 1986*) or an associate of such an employee.

109ZC Treatment of dividend that is reduced on account of an amount taken under this Division to be a dividend

(1) This section sets out special rules for dealing with a dividend (the ***later dividend***) distributed by a private company if some or all of the later dividend is set off against some or all of an amount taken under this Division to be a dividend previously paid by the company.

Example: Some or all of a dividend distributed by a private company to a shareholder might be set off to reduce a loan the company had previously made to the shareholder that was treated as a dividend under Subdivision B.

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(1A) This section also sets out special rules for dealing with a dividend (also the ***later dividend***) distributed by a private company if:

(a) the private company distributes the later dividend to a shareholder in the company; and

(b) the shareholder applies the amount of the dividend to repay all or part of a loan:

(i) that was obtained from the private company by an associate of the shareholder; and

(ii) in relation to which a dividend was previously taken under this Division to have been paid by the private company.

(2) The amount of the later dividend set off or applied is taken not to be a dividend for the purposes of this Act, except Part 3-6 of the *Income Tax Assessment Act 1997* (which deals with franking of distributions). However, if the amount set off or applied exceeds the amount of the later dividend that is not either the franked part of that dividend, or the part of that dividend that has been franked with an exempting credit, the excess is still a dividend.

Note: This prevents double taxation by ensuring that the entity's assessable income does not include the amount of the later dividend that is not paid to the entity (except to the extent that that amount is franked).

(3) An amount that is taken not to be a dividend under subsection (2) is not assessable income and is not exempt income.

109ZCA Treatment of dividend that is reduced on account of an amount included in assessable income under Subdivision EA

(1) This section sets out special rules for dealing with a dividend (the ***later dividend***) distributed by a private company if:

(a) an amount is included in the assessable income of a shareholder, or an associate of a shareholder, of the company under section 109XB because of a loan made to the shareholder or associate by a trustee in relation to a present entitlement of the company to an amount from the net income of the trust estate; and

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(b) subsection 109XA(2) applied to the loan; and
(c) some or all of the later dividend is applied to repay all or a part of the loan.

(2) The amount of the later dividend applied is taken not to be a dividend for the purposes of this Act, except Part 3-6 of the *Income Tax Assessment Act 1997* (which deals with franking of distributions).

(3) However, if the amount set off or applied exceeds the amount of the later dividend that is neither:
(a) the franked part of that dividend; nor
(b) the part of that dividend that has been franked with an exempting credit;
the excess is still a dividend.

Note: This prevents double taxation by ensuring that the entity's assessable income does not include the amount of the later dividend that is not paid to the entity (except to the extent that that amount is franked).

(4) An amount that is taken not to be a dividend under subsection (2) is not assessable income and is not exempt income.

Subdivision G—Defined terms

109ZD Defined terms

In this Division:

amalgamated loan has the meaning given by subsection 109E(3).

arrangement has the meaning given by section 995-1 of the *Income Tax Assessment Act 1997*.

associate has the meaning given by section 318.

benchmark franking percentage has the same meaning as in the *Income Tax Assessment Act 1997*.

benchmark interest rate for a year of income has the meaning given by subsection 109N(2).

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deficit has the same meaning as in the *Income Tax Assessment Act 1997*.

distributable surplus of a company for a year of income has the meaning given by subsection 109Y(2).

entity has the meaning given by section 960-100 of the *Income Tax Assessment Act 1997*.

family law obligation means an order, agreement or award mentioned in paragraph 126-5(1)(a), (b), (d), (e) or (f) of the *Income Tax Assessment Act 1997*.

forgive a debt has the meaning given by section 109F.

franking account has the same meaning as in the *Income Tax Assessment Act 1997*.

franking percentage has the same meaning as in the *Income Tax Assessment Act 1997*.

franking period has the same meaning as in the *Income Tax Assessment Act 1997*.

guarantee, in relation to a loan, includes providing security for the loan.

loan has the meaning given by subsection 109D(3).

lodgment day for a private company's year of income has the meaning given by subsection 109D(6).

payment has the meaning given by subsection 109C(3) and section 109CA.

unfrankable has the same meaning as in the *Income Tax Assessment Act 1997*.

109ZE Interpretation rules about entities

The rules in section 960-100 of the *Income Tax Assessment Act 1997* about entities apply to this Division.

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Division 9—Co-operative and mutual companies

117 Co-operative companies

(1) In this Division, ***co-operative company*** means a company, not being a friendly society dispensary, the rules of which limit the number of shares which may be held by, or by and on behalf of, any one shareholder, and prohibit the quotation of the shares for sale or purchase at any stock exchange or in any other public manner whatever, and includes a company, not being a friendly society dispensary, which has no share capital, and which in either case is established for the purpose of carrying on any business having as its primary object or objects one or more of the following:

(a) the acquisition of commodities or animals for disposal or distribution among its shareholders;

(b) the acquisition of commodities or animals from its shareholders for disposal or distribution;

(c) the storage, marketing, packing or processing of commodities of its shareholders;

(d) the rendering of services to its shareholders;

(e) the obtaining of funds from its shareholders for the purpose of making loans to its shareholders to enable them to acquire land or buildings to be used for the purpose of residence or of residence and business.

(2) A company is not a co-operative company within the meaning of this Division in relation to a year of income if the company is, for the purposes of section 23G, an approved credit union in relation to that year of income.

(3) Subsection (2) does not apply to a credit union in relation to a year of income if:

(a) the credit union is a recognised medium credit union in relation to the year of income; or

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(b) the credit union is a recognised large credit union in relation to the year of income.

118 Company not co-operative if less than 90% of business with members

If, in the ordinary course of business of a company in the year of income, the value of commodities and animals disposed of to, or acquired from, its shareholders by the company, or the amount of its receipts from the storage, marketing, packing and processing of commodities of its shareholders, or from the rendering of services to them, or the amount lent by it to them, is less respectively than 90% of the total value of commodities and animals disposed of or acquired by the company, or of its receipts from the storage, marketing, packing and processing of commodities, or from the rendering of services, or of the total amount lent by it, that company shall in respect of that year be deemed not to be a co-operative company.

119 Sums received to be taxed

(1) The assessable income of a co-operative company shall include all sums received by it, whether from shareholders or from other persons, for the storage, marketing, packing or processing of commodities, or for the rendering of services, or in payment for commodities or animals or land sold, whether on account of the company or on account of its shareholders.

(2) For the purposes of subsection (1), if a credit union (within the meaning of section 23G) receives a payment of, or in the nature of, interest, the payment is taken to be for the rendering of services.

(3) Subsection (2) does not limit the generality of subsection (1).

120 Deductions allowable to co-operative company

(1) So much of the assessable income of a co-operative company as:

(a) is distributed among its shareholders as rebates or bonuses based on business done by shareholders with the company;

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(b) is distributed among its shareholders as interest or dividends on shares; or

(c) in the case of a company having as its primary object that specified in paragraph 117(1)(b)—is applied by the company for or towards the repayment of any moneys loaned to the company by a government of the Commonwealth or a State to enable the company to acquire assets which are required for the purpose of carrying on the business of the company or to pay that government for assets so required which the company has taken over from that government;

shall be an allowable deduction:

Provided that the deduction under paragraph (c) shall not be allowed unless shares representing not less than 90% of the value of the company are held by persons who supply the company with the commodities or animals which the company requires for the purposes of its business.

(2) No such rebate or bonus based on purchases made by a shareholder from the company shall be included in his or her assessable income except where the amount of such purchases is allowable as a deduction in ascertaining his or her taxable income of any year.

(3) It is hereby declared to be the intention of the Parliament that paragraph (1)(c) applies to loans taken out for the purpose of acquiring assets from:

(a) government sources; or

(b) non-government sources.

(4) No deduction is allowable under subsection (1) to the extent that the assessable income of a co-operative company is distributed as the franked part of a franked distribution.

(5) For the purposes of this section, in determining whether the assessable income of a co-operative company is distributed as the franked part of a franked distribution, if:

(a) an amount is distributed by the co-operative company as a franked distribution; and

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(b) the franking percentage (within the meaning of the *Income Tax Assessment Act 1997*) for the distribution is less than 100%; and

(c) a part of the distribution is attributable to sources other than the assessable income of the co-operative company;

it is to be assumed that the franked part of the distribution is attributable, to the greatest extent possible, to those other sources.

(6) If a co-operative company distributes assessable income among its shareholders within the period of 3 months (or such longer period as the Commissioner decides) starting at the end of a year of income, the co-operative company may elect that the distribution is to be taken, for the purposes of this section only, to have been made on the last day of the year of income.

(7) In this section:

franked distribution has the same meaning as in the *Income Tax Assessment Act 1997*.

121 Mutual insurance associations

(1) An association of persons formed for the purpose of insuring those persons against loss, damage or risk of any kind is taken, for the purposes of this Act, to be a company carrying on the business of insurance.

(2) The assessable income of such a company includes all premiums derived by it, whether from its members or not.

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Division 9AA—Demutualisation of insurance companies and affiliates

Subdivision A—What this Division is about

121AA What this Division is about

Basically, if an insurance company demutualises and its policyholders or members dispose of their listed shares in the company, for tax purposes the acquisition cost of the shares is based on the lesser of:

(a) the embedded value or net tangible asset value of the company; and

(b) the value of the company based on the total first trading day price of all shares in the company.

Other tax consequences result from disposals of other interests and from other events in connection with the demutualisation.

Subdivision B—Key concepts and related definitions

121AB Insurance company definitions

(1) A ***mutual insurance company*** is an insurance company:

(a) whose profits are divisible only among its policyholders; or

(b) that satisfies all of the following conditions:

(i) it is limited by guarantee;

(ii) it did not divide its profits among its members during the 10 years ending on 9 May 1995;

(iii) on a winding-up, its profits are not divisible among its members; or

(c) that satisfies all of the following conditions:

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(i) at 7.30 pm, by legal time in the Australian Capital Territory, on 9 May 1995, it was a friendly society (within the meaning of this Act as in force at that time);

(ii) it was an insurance company on 1 July 1999;

(iii) it does not have capital divided into shares held by its members; or

(d) if the insurance company is a mutual entity (within the meaning of the *Corporations Act 2001*)—that would be covered by paragraph (a), (b) or (c) if the following were disregarded:

(i) any MCIs (within the meaning of that Act) issued by the entity;

(ii) any dividends or profits paid or payable in respect of such MCIs;

(iii) any members of the entity who are members by virtue of holding such MCIs.

(2) An ***insurance company*** is a life insurance company or a general insurance company.

(3) A ***life insurance company*** is a company registered under section 21 of the *Life Insurance Act 1995*.

(4) A ***general insurance company*** is a company whose sole or principal business is insurance business within the meaning of subsection 3(1) of the *Insurance Act 1973*, but does not include a life insurance company.

121AC Mutual affiliate company

(1) A ***mutual affiliate company*** is a company that satisfies the following conditions:

(a) it is limited by guarantee;

(b) it is not an insurance company;

(c) at least 75% of the policyholders of a mutual insurance company are members of it;

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(d) it did not divide its profits among its members during the 10 years ending on 9 May 1995;
(e) on a winding-up, its profits are not divisible among its members in their capacity as such.

(2) If the company is a mutual entity (within the meaning of the *Corporations Act 2001*) then, for the purposes of subsection (1), disregard the following:
(a) any MCIs (within the meaning of that Act) issued by the company;
(b) any dividends or profits paid or payable in respect of such MCIs;
(c) any members of the company who are members by virtue of holding such MCIs.

121AD Demutualisation and demutualisation resolution day

(1) A mutual insurance company ***demutualises*** if it ceases to be a mutual insurance company:
(a) in any case—other than by ceasing to be an insurance company; or
(b) if it is a life insurance company—because the whole of its life insurance business is transferred to another company under a scheme confirmed by the Federal Court of Australia.

(2) A mutual affiliate company ***demutualises*** if it ceases to be a mutual affiliate company other than by ceasing to be a company.

(3) The ***demutualisation resolution day***, in relation to the demutualisation of a company, is:
(a) if paragraph (b) does not apply—the day on which the resolution to proceed with the demutualisation is passed; or
(b) if paragraph (1)(b) applies to the demutualisation—the day on which the transfer of the whole of the company's life insurance business takes place.

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121AE Demutualisation methods, the policyholder/member group and the listing period

Demutualisation methods 1 to 6

(1) There are 6 methods by which the demutualisation of a mutual insurance company, where a mutual affiliate company is not also demutualised, may be implemented that are relevant for the purposes of this Division. They are described in sections 121AF to 121AK as demutualisation methods 1 to 6.

Demutualisation method 7

(2) There is one method by which the demutualisation of both a mutual insurance company and a mutual affiliate company may be implemented that is relevant for the purposes of this Division. It is described in section 121AL as demutualisation method 7.

Demutualisation methods

(3) Each of the methods described in sections 121AF to 121AL is a ***demutualisation method***.

Policyholder/member group

(4) The ***policyholder/member group***, in relation to the demutualisation of a mutual insurance company under any of demutualisation methods 1 to 6, consists of the following persons:

(a) in the case of a mutual insurance company covered by paragraph 121AB(1)(a)—policyholders (other than trustees covered by paragraph (d) or (e)) in the company immediately before the demutualisation;

(b) in the case of any other mutual insurance company—members (other than trustees covered by paragraph (d) or (e)) of the company immediately before the demutualisation;

(c) in any case—any of the following who, in connection with the demutualisation, are entitled to the same rights to shares or the proceeds of the sale of shares as the policyholders (in a paragraph (a) case) or the members (in a paragraph (b) case):

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(i) employees of the company or a wholly-owned subsidiary of the company;
(ii) persons who ceased to be such policyholders or members before the demutualisation;
(iii) charities;
(iv) persons who are entitled to the rights because of the death of the policyholders or members;

(d) in any case—each person who satisfies the following requirements:
(i) the person is a member of a regulated superannuation fund (as defined by section 19 of the *Superannuation Industry (Supervision) Act 1993*), other than a standard employer-sponsored member (as defined by subsection 16(5) of that Act);
(ii) the trustee of the fund holds a policy or policies in the mutual insurance company;
(iii) the trustee of the fund is a company that is a wholly-owned subsidiary of the mutual insurance company;
(iv) the person's benefits in the fund consist solely of the proceeds of the policy or policies;
(v) in connection with the demutualisation, the person, rather than the trustee, has the right to shares or the proceeds of the sale of shares in respect of the policy or policies held by the trustee;

(e) in any case—each person who satisfies the following requirements:
(i) the person is the member of a single-member superannuation fund;
(ii) the trustee of the fund holds a policy or policies in the mutual insurance company;
(iii) in connection with the demutualisation, the person, rather than the trustee, has the right to shares or the proceeds of the sale of shares in respect of the policy or policies held by the trustee.

