



Tax and Superannuation Laws Amendment (2015 Measures No. 6) Act 2016

No. 10, 2016

**An Act to amend the law relating to taxation, and
for related purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

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Tax and Superannuation Laws Amendment (2015 Measures No. 6) Act 2016

No. 10, 2016

An Act to amend the law relating to taxation, and for related purposes

[Assented to 25 February 2016]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Tax and Superannuation Laws
Amendment (2015 Measures No. 6) Act 2016*.

No. 10, 2016 Tax and Superannuation Laws Amendment (2015 Measures No. 6) Act 1
2016

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	25 February 2016
2. Schedule 1, Parts 1 to 4	The day after this Act receives the Royal Assent.	26 February 2016
3. Schedule 1, Part 5	Immediately after the commencement of the provisions covered by table item 4.	26 February 2016
4. Schedule 2, Parts 1 and 2	The day after this Act receives the Royal Assent.	26 February 2016
5. Schedule 2, Part 3	Immediately after the commencement of Schedule 3 to the <i>Tax Laws Amendment (New Tax System for Managed Investment Trusts) Act 2016</i> . However, the provisions do not commence at all if that Schedule commences at the same time as, or before, the provisions covered by table item 4.	5 May 2016

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—CGT treatment of earnout rights

Part 1—Main amendments

Income Tax Assessment Act 1997

1 After section 112-35

Insert:

112-36 Acquisitions of assets involving look-through earnout rights

Consequences for cost base and reduced cost base

- (1) If you *acquire a *CGT asset because an entity *disposes of the CGT asset to you, and that disposal causes *CGT event A1 (the ***first CGT event***) to happen:
 - (a) neither the *cost base nor the *reduced cost base of the CGT asset includes the value of any *look-through earnout right relating to the CGT asset and the acquisition; and
 - (b) include in the first element of the CGT asset's cost base and reduced cost base any *financial benefit that you provide under such a look-through earnout right; and
 - (c) reduce the first element of the CGT asset's cost base and reduced cost base by an amount equal to the amount of any financial benefit that you receive under such a look-through earnout right.

Remaking choices affected by the look-through earnout right

- (2) Despite section 103-25, you may remake any choice you made under this Part or Part 3-3 for a later *CGT event involving the *CGT asset if:
 - (a) after the later CGT event, you provide or receive a *financial benefit under such a *look-through earnout right; and
 - (b) you remake the choice at or before the time you are required to lodge your *income tax return for the income year in which the financial benefit is provided or