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(5) The ***policyholder/member group***, in relation to the demutualisation of a mutual insurance company and a mutual affiliate company under demutualisation method 7, consists of the following persons:

(a) if the mutual insurance company is covered by paragraph 121AB(1)(a)—policyholders (other than trustees covered by paragraph (e) or (f)) in the mutual insurance company immediately before the demutualisation;

(b) in the case of any other mutual insurance company—members (other than trustees covered by paragraph (e) or (f)) of the company immediately before the demutualisation;

(c) members (other than trustees covered by paragraph (e) or (f)) of the mutual affiliate company immediately before the demutualisation;

(d) any of the following who, in connection with the demutualisation, are entitled to the same rights to shares or the proceeds of the sale of shares as the members:

(i) employees of the mutual insurance company, the mutual affiliate company or a wholly-owned subsidiary of either company;

(ii) persons who ceased to be such members before the demutualisation;

(iii) charities;

(iv) persons who are entitled to the rights because of the death of members;

(e) in any case—each person who satisfies the following requirements:

(i) the person is a member of a regulated superannuation fund (as defined by section 19 of the *Superannuation Industry (Supervision) Act 1993*), other than a standard employer-sponsored member (as defined by subsection 16(5) of that Act);

(ii) the trustee of the fund holds a policy or policies in the mutual insurance company;

(iii) the trustee of the fund is a company that is a wholly-owned subsidiary of the mutual insurance company;

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(iv) the person's benefits in the fund consist of the proceeds of the policy or policies;

(v) in connection with the demutualisation, the person, rather than the trustee, has the right to shares or the proceeds of the sale of shares in respect of the policy or policies held by the trustee;

(f) in any case—each person who satisfies the following requirements:

(i) the person is the member of a single-member superannuation fund;

(ii) the trustee of the fund holds a policy or policies in the mutual insurance company;

(iii) in connection with the demutualisation, the person, rather than the trustee, has the right to shares or the proceeds of the sale of shares in respect of the policy or policies held by the trustee.

(6) The ***listing period*** is the period ending 2 years after the demutualisation resolution day, or at such later time as the Commissioner, before the end of the 2 years, allows.

121AEA Replacement of policyholders by persons exercising certain rights

If, as a result of the exercise of any power under the articles of association of an insurance company, persons are entitled to exercise rights in place of policyholders, then, to the extent that the Commissioner considers it appropriate, the persons are treated for the purposes of this Division as replacing the policyholders.

121AF Demutualisation method 1

(1) Under ***demutualisation method 1***, in connection with the implementation of the demutualisation:

(a) all membership rights in the mutual insurance company are extinguished; and

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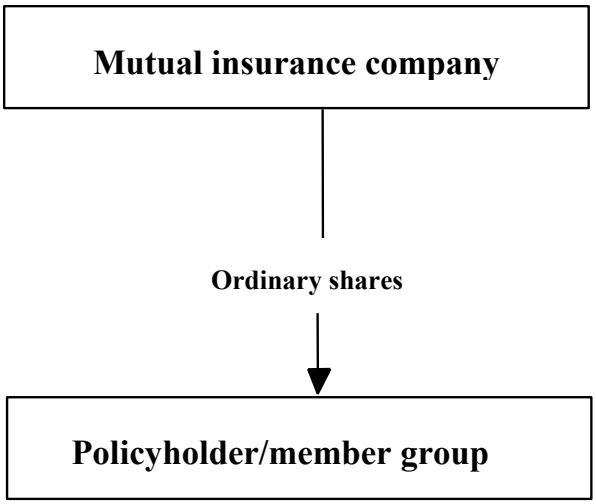
(b) shares (the ***ordinary shares***) of only one class in the mutual insurance company are issued to each person in the policyholder/member group; and

(c) the ordinary shares are listed within the listing period.

Note: Other things may also happen in connection with the implementation of the demutualisation.

(2) The following diagram shows, where this demutualisation method is used, the issue of the shares to the policyholder/member group.

Demutualisation method 1



121AG Demutualisation method 2

(1) Under ***demutualisation method 2***, in connection with the implementation of the demutualisation:

(a) all membership rights in the mutual insurance company are extinguished; and

(b) not more than 10 shares (the ***special shares***) in the mutual insurance company are issued to a trustee to hold for the benefit of the policyholder/member group, where:

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(i) the issue takes place before the issue of the ordinary shares mentioned in paragraph (c); and

(ii) on the issue of all the ordinary shares, the rights attaching to the special shares become the same as those attaching to the ordinary shares; and

(c) a greater number of shares (the ***ordinary shares***) of only one class in the mutual insurance company are either:

(i) issued, at the election of each person in the policyholder/member group, to the person or to a trustee to sell on behalf of the person; or

(ii) issued to a trustee, at the election of each person in the policyholder/member group, to distribute to the person or to sell on behalf of the person; and

(d) the trustee sells the ordinary shares and distributes the proceeds to the person, or distributes the ordinary shares to the person; and

(e) the ordinary shares are listed within the listing period.

Note: Other things may also happen in connection with the implementation of the demutualisation.

(2) The following diagram shows the main events, where this demutualisation method is used involving an election covered by subparagraph (1)(c)(ii).

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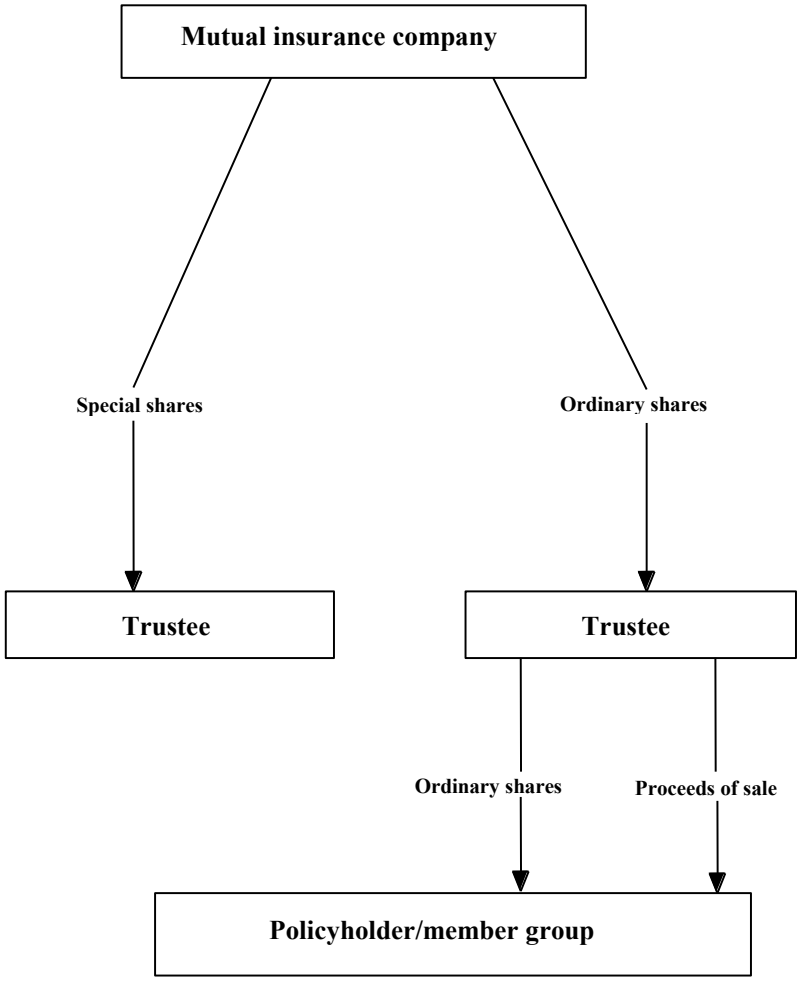
Demutualisation method 2



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121AH Demutualisation method 3

(1) Under ***demutualisation method 3***, in connection with the implementation of the demutualisation:

(a) all membership rights in the mutual insurance company are extinguished; and

(b) shares in the mutual insurance company are issued to another company (the ***holding company***); and

(c) shares (the *ordinary shares*) of only one class in:

(i) the holding company; or

(ii) another company (the ***ultimate holding company***) of which the holding company is a wholly-owned subsidiary, either directly or through one or more other wholly-owned subsidiaries (each of which is an ***interposed holding company***);

are issued to each person in the policyholder/member group; and

(d) the ordinary shares are listed within the listing period.

Note: Other things may also happen in connection with the implementation of the demutualisation.

(2) The following diagram shows the main events, where this demutualisation method is used.

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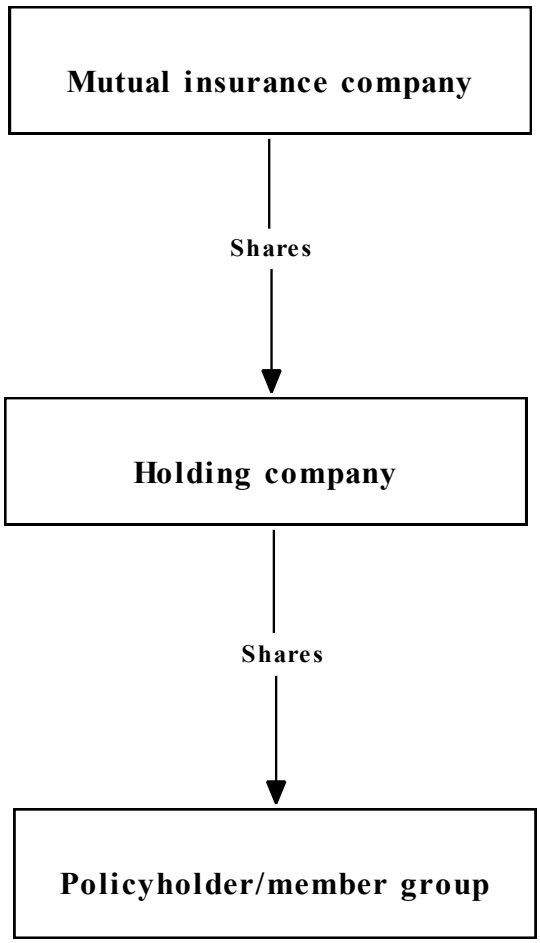
Demutualisation method 3



121AI Demutualisation method 4

(1) Under ***demutualisation method 4***, in connection with the implementation of the demutualisation:

(a) all membership rights in the mutual insurance company are extinguished; and

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(b) shares in the mutual insurance company are issued to another company (the ***holding company***); and

(c) not more than 10 shares (the ***special shares***) in:

(i) the holding company; or

(ii) another company (the ***ultimate holding company***) of which the holding company is a wholly-owned subsidiary, either directly or through one or more other wholly-owned subsidiaries (each of which is an ***interposed holding company***);

are issued to a trustee to hold for the benefit of the policyholder/member group; and

(d) the issue of the special shares takes place before the issue of the ordinary shares mentioned in paragraph (e), and on the issue of all the ordinary shares, the rights attaching to the special shares become the same as those attaching to the ordinary shares; and

(e) a greater number of shares (the ***ordinary shares***) of only one class in the holding company or ultimate holding company are either:

(i) issued, at the election of each person in the policyholder/member group, to the person or to a trustee to sell on behalf of the person; or

(ii) issued to a trustee, at the election of each person in the policyholder/member group, to distribute to the person or to sell on behalf of the person; and

(f) the trustee sells the ordinary shares and distributes the proceeds of sale to the person, or distributes the ordinary shares to the person; and

(g) the ordinary shares are listed within the listing period.

Note: Other things may also happen in connection with the implementation of the demutualisation.

(2) The following diagram shows the main events, where this demutualisation method is used involving 2 trustees and an election covered by subparagraph (1)(e)(ii).

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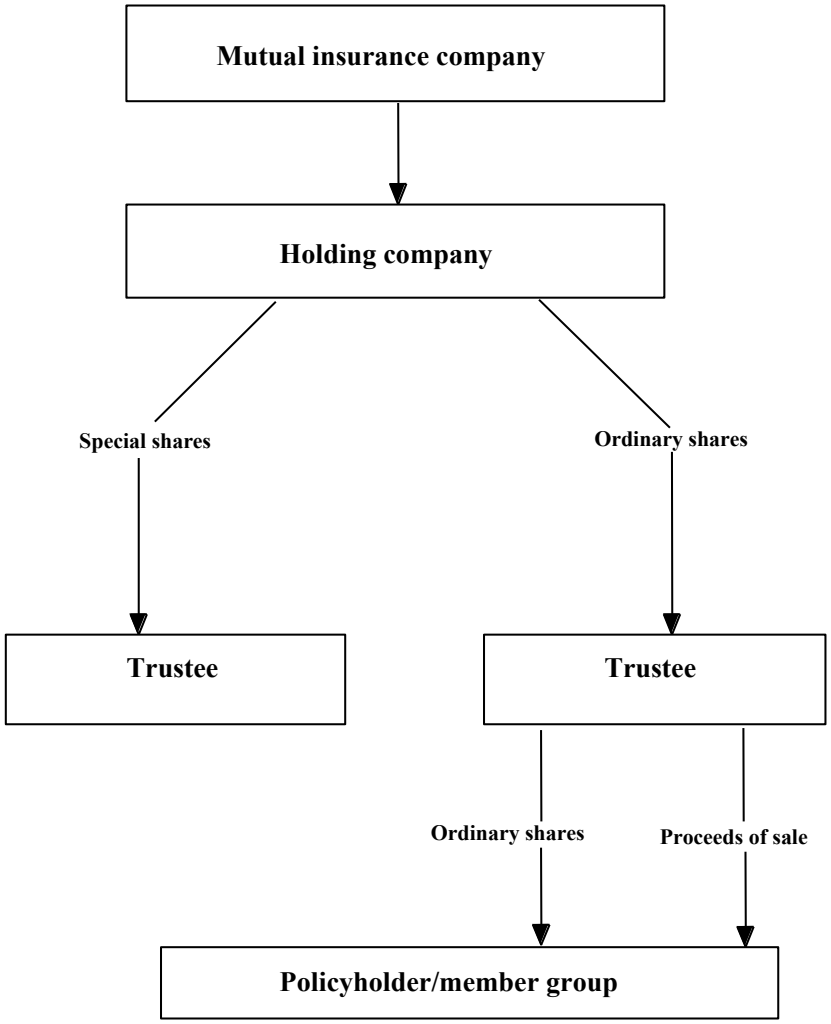
Demutualisation method 4



121AJ Demutualisation method 5

(1) Under *demutualisation method 5*, in connection with the implementation of the demutualisation:

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(a) all membership rights in the mutual insurance company are extinguished; and

(b) shares in the mutual insurance company are issued to another company (the ***holding company***); and

(c) shares (the ***ordinary shares***) of only one class in:

(i) the holding company; or

(ii) another company (the ***ultimate holding company***) of which the holding company is a wholly-owned subsidiary, either directly or through one or more other wholly-owned subsidiaries (each of which is an ***interposed holding company***);

are either:

(iii) issued, at the election of each person in the policyholder/ member group, to the person or to a trustee to sell on behalf of the person; or

(iv) issued to a trustee, at the election of each person in the policyholder/member group, to distribute to the person or to sell on behalf of the person; and

(d) the trustee sells the ordinary shares and distributes the proceeds of sale to the person, or distributes the ordinary shares to the person; and

(e) the ordinary shares are listed within the listing period.

Note: Other things may also happen in connection with the implementation of the demutualisation.

(2) The following diagram shows the main events, where this demutualisation method is used involving an election covered by subparagraph (1)(c)(iv).

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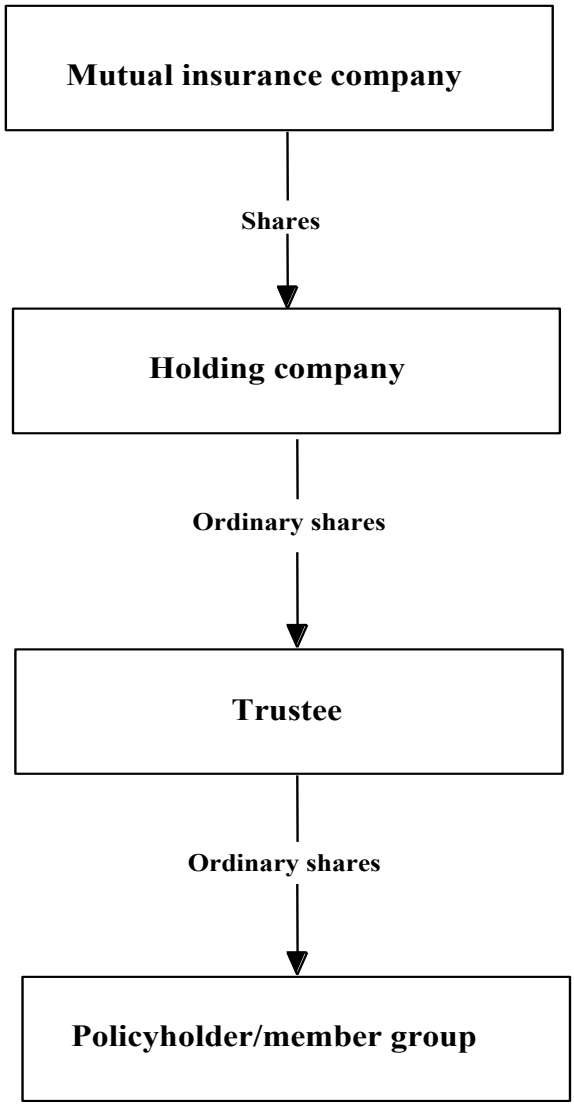
Demutualisation method 5



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121AK Demutualisation method 6

(1) Under ***demutualisation method 6***, in connection with the implementation of the demutualisation of a life insurance company:

(a) all membership rights in the company are extinguished; and

(b) the whole of the life insurance business of the company is, under a scheme confirmed by the Federal Court of Australia, transferred to another company formed for the purpose; and

(c) shares (the ***ordinary shares***) of only one class in the other company are:

(i) issued, at the election of each person in the policyholder/member group, to the person or to a trustee to sell on behalf of the person; or

(ii) issued to a trustee, at the election of each person in the policyholder/member group, to distribute to the person or to sell on behalf of the person; and

(d) the trustee sells the ordinary shares and distributes the proceeds of sale to the person or distributes the ordinary shares to the person; and

(e) the ordinary shares are listed within the listing period.

Note: Other things may also happen in connection with the implementation of the demutualisation.

(2) The following diagram shows the main events, where this demutualisation method is used.

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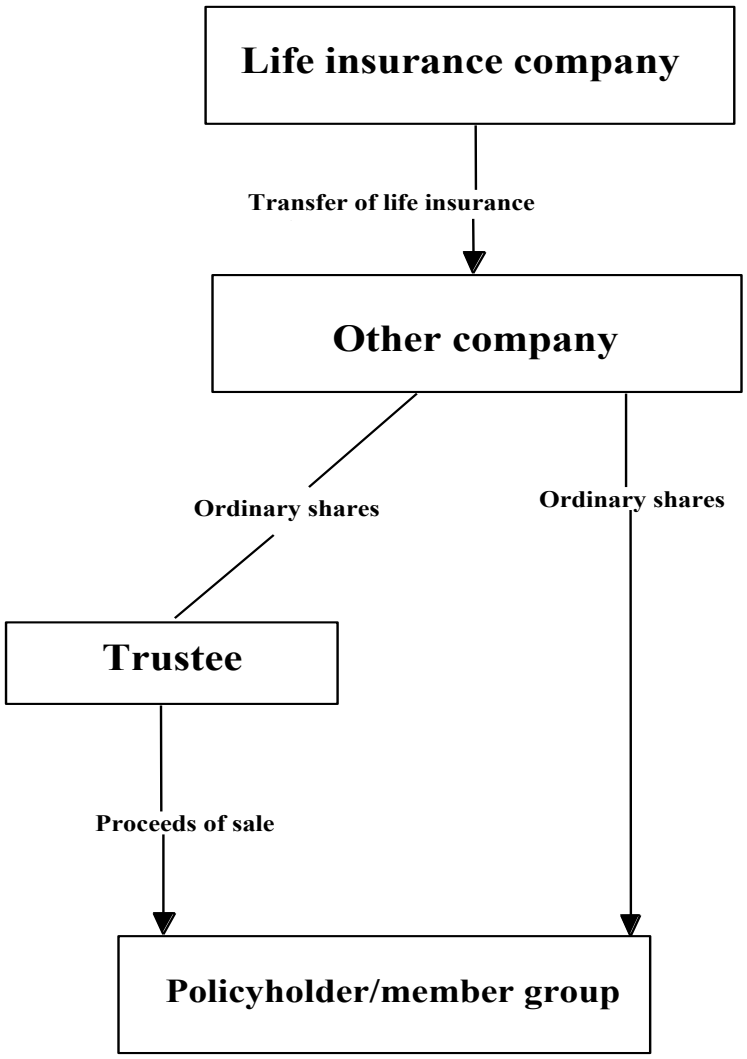
Demutualisation method 6



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121AL Demutualisation method 7

(1) Under ***demutualisation method 7***, in connection with the implementation of the demutualisation of both a mutual insurance company and a mutual affiliate company:

(a) all membership rights in both companies are extinguished; and

(b) shares in the mutual insurance company and the mutual affiliate company are issued to another company (the ***holding company***); and

(c) shares (the ***ordinary shares***) of only one class in:

(i) the holding company; or

(ii) another company (the ***ultimate holding company***) of which the holding company is a wholly-owned subsidiary, either directly or through one or more other wholly-owned subsidiaries (each of which is an ***interposed holding company***);

are either:

(iii) issued, at the election of each person in the policyholder/member group to the person or to a trustee to sell on behalf of the person; or

(iv) issued to a trustee, at the election of each person in the policyholder/member group, to distribute to the person or to sell on behalf of the person; and

(d) the trustee sells the ordinary shares and distributes the proceeds of the sale to the person, or distributes the ordinary shares to the person; and

(e) the ordinary shares are listed within the listing period.

Note: Other things may also happen in connection with the implementation of the demutualisation.

(2) The following diagram shows the main events, where this demutualisation method is used involving an election covered by subparagraph (1)(c)(iv).

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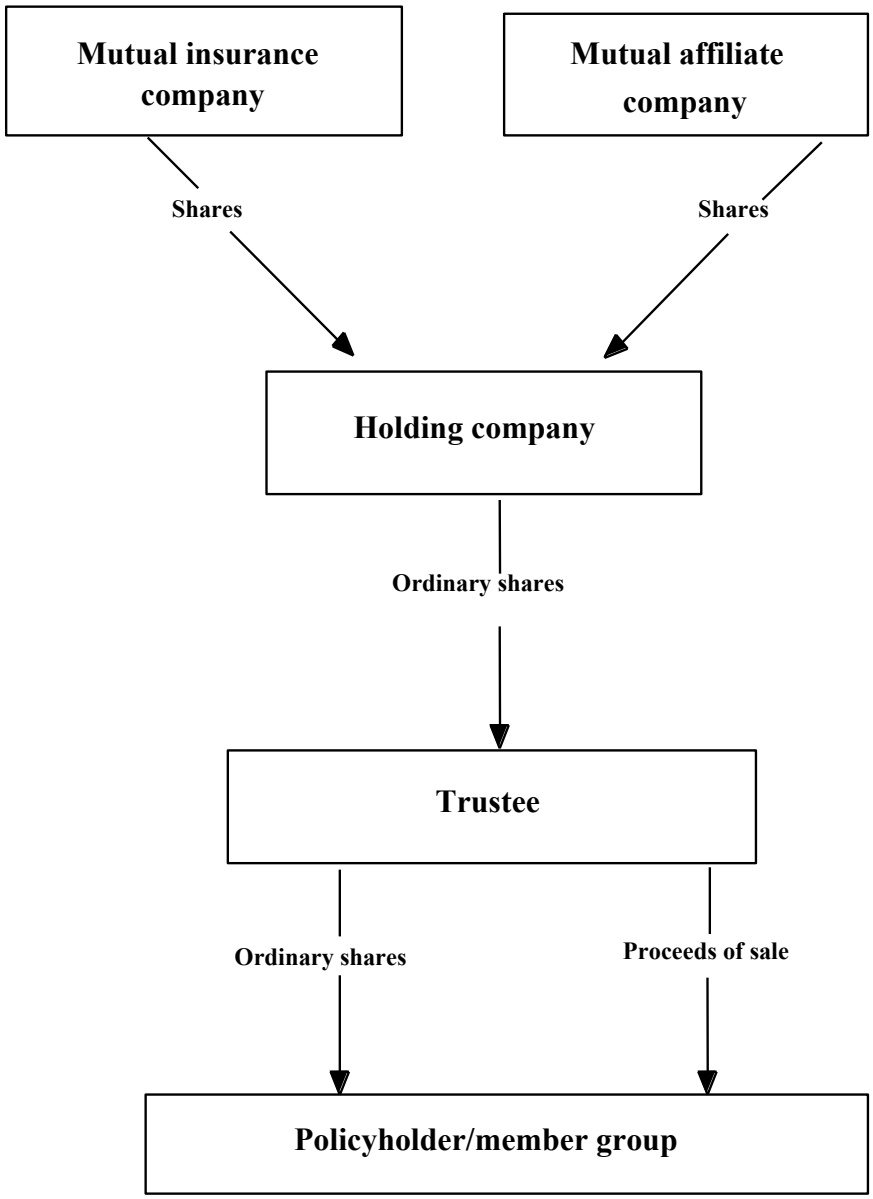
Demutualisation method 7



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121AM Embedded value of a mutual life insurance company

(1) The ***embedded value*** of a mutual life insurance company that demutualises using a demutualisation method is, in accordance with this section, the sum of its existing business value and its adjusted net worth on the applicable accounting day (see subsection (3)).

Eligible actuary and Australian actuarial practice

(2) The sum is to be worked out by an eligible actuary (see subsection 121AO(3)) according to Australian actuarial practice.

Applicable accounting day

(3) The ***applicable accounting day*** is:
  (a) if an accounting period of the company ends on the demutualisation resolution day—that day; or
  (b) in any other case—the last day of the most recent accounting period of the company ending before the demutualisation resolution day.

Adjustment for changes after applicable accounting day

(4) In a case covered by paragraph (3)(b), if any significant change in the amount of the existing business value or adjusted net worth occurs between the applicable accounting day and the demutualisation resolution day, the amount is to be adjusted to take account of the change.

Continued business assumption

(5) In working out the existing business value or the adjusted net worth, it is to be assumed:
  (a) that after the applicable accounting day the company will continue to conduct its life insurance business and any other activity in the same way as it did before that day, and that it will not conduct any different business or other activity; and
  (b) that the demutualisation will not occur.

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Discount rate assumption

(6) In working out the existing business value or adjusted net worth, the annual discount rate to be used in respect of each future accounting period is worked out using the formula:

$$\text{10 year Treasury bond rate} + 4.5\% + \text{Capital reserve adequacy shortfall percentage}$$

where:

10 year Treasury bond rate means the Treasury bond rate (see subsection 121AO(1)) for the applicable accounting day in respect of bonds with a 10 year term.

Capital reserve adequacy shortfall percentage means:

(a) if, for any future accounting period, the capital reserves of the company are projected to fall below the capital reserve adequacy level (see subsection 121AO(2)) by 1% or more at both the beginning and end of the accounting period—the percentage worked out by averaging the percentages worked out under each of the following subparagraphs:

(i) 0.2% for each 1% by which the capital reserves are projected to fall below the level at the beginning of the period;

(ii) 0.2% for each 1% by which the capital reserves are projected to fall below the level at the end of the period; or

(b) in any other case—nil.

Annual inflation rate assumption

(7) In working out the existing business value, the annual inflation rate to be applied is worked out using the formula:

$$\text{10 year Treasury bond rate (see subsection (6))} - 4\%$$

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Expenditure assumption

(8) In working out the existing business value, it is to be assumed that expenditure that the company will incur, in conducting its life insurance business, on recurring items after the demutualisation resolution day will be of the same kinds and amounts (increased to take account of any inflation, using the annual inflation rate in subsection (7)) as the company incurred in the accounting period, or part of an accounting period, ending on the demutualisation resolution day.

Investment return assumption

(9) In working out the existing business value or the adjusted net worth, it is to be assumed that the annual rate of return on each investment of the company is:

(a) if the investment is a security with a term less than 2 years or is cash—the Treasury bond rate (see subsection 121AO(1)) for the applicable accounting day in respect of bonds with a 26 week term; or

(b) if the investment is any other kind of security—the Treasury bond rate for the applicable accounting day in respect of bonds with a 10 year term; or

(c) in any other case—the rate mentioned in paragraph (b), plus 3%.

Future distributable profits assumption

(10) In working out the existing business value or the adjusted net worth, the future distributable profits are to be determined on the assumption that the company:

(a) will not distribute its profits so as to cause its capital reserves to fall below the capital reserve adequacy level (see subsection 121AO(2)) applicable to the company; and

(b) will distribute all of its profits except to the extent necessary for its capital reserves not to fall below the capital reserve adequacy level.

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121AN Net tangible asset value of a general insurance company or mutual affiliate company

(1) The ***net tangible asset value*** of a general insurance company, or a mutual affiliate company, that demutualises using a demutualisation method is, in accordance with this section:

(a) the amount of its assets on the applicable accounting day (see subsection (4));

reduced by:

(b) the amount of its liabilities (including future liabilities) arising from its business conducted before that day.

Australian accounting practice

(2) The amount of the company's assets and liabilities (other than future liabilities) is to be worked out according to Australian accounting practice.

Eligible actuary and Australian actuarial practice

(3) The amount of the company's future liabilities is to be worked out by an eligible actuary (see subsection 121AO(3)) according to Australian actuarial practice.

Applicable accounting day

(4) The ***applicable accounting day*** is:

(a) if an accounting period of the company ends on the demutualisation resolution day—that day; or

(b) in any other case—the last day of the most recent accounting period of the company ending before the demutualisation resolution day.

Adjustment for changes after applicable accounting day

(5) In a case covered by paragraph (4)(b), if any significant change in the amount of the company's assets or liabilities occurs between the applicable accounting day and the demutualisation resolution day, that amount is to be adjusted to take account of the change.

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Continued business assumption

(6) In working out the net tangible asset value, it is to be assumed:
  (a) that after the applicable accounting day the company will continue to conduct its business and any other activity in the same way as it did before that day, and that it will not conduct any different business or other activity; and
  (b) that the demutualisation will not occur.

121AO Treasury bond rate, capital reserve adequacy level, eligible actuary and security

Treasury bond rate

(1) The ***Treasury bond rate*** for the applicable accounting day in respect of bonds with a particular term is:
  (a) if any Treasury bonds with that term were issued on the applicable accounting day—the annual yield on those bonds; or
  (b) in any other case—the annual yield on Treasury bonds with that term, as published by the Reserve Bank of Australia and applicable to the accounting day.

Capital reserve adequacy level

(2) The ***capital reserve adequacy level*** for a life insurance company that demutualises is:
  (a) if, after 1 July 1995 and before the applicable accounting day mentioned in subsection 121AM(3) or 121AN(4), a prudential standard made under section 230B of the *Life Insurance Act 1995* in relation to capital adequacy applied to the company—the level of capital reserves required by that standard; or
  (b) in any other case—the level of capital reserves required to provide adequate capital for the conduct of the life insurance business and other activities of the company.

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Eligible actuary

(3) An ***eligible actuary*** is a Fellow or Accredited Member of the Institute of Actuaries of Australia who is not an employee of:
  (a) the mutual insurance company or, where demutualisation method 7 applies, the mutual insurance company or the mutual affiliate company; or
  (b) a subsidiary of that company or, where demutualisation method 7 applies, of either company.

Security

(4) A ***security*** is:
  (a) a bond, debenture, certificate of entitlement, bill of exchange or promissory note; or
  (b) a deposit with a bank or other financial institution; or
  (c) a secured or unsecured loan.

121AP Subsidiary and wholly-owned subsidiary

Subsidiary

(1) A company (the ***test company***) is a ***subsidiary*** of another company (the ***holding company***) if at least half of the shares in the test company are beneficially owned by:
  (a) the holding company; or
  (b) a company that is, or 2 or more companies each of which is, a subsidiary of the holding company; or
  (c) the holding company and a company that is, or 2 or more companies each of which is, a subsidiary of the holding company.

(2) If a company is a subsidiary of another company (including because of this subsection), every company that is a subsidiary of the first-mentioned company is a subsidiary of the other company.

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Wholly-owned subsidiary

(3) A company is a ***wholly-owned subsidiary*** of another company if it would, under subsection (1) or (2), be a subsidiary of the other company assuming that the reference in subsection (1) to at least half of the shares were instead a reference to all of the shares.

121AQ Other definitions

In this Division:

annuity has the same meaning as in section 10 of the *Superannuation Industry (Supervision) Act 1993*.

first trading day price, in relation to a listed share, means the price on the stock market operated by ASX Limited, as published by that company, at which the share was last traded on the trading day on which it was listed.

general insurance business means insurance business (within the meaning of the *Insurance Act 1973*) other than life insurance business.

life insurance business has the same meaning as in the *Life Insurance Act 1995*.

listed means listed for quotation in the official list of ASX Limited.

superannuation interest has the same meaning as in the *Income Tax Assessment Act 1997*.

121AR List of definitions

The following table lists the expressions defined in this Division and shows the provisions in which they are defined:

Definition	Provision
annuity	121AQ
applicable accounting day	121AM(3) and 121AN(4)

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Definition	Provision
capital reserve adequacy level	121AO(2)
eligible actuary	121AO(3)
embedded value	121AM(1)
demutualise	121AD(1) and (2)
demutualisation method	121AE(3)
demutualisation method 1 to demutualisation method 7	121AF to 121AL
demutualisation resolution day	121AD(3)
first trading day price	121AQ
general insurance business	121AQ
general insurance company	121AB(4)
insurance company	121AB(2)
life insurance business	121AQ
life insurance company	121AB(3)
listed	121AQ
listing period	121AE(6)
mutual affiliate company	121AC
mutual insurance company	121AB(1)
net tangible asset value	121AN(1)
policyholder/member group	121AE(4) and (5)
security	121AO(4)
subsidiary	121AP(1) and (2)
superannuation interest	121AQ
Treasury bond rate	121AO(1)
wholly-owned subsidiary	121AP(3)

Subdivision C—Tax consequences of demutualisation

121AS CGT consequences of demutualisation

The table below sets out modifications of the application of Parts 3-1 and 3-3 (about CGT) of the *Income Tax Assessment Act*

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1997 in respect of events that are described in, or relate to events that are described in, particular demutualisation methods.

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TABLE 1—MODIFICATIONS OF CGT RULES

Item	Event	Modifications
1	**Any demutualisation method:** Extinguishment of membership rights as mentioned in paragraph (1)(a) of sections 121AF to 121AL.	A capital gain or capital loss arising from a CGT event constituted by the extinguishment is disregarded.
2	**Demutualisation method 6:** The whole of the life insurance business of the life insurance company is transferred to the other company as mentioned in paragraph 121AK(1)(b).	Subdivision 126-B of the *Income Tax Assessment Act 1997* as in force immediately before 21 October 1999 (about roll-overs for transfers) applies as if the life insurance company and the other company were members of the same wholly-owned group within the meaning of that Act.
3	**Any demutualisation method:** A person (the ***disposer***) in the policyholder/ member group disposes of a right to have ordinary shares issued or distributed to the person, or the proceeds of sale of ordinary shares distributed to the person, as mentioned in paragraph 121AF(1)(b), 121AG(1)(c) or (d), 121AH(1)(c), 121AI(1)(e) or (f), 121AJ(1)(c) or	1. A capital loss that the disposer makes from the disposal is disregarded if the disposal takes place before the demutualisation listing day (see note 4 to this table). 2. For the purpose of working out whether the disposer made a capital gain, or made a capital loss (where modification 1 does not apply), from the disposal, he or she is taken: (a) to have paid, as consideration for the acquisition of the right disposed of, an amount worked out using the following formula:

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TABLE 1—MODIFICATIONS OF CGT RULES

Item	Event	Modifications
	(d), 121AK(1)(c) or (d) or 121AL(1)(c) or (d).	$\frac{\text{Right disposed of}}{\text{Total of all rights of the same kind}} \times \text{Applicable company valuation amount (see note 1 to this Table)}$; and (b) to have paid the amount in paragraph (a), and to have acquired the right disposed of, on the demutualisation resolution day.
4	**Demutualisation method 2, 4, 5, 6 or 7:** A person (the ***disposer***) in the policyholder/member group disposes of an asset consisting of all or part of the person's interest in the trust property of the trustee mentioned in paragraph 121AG(1)(b) or (c), 121AI(1)(c) or (e), 121AJ(1)(c), 121AK(1)(c) or 121AL(1)(c).	1. A capital loss that the disposer makes from the disposal is disregarded if the disposal takes place before the demutualisation listing day (see note 4 to this table). 2. For the purpose of working out whether the disposer made a capital gain, or made a capital loss (where modification 1 does not apply), from the disposal, he or she is taken: (a) to have paid, as consideration for the acquisition of the interest disposed of, an amount worked out using the following formula:

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TABLE 1—MODIFICATIONS OF CGT RULES

Item	Event	Modifications
		$\frac{\text{Amount of interest disposed of}}{\text{Total amount of all interests in the trust property}} \times \text{Applicable company valuation amount (see note 1 to this Table)}$; and (b) to have paid the amount in paragraph (a), and to have acquired the interest disposed of, on the demutualisation resolution day.
5	**Demutualisation method 3, 4 or 5:** After the issue of the shares (each of which is a ***demutualisation share***) in the mutual insurance company as mentioned in paragraph 121AH(1)(b), 121AI(1)(b) or 121AJ(1)(b), the holding company (the ***disposer***) disposes of an asset consisting of: (a) a demutualisation share, or an interest in such a share; or (b) another share (a ***non-demutualisation*** bonus share) in the mutual insurance company, or	1. A capital loss that the disposer makes from the disposal of the demutualisation share or interest in such a share is disregarded if the disposal takes place before the demutualisation listing day (see note 4 to this table). 2. If the disposal is of a demutualisation share (other than a demutualisation original share) or an interest in such a share then, for the purpose of working out whether the disposer made a capital gain, or made a capital loss (where modification 1 does not apply), from the disposal, the disposer is taken: (a) to have paid as consideration for the acquisition of the share or interest both: (i) the amount worked out using the formula:

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TABLE 1—MODIFICATIONS OF CGT RULES

Item	Event	Modifications
	an interest in such a share, where the share is a bonus share mentioned in Division 8 of former Part IIIA and any of the demutualisation shares are the original shares mentioned in that Division. (For the purposes of the modifications relating to this item, if any of the original shares mentioned in Division 8 of former Part IIIA is a demutualisation share, it is called a ***demutualisation original share***.)	$\frac{\text{Share or amount of interest disposed of}}{\text{Total demutualisation shares or amount of interests in such shares}} \times \text{Applicable company valuation amount (see note 1 to this Table)}$; and (ii) any consideration actually paid or given for the acquisition; and (b) to have paid the amount in subparagraph (a)(i) on the demutualisation resolution day and the amount in subparagraph (a)(ii) when it was actually paid; and (c) to have acquired the share or interest on the demutualisation resolution day. 3. If the disposal is of either: (a) a demutualisation original share, or an interest in such a share; or (b) a non-demutualisation bonus share, or an interest in such a share; then, for the purpose of working out whether the disposer made a capital gain, or made a capital loss (where modification 1 does not apply), from the disposal: (c) for the purposes of applying section 130-20 (about bonus shares) of the *Income Tax*

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TABLE 1—MODIFICATIONS OF CGT RULES

Item	Event	Modifications
		Assessment Act 1997, the consideration for the acquisition of all of the demutualisation original shares to be taken into account under that section is taken to consist of both: (i) if the disposal and all previous disposals of the demutualisation original shares and the non-demutualisation bonus shares, or interests in them, take place after the demutualisation listing day—the amount worked out using the formula: $\frac{\text{Number of demutualisation original shares}}{\text{Number of demutualisation shares}} \times \text{Listing day company valuation amount (see note 3 to this table)}$; and (ii) if subparagraph (i) does not apply—the amount worked out using the formula: $\frac{\text{Number of demutualisation original shares}}{\text{Number of demutualisation shares}} \times \text{Pre - listing day company valuation amount (see note 2 to this table)}$; and (iii) any consideration actually paid or given for the acquisition of the share or

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TABLE 1—MODIFICATIONS OF CGT RULES

Item	Event	Modifications
		interest disposed of; and (d) if the disposal is of a demutualisation original share or an interest in such a share, the disposer is taken: (i) to have paid the amount in subparagraph (c)(i) or (ii) on the demutualisation resolution day and the amount in subparagraph (c)(iii) when it was actually paid; and (ii) to have acquired the share or interest on the demutualisation resolution day.
6	**Demutualisation method 7**: After the issue of the shares (each of which is a ***demutualisation share***) in the mutual insurance company and the mutual affiliate company as mentioned in paragraph 121AL(1)(b), the holding company (the ***disposer***) disposes of an asset consisting of: (a) a demutualisation share, or an interest in such a share; or	1. A capital loss that the disposer makes from the disposal of the demutualisation share or interest in such a share is disregarded if the disposal takes place before the demutualisation listing day (see note 4 to this table). 2. If the disposal is of a demutualisation share (other than a demutualisation original share) or an interest in such a share then, for the purpose of working out whether the disposer made a capital gain, or made a capital loss (where modification 1 does not apply), from the disposal, the disposer is taken: (a) to have paid as consideration for the acquisition of the share or interest both:

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TABLE 1—MODIFICATIONS OF CGT RULES

Item	Event	Modifications
	(b) another share (a ***non-demutualisation bonus share***) in the mutual insurance company or the mutual affiliate company, or an interest in such a share, where the share is a bonus share mentioned in section 130-20 (about bonus shares) of the *Income Tax Assessment Act 1997* and any of the demutualisation shares are the original shares mentioned in that section. (For the purposes of the modifications relating to this item, if any of the original shares mentioned in that section is a demutualisation share, it is called a ***demutualisation original share***.)	(i) the amount worked out using the formula: $\frac{\text{Share or amount of interest disposed of}}{\text{Total demutualisation shares or amount of interests in such shares in the company concerned}} \times \text{Net tangible asset value of the company concerned}$; and (ii) any consideration actually paid or given for the acquisition; and (b) to have paid the amount in subparagraph (a)(i) on the demutualisation resolution day and the amount in subparagraph (a)(ii) when it was actually paid; and (c) to have acquired the share or interest on the demutualisation resolution day. 3. If the disposal is of either: (a) a demutualisation original share, or an interest in such a share; or (b) a non-demutualisation bonus share, or an interest in such a share; then, for the purpose of working out whether the disposer made a capital gain, or made a

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TABLE 1—MODIFICATIONS OF CGT RULES

Item	Event	Modifications
		capital loss (where modification 1 does not apply), from the disposal: (c) for the purposes of applying section 130-20 (about bonus shares) of the *Income Tax Assessment Act 1997*, the consideration for the acquisition of all of the demutualisation original shares to be taken into account under that section is taken to consist of both: (i) the amount worked out using the formula: $\frac{\text{Number of demutualisation original shares}}{\text{Number of demutualisation shares}} \times \text{Pre-listing day company valuation amount}$; and (ii) any consideration actually paid or given for the acquisition of the share or interest disposed of; and (d) if the disposal is of a share connected with the demutualisation or interest in such a share, the disposer is taken: (i) to have paid the amount in subparagraph (c)(i) on the demutualisation resolution

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TABLE 1—MODIFICATIONS OF CGT RULES

Item	Event	Modifications
		day and the amount in subparagraph (c)(ii) when it was actually paid; and (ii) to have acquired the share or interest on the demutualisation resolution day.
7	**Demutualisation method 3, 4, 5 or 7:** After the issue of the shares in the mutual insurance company to the holding company as mentioned in paragraph 121AH(1)(b), 121AI(1)(b), 121AJ(1)(b), or in the mutual insurance company and the mutual affiliate company as mentioned in paragraph 121AL(1)(b): (a) the ultimate holding company (the ***disposer***) disposes of an asset consisting of either of the following shares in the holding company or an interposed holding company: (i) a share (a ***demutualisation share***) acquired before the issue of the shares	The same modifications apply as for item 5.

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TABLE 1—MODIFICATIONS OF CGT RULES

Item	Event	Modifications
	in the mutual insurance company, or an interest in such a share; or	
	(ii) another share (a ***non-demutualisation bonus share***), or an interest in such a share, where the share is a bonus share mentioned in section 130-20 (about bonus shares) of the *Income Tax Assessment Act 1997* and any of the demutualisation shares (whether or not disposed of at the time) are the original shares mentioned in that section; or	
	(b) the interposed holding company, or any of the interposed holding companies, (the ***disposer***) disposes of an asset consisting of either of the following shares in the holding company or an interposed holding	

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TABLE 1—MODIFICATIONS OF CGT RULES

Item	Event	Modifications
	company: (i) a share (a ***demutualisation share***) acquired before the issue of the shares in the mutual insurance company, or an interest in such a share; or (ii) another share (a ***non-demutualisation bonus share***), or an interest in such a share, where the share is a bonus share mentioned in section 130-20 (about bonus shares) of the *Income Tax Assessment Act 1997* and any of the demutualisation shares (whether or not disposed of at the time) are the original shares mentioned in that section. (For the purposes of the modifications relating to this item, if any of the original shares	

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TABLE 1—MODIFICATIONS OF CGT RULES

Item	Event	Modifications
	mentioned in that section is a demutualisation share, it is called a ***demutualisation original share***.) (The ultimate holding company and interposed holding company are those mentioned in paragraph 121AH(1)(c), 121AI(1)(c), 121AJ(1)(c) or 121AL(1)(c)).	
8	**Demutualisation method 2 or 4:** The rights attaching to the special shares held by the trustee become the same as those attaching to the ordinary shares as mentioned in subparagraph 121AG(1)(b)(ii) or paragraph 121AI(1)(d).	A capital gain or capital loss arising from a CGT event constituted by the change in the rights is disregarded.
9	**Demutualisation method 2, 4, 5, 6 or 7:** The trustee (the ***disposer***): (a) sells an ordinary share (a ***demutualisation***	1. The person in the policyholder/member group, instead of the trustee, is taken: (a) to have sold the demutualisation share or non-demutualisation bonus share; and

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TABLE 1—MODIFICATIONS OF CGT RULES

Item	Event	Modifications
	share) in the company as mentioned in paragraph 121AG(1)(d), 121AI(1)(f), 121AJ(1)(d), 121AK(1)(d) or 121AL(1)(d); or (b) sells another share (a ***non-demutualisation bonus share***), where the share is a bonus share mentioned in section 130-20 (about bonus shares) of the *Income Tax Assessment Act 1997* and any of the demutualisation shares (whether or not sold at the time) are the original shares mentioned in that section. (For the purposes of the modifications relating to this item, if any of the original shares mentioned in that section is a demutualisation share, it is called a ***demutualisation original share***.)	(b) to have paid, given and received any consideration that was paid, given or received by the trustee in respect of either share; and (c) to have done any other act in relation to either share that was done by the trustee. 2. The modifications in item 5 apply to the sale of the demutualisation share or non-demutualisation bonus share in the same way as they do to the disposal of such shares covered by that item.

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TABLE 1—MODIFICATIONS OF CGT RULES

Item	Event	Modifications
10	**Demutualisation method 2, 4, 5, 6 or 7:** The trustee distributes an ordinary share as mentioned in paragraph 121AG(1)(d), 121AI(1)(f), 121AJ(1)(d), 121AK(1)(d) or 121AL(1)(d).	A capital gain or capital loss arising from a CGT event constituted by the distribution is disregarded.
11	**Any demutualisation method:** A person (the ***disposer***) in the policyholder/member group disposes of an asset consisting of: (a) a share (a ***demutualisation share***), or an interest in such a share, issued or distributed to the person as mentioned in paragraph 121AF(1)(b), 121AG(1)(c) or (d), 121AH(1)(c), 121AI(1)(e) or (f), 121AJ(1)(c) or (d), 121AK(1)(c) or (d) or 121AL(1)(c) or (d); or	The same modifications apply as for item 5.

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TABLE 1—MODIFICATIONS OF CGT RULES

Item	Event	Modifications
	(b) another share (a ***non-demutualisation bonus share***) in the same company, or an interest in such a share, where the share is a bonus share mentioned in section 130-20 (about bonus shares) of the *Income Tax Assessment Act 1997* and any of the demutualisation shares (whether or not disposed of at the time) are the original shares mentioned in that section. (For the purposes of the modifications relating to this item, if any of the original shares mentioned in that section is a demutualisation share, it is called a ***demutualisation original share***.)	

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TABLE 1—MODIFICATIONS OF CGT RULES

Item	Event	Modifications
12	**Various demutualisation methods:** A disposal of an asset takes place before the demutualisation listing day, where: (a) modification 1 of item 3, 4, 5, 6, 7 or 11 of this table applies to the disposal; and (b) a roll-over provision (see note 5 to this table) applies to the disposal.	1. If the person who is taken to acquire the asset under the roll-over provision disposes of it before the demutualisation listing day, a capital loss that the person makes from the disposal is disregarded. 2. If the person disposes of the asset on or after the demutualisation listing day, then for the purposes of applying the roll-over provision to that disposal, the modifications in the item in this table apply as if modification 1 were not made.

Notes:

1. For the purposes of the table, the ***applicable company valuation amount***, in relation to the disposal of an asset or the allocation of an amount to a member in the records of a superannuation fund, is:
   (a) if the asset is disposed of, or the amount is allocated, before the demutualisation listing day—the pre-listing day company valuation amount; or
   (b) in any other case—the listing day company valuation amount.

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2. The ***pre-listing day company valuation amount*** is:
   (a) in relation to demutualisation methods 1 to 6, where the mutual insurance company is a life insurance company—the embedded value of the company; or
   (b) in relation to demutualisation methods 1 to 6, where the mutual insurance company is a general insurance company—the net tangible asset value of the company; or
   (c) in relation to demutualisation method 7—the sum of the net tangible asset values of the general insurance company and the mutual affiliate company.
3. The ***listing day company valuation amount*** is the lesser of:
   (a) the pre-listing day company valuation amount; and
   (b) the amount worked out using the formula:

$$\text{First trading day price of a listed ordinary share mentioned in the demutualisation method concerned} \times \text{Total number of ordinary shares issued or distributed to, or to be sold on behalf of, persons in the policyholder/member group}$$

4. The ***demutualisation listing day*** is the day on which the ordinary shares mentioned in the demutualisation method concerned are listed.
5. A ***roll-over provision*** is:
   - any of these Subdivisions of the *Income Tax Assessment Act 1997*: 122-A, 122-B, 124-B, 124-C, 124-D, 124-E, 124-F, 124-I, 126-A, 126-B; or
   - section 128-10 or 128-15, or Division 615, of that Act.
6. A trustee who gets a roll-over under Subdivision 124-M of the *Income Tax Assessment Act 1997* for an original interest consisting of shares issued as part of a demutualisation may be eligible for a further roll-over under Subdivision 126-E of that Act when a beneficiary becomes absolutely entitled to the replacement shares.

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121AT Other tax consequences of demutualisation

The table below sets out modifications of the application of this Act (except Parts 3-1 and 3-3 (about CGT) of the *Income Tax Assessment Act 1997*) in respect of events that are described in, or relate to events that are described in, particular demutualisation methods.

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TABLE 2—MODIFICATIONS OF THIS ACT (EXCEPT CGT RULES)

Item	Event	Modifications
1	Event described in item 1 of Table 1.	No amount is included in, or allowable as a deduction from, assessable income in respect of the extinguishment.
2	Event described in item 3 or 4 of Table 1.	1. If the disposal takes place before the demutualisation listing day (see note 4 to Table 1): (a) no loss is allowable as a deduction from the disposer's assessable income in respect of the disposal; and (b) any deduction allowable from the disposer's assessable income in respect of the acquisition of the right or interest does not exceed the amount included in the disposer's assessable income in respect of the disposal. 2. Paragraphs 2(a) and (b) of the modifications column for item 3 or 4 in Table 1 apply for the purposes of working out: (a) the amount of any profit included in the disposer's assessable income in respect of the disposal; or (b) the amount of any deduction allowable from the disposer's assessable income in respect of the acquisition of the right or interest.

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TABLE 2—MODIFICATIONS OF THIS ACT (EXCEPT CGT RULES)

Item	Event	Modifications
3	Event that would be described in item 5 of Table 1 if the references in that item to bonus shares and original shares mentioned in section 130-20 (about bonus shares) of the *Income Tax Assessment Act 1997* were instead references to bonus shares and original shares mentioned in section 6BA.	1. If the disposal is of a demutualisation share, or interest in such a share, and the disposal takes place before the demutualisation listing day: (a) no loss is allowable as a deduction from the disposer's assessable income in respect of the disposal; and (b) any deduction allowable from the disposer's assessable income in respect of the acquisition of the share or interest does not exceed the amount included in the disposer's assessable income in respect of the disposal. 2. If the disposal is of a demutualisation share (other than a demutualisation original share), or an interest in such a share, then paragraphs 2(a) to (c) of the modifications column for item 5 in Table 1 apply for the purposes of working out: (a) the amount of any profit included in, or loss (where modification 1 does not apply) allowable as a deduction from, the disposer's assessable income in respect of the disposal; or (b) the amount of any deduction allowable (where modification 1 does not apply) from the disposer's assessable income in respect of the acquisition of the share or interest

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TABLE 2—MODIFICATIONS OF THIS ACT (EXCEPT CGT RULES)

Item	Event	Modifications
		3. If the disposal is of either: (a) a demutualisation original share, or an interest in such a share; or (b) a non-demutualisation bonus share, or an interest in such a share; then paragraphs 3(c) and (d) of the modifications column for item 5 in Table 1 apply for the purpose of working out: (c) the amount of any profit included in, or loss (where modification 1 does not apply) allowable as a deduction from, the disposer's assessable income in respect of the disposal; or (d) the amount of any deduction allowable (where modification 1 does not apply) from the disposer's assessable income in respect of the acquisition of the share or interest. In applying paragraph 3(c) of the modifications column for item 5 in Table 1, the reference to section 130-20 (about bonus shares) of the *Income Tax Assessment Act 1997* is taken instead to be a reference to section 6BA.

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TABLE 2—MODIFICATIONS OF THIS ACT (EXCEPT CGT RULES)

Item	Event	Modifications
4	Event that would be described in item 6 of Table 1 if the references in that item to bonus shares and original shares mentioned in section 130-20 (about bonus shares) of the *Income Tax Assessment Act 1997* were instead references to bonus shares and original shares mentioned in section 6BA.	1. If the disposal is of a demutualisation share, or interest in such a share, and the disposal takes place before the demutualisation listing day: (a) no loss is allowable as a deduction from the disposer's assessable income in respect of the disposal; and (b) any deduction allowable from the disposer's assessable income in respect of the acquisition of the share or interest does not exceed the amount included in the disposer's assessable income in respect of the disposal. 2. If the disposal is of a demutualisation share (other than a demutualisation original share), or an interest in such a share, then paragraphs 2(a) to (c) of the modifications column for item 6 in Table 1 apply for the purposes of working out: (a) the amount of any profit included in, or loss (where modification 1 does not apply) allowable as a deduction from, the disposer's assessable income in respect of the disposal; or (b) the amount of any deduction allowable (where modification 1 does not apply) from the disposer's assessable income in respect of the acquisition of the share or interest.

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TABLE 2—MODIFICATIONS OF THIS ACT (EXCEPT CGT RULES)

Item	Event	Modifications
		3. If the disposal is of either: (a) a demutualisation original share, or interest in such a share; or (b) a non-demutualisation bonus share, or an interest in such a share; then paragraphs 3(c) and (d) of the modifications column for item 6 in Table 1 apply for the purpose of working out: (c) the amount of any profit included in, or loss (where modification 1 does not apply) allowable as a deduction from, the disposer's assessable income in respect of the disposal; or (d) the amount of any deduction allowable (where modification 1 does not apply) from the disposer's assessable income in respect of the acquisition of the share or interest. In applying paragraph 3(c) of the modifications column for item 6 in Table 1, the reference to section 130-20 (about bonus shares) of the *Income Tax Assessment Act 1997* is taken instead to be a reference to section 6BA.

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TABLE 2—MODIFICATIONS OF THIS ACT (EXCEPT CGT RULES)

Item	Event	Modifications
5	Event that would be described in item 7 of Table 1 if the references in that item to bonus shares and original shares mentioned in section 130-20 (about bonus shares) of the *Income Tax Assessment Act 1997* were instead references to bonus shares and original shares mentioned in section 6BA.	The same modifications as for item 3 of this table apply.
6	Event described in item 8 of Table 1.	No amount is included in, or allowable as a deduction from, assessable income in respect of the change in the rights.
7	Event that would be described in item 9 of Table 1 if the references in that item to bonus shares and original shares mentioned in section 130-20 (about bonus shares) of the *Income Tax Assessment Act 1997* were instead references to bonus shares and original shares mentioned in section 6BA.	1. The person in the policyholder/member group, instead of the trustee is taken: (a) to have sold the demutualisation share or non-demutualisation bonus share; and (b) to have paid, given and received any consideration that was paid, given or received by the trustee in respect of either share; and (c) to have done any other act in relation to either share that was done by the trustee. 2. The modifications in item 3 of this table apply to the sale of the

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TABLE 2—MODIFICATIONS OF THIS ACT (EXCEPT CGT RULES)

Item	Event	Modifications
		demutualisation share or non-demutualisation bonus share in the same way as they do to the disposal of such shares covered by that item.
8	Event that would be described in item 11 of Table 1 if the references in that item to bonus shares and original shares mentioned in section 130-20 (about bonus shares) of the *Income Tax Assessment Act 1997* were instead references to bonus shares and original shares mentioned in section 6BA.	The same modifications as for item 3 of this table apply.
9	Under demutualisation method 6, the whole of the life insurance business of a life insurance company is transferred to another company as mentioned in paragraph 121AK(1)(b).	The other company is taken to continue to carry on the transferred life insurance business of the mutual life insurance company.
10	An ordinary share is issued or distributed to a person in the policyholder/member group as mentioned in paragraph 121AF(1)(b), 121AG(1)(c) or (d), 121AH(1)(c), 121AI(1)(e) or (f), 121AJ(1)(c) or (d), 121AK(1)(c) or (d) or 121AL(1)(c) or (d).	No amount is included in, or allowable as a deduction from, assessable income of the person in respect of the issue or distribution of the share, except where the share is issued in consideration for services provided, or to be provided, by the person.

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TABLE 2—MODIFICATIONS OF THIS ACT (EXCEPT CGT RULES)

Item	Event	Modifications
11	Ordinary shares in the company are issued or distributed as mentioned in paragraph 121AF(1)(b), 121AG(1)(c) or (d), 121AH(1)(c), 121AI(1)(e) or (f), 121AJ(1)(c) or (d), 121AK(1)(c) or (d) or 121AL(1)(c) or (d) to a person in the policyholder/member group who is the trustee of a superannuation fund to hold on behalf of a member of the fund. The trustee within 30 days allocates to the member, in the records of the fund, an amount representing the member's contributions in respect of the shares (the ***allocation shares***).	If the trustee pays a superannuation benefit to the member, the tax free component (within the meaning of the *Income Tax Assessment Act 1997*) of the superannuation interest (within the meaning of that Act) from which the benefit is paid is increased by the amount worked out using the formula: $\frac{\text{Number of allocation shares}}{\text{Total number of ordinary shares issued or distributed to, or to be sold on behalf of, the policyholder/member group}} \times$ Applicable company valuation amount (see note 1 to Table 1)
12	A resolution is passed to proceed, in accordance with one of the demutualisation methods, with the demutualisation of: (a) a mutual insurance company that is a general insurance company; or (b) both such a mutual insurance company and a	The franking surplus is reduced to nil at the beginning of the demutualisation resolution day.

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TABLE 2—MODIFICATIONS OF THIS ACT (EXCEPT CGT RULES)

Item	Event	Modifications
	mutual affiliate company. Immediately before the demutualisation resolution day: (a) in the case of any demutualisation method—the general insurance company or any wholly-owned subsidiary of the general insurance company; or (b) in the case of demutualisation method 7—the mutual affiliate company, a wholly-owned subsidiary of the mutual affiliate company, or a company all of whose shares are beneficially owned by the general insurance company and the mutual affiliate company; has a franking surplus.	

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TABLE 2—MODIFICATIONS OF THIS ACT (EXCEPT CGT RULES)

Item	Event	Modifications
13	A resolution is passed to proceed with the demutualisation of a mutual insurance company or both a mutual insurance company and a mutual affiliate company. A dividend that was declared before the demutualisation resolution day is paid on or after the demutualisation resolution day to: (a) in the case of any demutualisation method—the mutual insurance company or any wholly-owned subsidiary of the mutual insurance company; or (b) in the case of demutualisation method 7—the mutual affiliate company, a wholly-owned subsidiary of the mutual affiliate company, or a company all of whose shares are beneficially owned by the general insurance company and the mutual affiliate company.	No franking credit arises for the company or the subsidiary in relation to the payment of the dividend on or after the demutualisation resolution day.

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121AU This Subdivision does not apply to demutualisation of friendly society health or life insurers

This Subdivision does not apply in relation to the demutualisation of a company in relation to whose demutualisation Division 316 (Demutualisation of friendly society health or life insurers) of the *Income Tax Assessment Act 1997* applies.

Note: Section 316-5 of the *Income Tax Assessment Act 1997* explains which demutualisations of entities Division 316 of that Act applies to.

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Division 9A—Offshore banking units

Subdivision A—Object and simplified outline

121B Simplified outline

Scope of section

(1) The following is a simplified outline of the Division.

Main concepts

(2) Subdivision B sets out the concepts used in the Division, the most important being:

(a) ***OB activity*** (sections 121D, 121EA and 121EAA) together with the related definition of ***offshore person*** (section 121E); and

(b) special income and allowable deduction definitions relating to OB activities (sections 121EDA to 121EF).

Operative provisions

(3) Subdivision C contains the operative provisions. Basically, they provide as follows:

(d) income from OB activities is taken to be Australian sourced;

(e) a deemed interest penalty applies to equity provided by an OBU's resident owner;

(f) income of OBU offshore investment trusts is exempt from tax;

(g) income derived by overseas charitable institutions from OBUs is exempt from tax;

(h) certain adjustments are made to the capital gains and losses that flow from disposals of certain interests in trusts of which an OBU is the trustee.

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Subdivision B—Interpretation

121C Interpretation

In this Division:

adjusted assessable OB income has the meaning given by subsection 121EE(4).

adjusted total assessable income has the meaning given by subsection 121EE(5).

allowable OB deduction has the meaning given by subsection 121EF(2).

apportionable OB deduction has the meaning given by subsection 121EF(5).

assessable OB income has the meaning given by subsection 121EE(2).

associate has the meaning given by section 318.

Australian thing has the meaning given by subsection 121DA(5).

average Australian asset percentage has the meaning given by subsection 121DA(2).

borrow includes raise finance by the issue of a security.

eligible contract means:

(a) any of the following:
  (i) a futures contract;
  (ii) a forward contract;
  (iii) an options contract;
  (iv) a swap contract;
  (v) a cap, collar, floor or similar contract; or
(b) a loan contract; or
(c) a securities lending or repurchase arrangement; or

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(d) a non-deliverable forward foreign currency contract.

exclusive non-OB deduction has the meaning given by subsection 121EF(6).

exclusive OB deduction has the meaning given by subsection 121EF(3).

general OB deduction has the meaning given by subsection 121EF(4).

lend includes provide finance by the purchase of a security.

loss deduction has the meaning given by subsection 121EF(7).

monthly Australian asset percentage has the meaning given by subsection 121DA(3).

non-OB accounting records has the meaning given by subsection 121EAA(3).

non-OB money, in relation to an OBU, means money of the OBU other than:

(a) money received by the OBU in carrying on an OB activity; or

(b) OBU resident-owner money of the OBU; or

(c) money paid to the OBU by a non-resident (other than in carrying on business in Australia at or through a permanent establishment of the non-resident) by way of subscription for, or a call on, shares in the OBU;

(an example of non-OB money being money borrowed from a resident whose lending of the money does not occur in carrying on business in a country outside Australia at or through a permanent establishment of the resident).

non-resident trust means a unit trust that is not a resident unit trust within the meaning of section 102Q.

OB activity has the meaning given by section 121D.

OB advisory activity has the meaning given by section 121DC.

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OB eligible contract activity has the meaning given by section 121DB.

OB income has the meaning given by section 121EDA.

OB leasing activity has the meaning given by section 121DD.

OBU (offshore banking unit) means an offshore banking unit within the meaning of Division 11A of Part III.

Note: In this Division, the head company of a consolidated group or MEC group may be treated for certain purposes as an OBU at a time when a subsidiary member of the group is an OBU (see Subdivision 717-O of the *Income Tax Assessment Act 1997*).

OBU resident-owner money has the meaning given by section 121EC.

offshore person has the meaning given by section 121E.

offshore property means property that:

(a) cannot be in Australia; or

Example: Land outside Australia.

(b) is used, or will be used:

(i) wholly outside Australia; or

(ii) in Australia to an extent that is not material.

overseas charitable institution means a non-resident institution the income of which:

(a) would be exempt from tax under item 1.1 of section 50-5 of the *Income Tax Assessment Act 1997* (and not under any other item of that section) if the institution had a physical presence in Australia and incurred its expenditure and pursued its objectives principally in Australia; and

(b) is exempt in the country in which it is resident.

owner, in relation to a company, means a person who, alone or together with an associate or associates, is the beneficial owner of all of the shares in the company.

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portfolio investment has the meaning given by subsection 121DA(1).

related person, in relation to an OBU, means:

(a) an associate of the OBU; or

(b) a permanent establishment referred to in paragraph 121EB(1)(b) in relation to the OBU.

security means a bond, debenture, debt interest, bill of exchange, promissory note or other security or similar instrument.

trade with a person has the meaning given by section 121ED.

90-day bank bill rate, at a particular time, means:

(a) if the Reserve Bank of Australia has published a rate described as the 90-day bank accepted bill rate in respect of a period in which the particular time occurs—that rate; or

(b) in any other case—the rate declared by regulations for the purposes of this definition to be the 90-day bank accepted bill rate in respect of a period in which the particular time occurs.

121D Meaning of *OB activity*

Kinds of OB activity

(1) Each of the following things done by an OBU is an ***OB activity*** (offshore banking activity) of the OBU (subject to sections 121EA and 121EAA):

(a) a borrowing or lending activity described in subsection (2); or

(b) a guarantee-type activity described in subsection (3); or

(c) a trading activity described in subsection (4) (subject to subsection (4A)); or

(d) an OB eligible contract activity (see section 121DB); or

(e) an investment activity described in subsection (6), (6A) or (6B); or

(f) an OB advisory activity (see section 121DC); or

(g) a hedging activity described in subsection (8); or

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(ga) an OB leasing activity (see section 121DD); or

(h) any other activity involving an offshore person, being an activity declared by regulations for the purposes of this paragraph to be an OB activity.

Borrowing or lending activity

(2) For the purposes of paragraph (1)(a), a ***borrowing or lending activity*** is:

(a) borrowing money from an offshore person where, if that person is a related person or a person to whom paragraph 121E(b) applies and is not an OBU, the money is not Australian currency; or

(b) lending money, or making commitments to lend money, to an offshore person where, if that person is a person to whom paragraph 121E(b) applies and is not an OBU, the money is not Australian currency; or

(c) borrowing gold from an offshore person; or

(d) lending gold to an offshore person; or

(e) acting as an arranger in a syndicated lending arrangement that includes a borrowing or lending activity to which paragraph (a), (b), (c) or (d) applies.

Guarantee-type activity

(3) For the purposes of paragraph (1)(b), a ***guarantee-type activity*** is:

(a) providing a guarantee or letter of credit to an offshore person in relation to activities that are, or will be, conducted:

(i) wholly outside Australia; or

(ii) in Australia to an extent that is not material; or

(b) underwriting a risk for an offshore person in respect of:

(i) offshore property; or

(ii) an event, if the likelihood of the event happening in Australia is not material; or

(c) syndicating a loan for an offshore person; or

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(d) issuing a performance bond to an offshore person in relation to activities that are, or will be, conducted:
(i) wholly outside Australia; or
(ii) in Australia to an extent that is not material;

where, if the offshore person is a related person, any money payable under the guarantee, letter, underwriting, loan or bond is not Australian currency.

Trading activity

(4) For the purposes of paragraph (1)(c), a ***trading activity*** is:
(a) trading with an offshore person in:
(i) securities issued by non-residents; or
(ii) eligible contracts, under which any amounts payable are payable by non-residents; or
(aa) trading with any person in non-deliverable forward foreign currency contracts; or
(b) trading with an offshore person in:
(i) shares in non-resident companies; or
(ii) units in non-resident trusts; or
(c) trading with an offshore person in options or rights in respect of securities, eligible contracts, shares or units referred to in paragraph (a) or (b); or
(d) trading (including on behalf of an offshore person) on the Sydney Futures Exchange in futures contracts, or options contracts, under which any money payable is not Australian currency; or
(e) trading in currency, or options or rights in respect of currency, with any person, where the currency is not Australian currency; or
(ea) trading in currency, or options or rights in respect of currency, with an offshore person; or
(f) trading in gold bullion, or in options or rights in respect of such bullion:
(i) with an offshore person where the money or moneys payable or receivable is or are in any currency; or

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(ii) a person other than an offshore person where the money or moneys payable or receivable is or are in a currency other than Australian currency; or

(g) trading with an offshore person in silver, platinum or palladium bullion, or in options or rights in respect of such bullion; or

(h) trading with an offshore person in base metals; or

(i) trading with an offshore person in commodities, or in options or rights in respect of commodities, if:

(i) the commodities, options or rights are not mentioned in another paragraph of this subsection; and

(ii) the trading is incidental to an OB eligible contract activity.

(4A) However, paragraph (1)(c) does not apply to a trading activity done by an OBU if:

(a) the thing traded in affected the OBU's total participation interest (within the meaning of the *Income Tax Assessment Act 1997*) in another entity; and

(b) just before the trading activity:

(i) the OBU's total participation interest in the other entity was at least 10%; or

(ii) any of the thing traded in was held by the OBU, and was not recorded in the OBU's accounting records as held for trading in accordance with accounting standards (within the meaning of that Act).

(4B) For the purposes of subsection (4A), disregard rights on winding-up.

Investment activity

(6) For the purposes of paragraph (1)(e), an ***investment activity*** is making (but not managing), as broker or agent for, or trustee for the benefit of, an offshore person to whom paragraph 121E(a) applies, an investment with an offshore person to whom that paragraph applies, where:

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(a) the currency in which the investment is made is not Australian currency; and

(b) if the investment involves the purchase of any thing:

(i) if the thing is a share in a company—the company is a non-resident company; or

(ii) if the thing is a unit in a unit trust—the unit trust is a non-resident trust; or

(iii) if the thing is land or a building—the land or building is not in Australia; or

(iv) in any other case—the thing is located outside Australia.

Investment activity—portfolio investment

(6A) For the purposes of paragraph (1)(e), an ***investment activity*** is also the managing by an OBU of a portfolio investment (see subsection 121DA(1)) for the whole or part (the ***investment management period***) of a year of income, where:

(a) the portfolio investment is managed as broker, agent or custodian for, or trustee for the benefit of, a non-resident; and

(b) the portfolio investment was made by the OBU or the non-resident; and

(c) the portfolio investment was made with a non-resident (except to the extent that making the investment consisted of making a loan or purchasing an Australian thing); and

(d) the currency in which the portfolio investment was made was not Australian currency; and

(e) if the portfolio investment consists of only a single thing—the thing is not an Australian thing (see subsection 121DA(5)).

Investment activity—portfolio investment for overseas charitable institutions

(6B) For the purposes of paragraph (1)(e), an ***investment activity*** is also the managing by an OBU of a portfolio investment (see subsection 121DA(1)) for the whole or part (the ***investment management period***) of a year of income, where:

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(a) the portfolio investment is managed as broker, agent or custodian for, or trustee for the benefit of, an overseas charitable institution; and
(b) the portfolio investment was made by the OBU or the overseas charitable institution.

Hedging activities

(8) For the purposes of paragraph (1)(g), a ***hedging activity*** is entering into a financial arrangement (within the meaning of the *Income Tax Assessment Act 1997*) with an offshore person for the sole purpose of eliminating or reducing the risk of adverse financial consequences that might result to the OBU from:
(a) interest rate exposure of the OBU in respect of borrowing or lending activities (described in subsection (2)) of the OBU; or
(b) currency exposure of the OBU in respect of borrowing or lending activities (described in subsection (2)) of the OBU.

Effect of subsection (8)

(9) Subsection (8) does not limit the scope of any other OB activity of the OBU (for example the trading activity mentioned in paragraph (4)(e)).

121DA Meaning of expressions relevant to *investment activity*

Portfolio investment

(1) If, under a contract or trust instrument, an OBU manages one or more investments as broker an agent or custodian for, or trustee for the benefit of, a non-resident, the investment, or all of the investments, constitute a ***portfolio investment***.

Average Australian asset percentage

(2) The ***average Australian asset percentage*** of a portfolio investment is the average, for all months that wholly or partly fall within the investment management period (see subsection 121D(6A) or (6B)),

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of the monthly Australian asset percentages (see subsection (3)) of all of the things comprising the portfolio investment.

Monthly Australian asset percentage

(3) For the purposes of subsection (2), the ***monthly Australian asset percentage*** of the things for a month is the percentage of the total value of all of the things comprising the portfolio investment, for the month, that is represented by the value of Australian things.

Basis for working out percentage

(4) The percentage in subsection (3) must be worked out according to reasonable accounting practice that applies on the same basis for all months falling wholly or partly within the investment management period.

Australian thing

(5) A thing is an ***Australian thing*** at a particular time if:
  (a) where the thing is a share in a company—the company is a resident company at the time; or
  (b) where the thing is a unit in a unit trust—the unit trust is a resident trust (within the meaning of section 102Q) in relation to the year of income in which the time occurs; or
  (c) where the thing is land or a building—the land or building is in Australia; or
  (d) where the thing is a loan—the loan was made to an Australian resident; or
  (e) in any other case—the thing is located in Australia at the time.

121DB Meaning of *OB eligible contract activity*

An ***OB eligible contract activity*** is entering into an eligible contract (other than a loan contract that is not a securities lending or repurchase arrangement) with:
  (a) an offshore person; or

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(b) if the eligible contract is a non-deliverable forward foreign currency contract—any person.

121DC Meaning of *OB advisory activity*

(1) An ***OB advisory activity*** is giving investment or other financial advice to an offshore person, including advice about disposing of an investment.

(2) Giving advice about the making of a particular investment is not an ***OB advisory activity*** unless the investment is of a kind mentioned in subsection 121D(6) (Investment activity).

(3) Subsection (2) does not exclude giving advice about a particular investment of a different kind if doing so is incidental to advising on an investment of a kind mentioned in subsection 121D(6) (for example for the purpose of comparison or because the investments are commercially related).

(4) To avoid doubt, for the purposes of this section, advice about disposing of an investment is not advice about the making of the investment.

121DD Meaning of *OB leasing activity*

(1) An ***OB leasing activity*** is leasing activity with an offshore person involving offshore property.

(2) Without limiting subsection (1), ***OB leasing activity*** includes entering into:

(a) any arrangement (within the meaning of section 51AD) under which a right to use offshore property is granted by the owner to another person; or

(b) any arrangement (within the meaning of that section) under which a right to use offshore property, being a right derived directly or indirectly from a right mentioned in paragraph (a) in relation to the property, is granted by a person to another person;

with an offshore person.

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121E Meaning of *offshore person*

A reference to an offshore person, in relation to the doing of any thing by an OBU (***the first OBU***), is a reference to:

(a) a non-resident whose involvement in the doing of the thing does not occur in carrying on business in Australia at or through a permanent establishment of that person; or

(b) a resident whose involvement in the doing of the thing occurs in carrying on business in a country outside Australia at or through a permanent establishment of the person; or

(c) another OBU (***the second OBU***), where, if the doing of the thing involves the payment of any money (for example a loan of money) by the second OBU to the first OBU, the second OBU gives, at or before the time of the payment, a statement in writing to the first OBU to the effect that none of the money is non-OB money of the second OBU.

121EA OBU requirement

For a thing done by an OBU to be an OB activity, it is necessary that, when the thing is done:

(a) the OBU is a resident and the thing is not done in carrying on business in a country outside Australia at or through a permanent establishment of the OBU; or

(b) the OBU is a non-resident and the thing is done in carrying on business in Australia at or through a permanent establishment of the OBU.

121EAA Activities recorded in domestic books not OB activities

(1) An OBU may, when it does a thing that would otherwise be an OB activity of the OBU, choose to have the thing not be an ***OB activity***.

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Accounting records

(2) The OBU recording the thing in the OBU's non-OB accounting records is sufficient evidence of the making of the choice, if the OBU uses money in the thing.

Note 1: The OBU must maintain accounting records, separate from its non-OB accounting records, in respect of money used in its OB activities: see subsection 262A(1A).

Note 2: Subsection (2) of this section and subsection 262A(1A) do not apply if the OBU does not use money in the thing, but the OBU must keep documents containing particulars of the choice: see paragraph 262A(2)(b).

Note 3: Subsection (2) does not prevent the OBU from correcting a mistake in its accounting records.

(3) The OBU's ***non-OB accounting records*** are the OBU's accounting records, other than the accounting records maintained in respect of money used in the OBU's OB activities under subsection 262A(1A).

Grouping

(4) The OBU is treated as having chosen under subsection (1) to have a thing (the ***transaction***) done by the OBU not be an ***OB activity*** if:

(a) it is reasonable to regard the transaction and one or more other things done by the OBU as constituting a single scheme (within the meaning of the *Income Tax Assessment Act 1997*); and

(b) the OBU chooses under subsection (1) to have any of those other things done by the OBU not be an OB activity.

(5) For the purposes of subsection (4), whether the transaction and one or more other things constitute a single scheme is a question of fact and degree determined having regard to the following (whichever are applicable):

(a) the nature of the transaction and the other things;

(b) their terms and conditions (including those relating to any payment or other consideration for them);

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(c) the circumstances surrounding their creation and their proposed exercise or performance (including what can reasonably be seen as the purposes of one or more of the entities involved);
(d) whether they can be dealt with separately or must be dealt with together;
(e) normal commercial understandings and practices in relation to them (including whether they are regarded commercially as separate things or as a group or series that forms a whole).

(6) In applying subsection (5), have regard to the matters mentioned in paragraphs (5)(a) to (e) both:
(a) in relation to the transaction and other things separately; and
(b) in relation to the transaction and other things in combination with each other.

121EB Internal financial dealings of an OBU

Permanent establishments treated as separate persons

(1) If an OBU consists of:
(a) one or more permanent establishments in Australia at or through which the OBU carries on what are OB activities apart from this section; and
(b) one or more other permanent establishments either in Australia or outside Australia;

then sections 121D to 121EAA (inclusive) apply as if:
(c) the OBU consisted only of the permanent establishments referred to in paragraph (a); and
(d) the permanent establishments referred to in paragraph (b) were separate persons.

Head office can be permanent establishment

(2) For the purpose of determining under subsection (1) whether something is a permanent establishment, it does not matter whether it is a head office or not.

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(3) To avoid doubt, this section applies for the purposes of applying Subdivision 230-A of the *Income Tax Assessment Act 1997* to a financial arrangement (within the meaning of that Act).

Note: This means that it is possible for financial arrangements to be entered into between the bank and the branch and for the bank or the branch to have a gain or loss from such an arrangement dealt with under Division 230 of the *Income Tax Assessment Act 1997*.

Arm's length pricing

(4) For the purposes of this Division, treat an amount that, because of subsections (1) to (3):

(a) is included in the OBU's OB income; or

(b) is an allowable OB deduction of the OBU;

as being the amount that would be so included, or that would be the amount of the allowable OB deduction, were the OBU and the permanent establishments mentioned in paragraph (1)(d) dealing with each other at arm's length.

(5) For the purposes of determining the effect subsection (4) has in relation to the amount that is included or allowable, work out the arm's length dealing so as best to achieve consistency with:

(a) the documents covered by section 815-235 of the *Income Tax Assessment Act 1997* (Guidance); and

(b) subject to paragraph (a), the documents covered by section 815-135 of that Act.

121EC Meaning of *OBU resident-owner money*

Money is ***OBU resident-owner money*** of an OBU if it is paid to the OBU by a resident owner of the OBU by way of a subscription for, or a call on, shares in the OBU, except if the shares are redeemable preference shares.

121ED Meaning of *trade with a person*

A person (***the trader***) is said to ***trade with another person*** in a thing if:

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(a) the trader, for the purpose of trading in the thing, acquires it on issue from the other person; or
(b) the trader, for the purpose of trading in the thing, buys it from the other person; or
(c) the trader, in trading in the thing, sells it to the other person.

121EDA Meaning of *OB income*

OB income

(1) Subject to subsections (2) to (5), the ***OB income*** of an OBU of a year of income is so much of the OBU's ordinary income and statutory income of the year of income as is:
(a) derived from OB activities of the OBU or the part of the OBU to which paragraph 121EB(1)(c) applies; or
(b) included in the statutory income because of such activities.

(2) Subsection (1) does not apply to amounts included under Part 3-1 of the *Income Tax Assessment Act 1997* (about capital gains).

(3) Subsection (1) does not apply to the extent that the money lent, invested or otherwise used in carrying on the OB activities is non-OB money of the OBU.

(4) A typical example of an amount covered by the exception in subsection (3) is interest derived from the OB activity of lending money to an offshore person, where the money lent is non-OB money.

Reduction of OB income because of certain investment activities

(5) Ordinary or statutory income that:
(a) would otherwise be taken into account under subsection (1); and
(b) is derived from an investment activity (within the meaning of subsection 121D(6A) or (6B)) included in OB activities of the OBU or the part of the OBU to which paragraph 121EB(1)(c) applies;

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is reduced by the average Australian asset percentage (within the meaning of subsection 121DA(2)) of the portfolio investment concerned.

121EE Definitions relating to assessable income of an OBU

Purpose of section

(1) This section sets out certain definitions used in this Division that relate to the assessable income of an OBU of a year of income.

Assessable OB income

(2) The ***assessable OB income*** of an OBU is so much of the OBU's OB income of the year of income as is assessable income.

Adjusted assessable OB income

(4) The ***adjusted assessable OB income*** of an OBU is the OBU's assessable OB income of the year of income reduced by the sum of the OBU's exclusive OB deductions for interest (including a discount in the nature of interest).

Adjusted total assessable income

(5) The ***adjusted total assessable income*** of an OBU is the OBU's assessable income of the year of income reduced by the sum of the OBU's exclusive OB deductions, and exclusive non-OB deductions, for interest (including a discount in the nature of interest).

121EF Definitions relating to allowable deductions of an OBU

Purpose of section

(1) This section sets out certain definitions used in this Division relating to allowable deductions of an OBU in relation to a year of income.

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Allowable OB deduction

(2) An ***allowable OB deduction*** is any of the following 3 kinds of allowable deduction:
  (a) an exclusive OB deduction;
  (b) a general OB deduction;
  (c) an apportionable OB deduction.

Exclusive OB deduction

(3) An ***exclusive OB deduction*** is any deduction (other than a loss deduction) allowable from the OBU's assessable income of the year of income that relates exclusively to assessable OB income.

General OB deduction

(4) A deduction that:
  (a) is none of the following:
    (i) a loss deduction;
    (ii) an apportionable deduction;
    (iii) an exclusive OB deduction;
    (iv) an exclusive non-OB deduction; and
  (b) is allowable from the OBU's assessable income of the year of income;

  is a ***general OB deduction*** to the extent that:
  (c) it is incurred in gaining or producing the OB income of the OBU; or
  (d) it is necessarily incurred in carrying on a business for the purpose of gaining or producing the OB income of the OBU.

Apportionable OB deduction

(5) An ***apportionable OB deduction*** is so much of any apportionable deduction allowable from the OBU's assessable income of the year of income as is calculated by multiplying the deduction by the following fraction:

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$$\text{OBU's assessable OB income} - \left[\begin{array}{c}\text{OBU's exclusive OB deductions} + \\ \text{OBU's general OB deductions}\end{array}\right]$$

OBU's taxable income + OBU's apportionable deductions.

Exclusive non-OB deduction

(6) An ***exclusive non-OB deduction*** is any deduction (other than a loss deduction) allowable from the OBU's assessable income of the year of income that relates exclusively to assessable income that is not assessable OB income.

Loss deduction

(7) A ***loss deduction*** is any allowable deduction under Division 36 of the *Income Tax Assessment Act 1997*.

Subdivision C—Operative provisions

121EJ Source of income derived from OB activities

For the purposes of this Act, income of an OBU that is derived from OB activities of the OBU is taken to be derived from a source in Australia.

121EK Deemed interest on 90% of certain OBU resident-owner money

Deemed interest

(1) If:

(a) an owner of an OBU pays an amount of money to the OBU and, because of section 121EC, the amount becomes OBU resident-owner money of the OBU; and

(b) the OBU uses, or holds ready for use, the whole or part of the amount (which whole or part is called ***the OB use amount***) in carrying on any of its OB activities during the whole or part of any year of income (which whole or part is called ***the OB use period***);

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then the assessable income of the owner of the year of income includes deemed interest as described in subsection (2).

Amount of deemed interest

(2) The deemed interest is:
  (a) applied to 90% of the OB use amount; and
  (b) applied on a daily-rests basis for the OB use period at a rate that is 2% above the 90-day bank bill rate from time to time during that period.

Deduction for deemed interest

(3) A deduction is allowable from the OBU's assessable income, equal to the amount included in the owner's assessable income, for the year of income. The deduction is taken to be an exclusive OB deduction for interest.

121EL Exemption of income etc. of OBU offshore investment trusts

(1) If:
  (a) an OBU is a trustee, or is the central manager and controller, of a trust estate; and
  (b) the only persons who benefit, or are capable (whether by the exercise of a power of appointment or otherwise) of benefiting, under the trust are non-residents; and
  (c) the terms of the trust are to the effect that income, profits or capital gains of the trust estate may only come from investment activities covered by subsection 121D(6) or (6A);

then:
  (d) any income of the trust estate derived from an investment activity covered by subsection 121D(6) is exempt from income tax; and
  (e) any capital gain or capital loss made by the trust estate from a CGT event happening in relation to a CGT asset of the trust estate in the course of, or in connection with, an investment activity covered by subsection 121D(6) is disregarded; and

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(f) any income of the trust estate derived from an investment activity covered by subsection 121D(6A) is exempt from income tax, in so far as the income exceeds the average Australian asset percentage (within the meaning of subsection 121DA(2)) for the portfolio investment concerned; and

(g) if, apart from this section, the trust estate would make a capital gain or capital loss from a CGT event happening in relation to a CGT asset of the trust estate in the course of, or in connection with, an investment activity covered by subsection 121D(6A)—the trust estate makes only the average Australian asset percentage (for the portfolio investment concerned) of the gain or loss.

(2) If:

(a) an OBU is a trustee, or is the central manager and controller, of a trust estate; and

(b) the only person who benefits, or is capable (whether by the exercise of a power of appointment or otherwise) of benefiting, under the trust is an overseas charitable institution; and

(c) the terms of the trust are to the effect that income, profits or capital gains of the trust estate may only come from investment activities covered by subsection 121D(6B);

then:

(d) any income of the trust estate derived from an investment activity covered by subsection 121D(6B) is exempt from income tax; and

(e) any capital gain or capital loss made by the trust estate from a CGT event happening in relation to a CGT asset of the trust estate in the course of, or in connection with, an investment activity covered by subsection 121D(6B) is disregarded.

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121ELA Exemption of income etc. of overseas charitable institutions

Investment with OBU

(1) Income, derived by an overseas charitable institution, is exempt to the extent that it is:

(a) a payment or outgoing from an OBU as part of the OB activities of the OBU; or

(b) a distribution of income that is exempt under subsection 121EL(2).

Capital gains and losses

(2) If:

(a) an OBU is a trustee, or is the central manager and controller, of a unit trust estate; and

(b) the only person who benefits, or is capable (whether by the exercise of a power of appointment or otherwise) of benefiting, under the trust is an overseas charitable institution; and

(c) the terms of the trust are to the effect that income, profits or capital gains of the trust estate may only come from investment activities covered by subsection 121D(6B); and

(d) the overseas charitable institution disposes of its interest in the trust;

then the overseas charitable institution makes no capital gain or capital loss from a CGT event happening in relation to the disposal.

121ELB Adjustment of capital gains and losses from disposal of units in OBU offshore investment trusts

Trust with subsection 121D(6) investment activities

(1) If:

(a) an OBU is a trustee, or is the central manager and controller, of a unit trust estate; and

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(b) the only persons who benefit, or are capable (whether by the exercise of a power of appointment or otherwise) of benefiting, under the trust are non-residents; and

(c) all units in the trust are held by non-residents; and

(d) the terms of the trust are to the effect that income, profits or capital gains of the trust estate may only come from investment activities covered by subsection 121D(6); and

(e) a non-resident disposes of a unit in the trust;

then the non-resident makes no capital gain or capital loss from a CGT event happening in relation to the disposal.

Trust with subsection 121D(6A) investment activities

(2) If:

(a) an OBU is a trustee, or is the central manager and controller, of a unit trust estate; and

(b) the only persons who benefit, or are capable (whether by the exercise of a power of appointment or otherwise) of benefiting, under the trust are non-residents; and

(c) all units in the trust are held by non-residents; and

(d) the terms of the trust are to the effect that income, profits or capital gains of the trust estate may only come from investment activities covered by subsection 121D(6A); and

(e) a non-resident disposes of a unit in the trust; and

(f) the average Australian asset percentage for the portfolio investment concerned was 10% or less;

then if, apart from this section, the non-resident would make a capital gain or capital loss from a CGT event happening in relation to the disposal, the non-resident makes only the average Australian asset percentage of the gain or loss.

(3) In working out the average Australian asset percentage for the purposes of subsection (2), the investment management period is taken to be the period during the 12 months before the disposal during which the non-resident held the unit.

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Division 9C—Assessable income diverted under certain tax avoidance schemes

121F Interpretation

(1) In this Division, unless the contrary intention appears:

agreement means any agreement, arrangement or understanding, whether formal or informal, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings.

consideration includes a benefit of any kind.

diverted income, in relation to a taxpayer, means all the amounts that are included under this Division in the diverted income of the taxpayer.

diverted trust income, in relation to a trustee of a trust estate, means all the amounts that are included under this Division in the diverted trust income of the trust estate.

income includes all amounts that, apart from the operation of the relevant exempting provisions, would be assessable income.

property includes:

(a) a chose in action;

(b) any estate, interest, right or power, whether at law or in equity, in or over property; and

(c) any right to receive income.

public company rate means the rate of tax payable in respect of the taxable income of a company that is not a private company.

relevant exempting provision means any of the following provisions:

(aa) section 50-5, 50-10, 50-15, 50-25, 50-30, 50-40 or 50-45 of the *Income Tax Assessment Act 1997*;

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(b) paragraph 23(ja) as in force at any time before the commencement of section 1 of the *Taxation Laws Amendment Act (No. 4) 1987*;

(baa) paragraph 23(x) as in force at any time before the commencement of section 1 of the *Taxation Laws Amendment Act (No. 2) 1988*;

(ba) section 23F, 23FA or 23FB, as in force at any time before the commencement of section 1 of the *Taxation Laws Amendment Act (No. 4) 1987*;

(bb) paragraph 23(jaa) or section 23FC or 23FD, as in force at any time before the commencement of section 1 of the *Taxation Laws Amendment Act (No. 2) 1989*;

(bc) section 24AM;

(c) paragraph 320-37(1)(a) of the *Income Tax Assessment Act 1997*;

(cb) regulations under the *International Organisations (Privileges and Immunities) Act 1963*, insofar as those regulations provide that an organisation is not liable to income tax;

(d) any provision of an Act other than this Act to the effect that income of a particular person or body is not subject to taxation under any law of the Commonwealth or to the effect that a particular person or body is not subject to taxation under any law of the Commonwealth.

right to receive income, in relation to a person, means a right of the person to have income that will or may be derived (whether from property or otherwise) paid to, or applied or accumulated for the benefit of, the person.

tax avoidance agreement means an agreement that was entered into after 24 June 1980 and was entered into or carried out for the purpose, or for purposes that included the purpose, of securing that a person who, if the agreement had not been entered into or carried out, would have been liable to pay income tax in respect of a year of income would not be liable to pay income tax in respect of that year of income or would be liable to pay less income tax in respect of that year of income than that person would have been liable to pay if the agreement had not been entered into or carried out.

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taxpayer does not include a partnership.

(2) In determining for the purposes of this Division whether an agreement is a tax avoidance agreement, no regard shall be had to a purpose that is a merely incidental purpose.

(3) For the purposes of this Division, an agreement shall be taken to have been entered into or carried out for a particular purpose, or for purposes that included a particular purpose, if any of the parties to the agreement entered into or carried out the agreement for that purpose, or for purposes that included that purpose, as the case may be.

(4) A reference in this Division to a person shall be read as including a reference to a person in the capacity of a trustee.

(5) For the purposes of the application of this Division in relation to property acquired under a tax avoidance agreement, a reference to income that is derived from that property shall be read as including a reference to income that is derived from the disposal of that property, of any part of that property or of any interest in that property.

121G Diverted income and diverted trust income

(1) Where:

(a) a taxpayer, not being a taxpayer in the capacity of a trustee, has acquired property (in this subsection referred to as the ***relevant property***) under a tax avoidance agreement or by reason of an act, transaction or circumstance occurring as part of, in connection with or as a result of a tax avoidance agreement;

(b) by reason that the taxpayer derives any income from the relevant property, an amount (in this subsection referred to as the ***relevant amount***) would, apart from the operation of the relevant exempting provisions, be included in the assessable income of the taxpayer of a year of income otherwise than under Division 5, section 97, section 99B or section 100;

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(c) apart from this Division, the relevant amount would not be included in the assessable income of the taxpayer of the year of income; and

(d) so much of the amount or value of the consideration provided by the taxpayer under or in connection with the tax avoidance agreement as the Commissioner is satisfied was provided in respect of the acquisition by the taxpayer of the relevant property substantially exceeds the amount or value of the consideration that might reasonably be expected to have been provided by the taxpayer in respect of the acquisition of the relevant property if the taxpayer were liable to pay tax, in respect of any income derived by the taxpayer from the relevant property, at the public company rate applicable for the financial year in which the taxpayer acquired the relevant property;

the diverted income of the taxpayer of the year of income shall include the relevant amount.

(2) Where:

(a) a taxpayer, not being a taxpayer in the capacity of a trustee, has acquired property (in this subsection referred to as the ***relevant property***), being an interest in a partnership, under a tax avoidance agreement or by reason of an act, transaction or circumstance occurring as part of, in connection with or as a result of a tax avoidance agreement;

(b) by reason of the ownership by the taxpayer of the relevant property, an amount (in this subsection referred to as the ***relevant amount***) would, apart from the operation of the relevant exempting provisions, be included, under Division 5, in the assessable income of the taxpayer of a year of income (in this subsection referred to as the ***relevant year of income***);

(c) apart from this Division, the relevant amount would not be included in the assessable income of the taxpayer of the relevant year of income; and

(d) so much of the amount or value of the consideration provided by the taxpayer under or in connection with the tax avoidance

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agreement as the Commissioner is satisfied was provided in respect of the acquisition by the taxpayer of the relevant property substantially exceeds the amount or value of the consideration that might reasonably be expected to have been provided by the taxpayer in respect of the acquisition of the relevant property if the taxpayer were liable to pay tax, in respect of any income derived by the taxpayer from the relevant property, at the public company rate applicable for the financial year in which the taxpayer acquired the relevant property;

the diverted income of the taxpayer of the relevant year of income shall include the relevant amount.

(3) Where:

(a) a taxpayer, not being a taxpayer in the capacity of a trustee, has acquired property (in this subsection referred to as the ***relevant property***), being a beneficial interest in a trust estate, under a tax avoidance agreement or by reason of an act, transaction or circumstance occurring as part of, in connection with or as a result of a tax avoidance agreement;

(b) by reason of the ownership by the taxpayer of the relevant property, an amount (in this subsection referred to as the ***relevant amount***) would, apart from the operation of the relevant exempting provisions, be included, under Division 6, in the assessable income of the taxpayer of a year of income (in this subsection referred to as the ***relevant year of income***);

(c) apart from this Division, the relevant amount would not be included in the assessable income of the taxpayer of the relevant year of income; and

(d) so much of the amount or value of the consideration provided by the taxpayer under or in connection with the tax avoidance agreement as the Commissioner is satisfied was provided in respect of the acquisition by the taxpayer of the relevant property substantially exceeds the amount or value of the consideration that might reasonably be expected to have been provided by the taxpayer in respect of the acquisition of the relevant property if the taxpayer were liable to pay tax, in

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respect of any income derived by the taxpayer from the relevant property, at the public company rate applicable for the financial year in which the taxpayer acquired the relevant property;

the diverted income of the taxpayer of the relevant year of income shall include the relevant amount.

(4) Where:

(a) a taxpayer, being a taxpayer in the capacity of a trustee of a trust estate, has acquired property (in this subsection referred to as the ***relevant property***) under a tax avoidance agreement or by reason of an act, transaction or circumstance occurring as part of, in connection with or as a result of a tax avoidance agreement;

(b) by reason that the taxpayer derives any income from the relevant property, an amount (in this subsection referred to as the ***relevant amount***) would, apart from the operation of the relevant exempting provisions, be included in the assessable income of the trust estate of a year of income otherwise than under Division 5, section 97, section 99B or section 100;

(c) apart from this Division, the relevant amount would not be included in the assessable income of the trust estate of the year of income; and

(e) so much of the amount or value of the consideration provided by the taxpayer under or in connection with the tax avoidance agreement as the Commissioner is satisfied was provided in respect of the acquisition by the taxpayer of the relevant property substantially exceeds the amount or value of the consideration that might reasonably be expected to have been provided by the taxpayer in respect of the acquisition of the relevant property if the taxpayer were liable to pay tax, in respect of any income derived by the taxpayer from the relevant property, at the public company rate applicable for the financial year in which the taxpayer acquired the relevant property;

the diverted trust income of the trust estate of the year of income shall include the relevant amount.

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(5) Where:

(a) a taxpayer, being a taxpayer in the capacity of a trustee of a trust estate, has acquired property (in this subsection referred to as the ***relevant property***), being an interest in a partnership, under a tax avoidance agreement or by reason of an act, transaction or circumstance occurring as part of, in connection with or as a result of a tax avoidance agreement;

(b) by reason of the ownership by the taxpayer of the relevant property, an amount (in this subsection referred to as the ***relevant amount***) would, apart from the operation of the relevant exempting provisions, be included, under Division 5, in the assessable income of the trust estate of a year of income (in this subsection referred to as the ***relevant year of income***);

(c) apart from this Division, the relevant amount would not be included in the assessable income of the trust estate of the relevant year of income; and

(e) so much of the amount or value of the consideration provided by the taxpayer under or in connection with the tax avoidance agreement as the Commissioner is satisfied was provided in respect of the acquisition by the taxpayer of the relevant property substantially exceeds the amount or value of the consideration that might reasonably be expected to have been provided by the taxpayer in respect of the acquisition of the relevant property if the taxpayer were liable to pay tax, in respect of any income derived by the taxpayer from the relevant property, at the public company rate applicable for the financial year in which the taxpayer acquired the relevant property;

the diverted trust income of the trust estate of the relevant year of income shall include the relevant amount.

(6) Where:

(a) a taxpayer, being a taxpayer in the capacity of a trustee of a trust estate (in this subsection referred to as the ***relevant trust estate***), has acquired property (in this subsection referred to as the ***relevant property***), being a beneficial interest in

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another trust estate, under a tax avoidance agreement or by reason of an act, transaction or circumstance occurring as part of, in connection with or as a result of a tax avoidance agreement;

(b) by reason of the ownership by the taxpayer of the relevant property, an amount (in this subsection referred to as the ***relevant amount***) would, apart from the operation of the relevant exempting provisions, be included, under section 97, 99B or 100, in the assessable income of the relevant trust estate of a year of income (in this subsection referred to as the ***relevant year of income***);

(c) apart from this Division, the relevant amount would not be included in the assessable income of the relevant trust estate of the relevant year of income; and

(e) so much of the amount or value of the consideration provided by the taxpayer under or in connection with the tax avoidance agreement as the Commissioner is satisfied was provided in respect of the acquisition by the taxpayer of the relevant property substantially exceeds the amount or value of the consideration that might reasonably be expected to have been provided by the taxpayer in respect of the acquisition of the relevant property if the taxpayer were liable to pay tax, in respect of any income derived by the taxpayer from the relevant property, at the public company rate applicable for the financial year in which the taxpayer acquired the relevant property;

the diverted trust income of the relevant trust estate of the relevant year of income shall include the relevant amount.

(8) Where:

(a) a deduction is allowable or deductions are allowable, in calculating the net income of a partnership or trust estate of a year of income, in respect of losses or outgoings (in this subsection referred to as the ***relevant losses or outgoings***) incurred under or in connection with a tax avoidance agreement;

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(b) if no deduction were allowable, in calculating that net income, in respect of the relevant losses or outgoings and no relevant exempting provisions were applicable in relation to a taxpayer, an amount would be included in the assessable income of the taxpayer of a year of income by reason that the taxpayer owned an interest in the partnership or a beneficial interest in the trust estate or owned an interest in any other partnership or a beneficial interest in any other trust estate; and

(c) if the deduction or deductions were allowed, in calculating that net income, in respect of the relevant losses or outgoings and no relevant exempting provision were applicable in relation to the taxpayer:

(i) no amount would be included in the assessable income of the taxpayer of the year of income by reason that the taxpayer owned an interest in a partnership or a beneficial interest in a trust estate as mentioned in paragraph (b); or

(ii) an amount would be included in the assessable income of the taxpayer of the year of income by reason that the taxpayer owned an interest in a partnership or a beneficial interest in a trust estate as mentioned in paragraph (b) but the amount that would be so included in that assessable income would be less than the amount referred to in paragraph (b);

then, for the purposes of the application of subsections (2), (3), (5) and (6) in relation to the taxpayer in relation to the tax avoidance agreement, no deduction shall be allowed in respect of the relevant losses or outgoings in calculating the net income of the partnership or trust estate referred to in paragraph (a).

(10) For the purposes of the application of subsection (8), a reference to a deduction that is allowable in calculating the net income of a partnership does not include a reference to a deduction allowable to the partnership in respect of expenditure taken under sections 70-90 and 70-95 and subsection 70-100(3) of the *Income Tax Assessment Act 1997* to have been incurred in the acquisition of trading stock by the partnership.

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(11) In determining for the purposes of this section the amount or value of the consideration that might reasonably be expected to have been provided by a taxpayer in respect of the acquisition of property by the taxpayer if the taxpayer were liable to pay tax in respect of any income derived by the taxpayer from the property at the public company rate applicable for the financial year in which the taxpayer acquired the property, the possibility that the taxpayer would be entitled to a rebate of tax in respect of any of that income shall be disregarded.

(12) In determining for the purposes of this section whether an amount would, apart from the operation of the relevant exempting provisions, be included in the assessable income of a taxpayer or a trust estate of a year of income, section 128D of this Act and section 802-15 of the *Income Tax Assessment Act 1997* shall be disregarded.

(13) For the purposes of this section, where:

(a) a taxpayer acquired property, being an interest in a trust estate or partnership, before the time when a tax avoidance agreement was entered into; and

(b) under the tax avoidance agreement, or by reason of an act, transaction or circumstance occurring as part of, in connection with or as a result of the tax avoidance agreement, the amount of the share (in this subsection referred to as the ***relevant share***) of the taxpayer of the income of the trust estate or partnership of any year of income was or is increased;

the following provisions apply:

(c) the property referred to in paragraph (a) shall be taken to have been acquired by the taxpayer under the tax avoidance agreement; and

(d) any consideration provided by the taxpayer in respect of the increase in the amount of the relevant share shall be taken to be consideration provided by the taxpayer in respect of the acquisition of the property referred to in paragraph (a).

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(14) For the purposes of the application of this section in relation to the acquisition of property by a person under a tax avoidance agreement, the Commissioner may be satisfied that consideration provided by the person under or in connection with the tax avoidance agreement was provided by the person in respect of the acquisition of the property notwithstanding, in a case where the person acquired property from another person, that the consideration was not provided to that other person.

121H Assessment of diverted income and diverted trust income

(1) A taxpayer, not being a taxpayer in the capacity of a trustee of a trust estate, shall be assessed and is liable to pay tax, at the rate declared by the Parliament for the purposes of this Division, upon the diverted income of the taxpayer of the year of income.

(2) A taxpayer in the capacity of a trustee of a trust estate shall be assessed and is liable to pay tax, at the rate declared by the Parliament for the purposes of this Division, upon the diverted trust income of the trust estate of the year of income.

121J Ascertainment of diverted income or diverted trust income deemed to be an assessment

The ascertainment of the amount of the diverted income or diverted trust income and of the tax payable thereon shall, for all purposes of this Act be deemed to be an assessment.

121K Application of International Tax Agreements Act

For the purposes of sections 15 and 16 of the *International Tax Agreements Act 1953*, any amount that is included in the diverted income or diverted trust income of a taxpayer of a year of income shall be deemed to be included in the assessable income of the taxpayer of the year of income.

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121L Division applies notwithstanding exemption under other laws

This Division has effect notwithstanding anything contained in any law of the Commonwealth other than this Act.

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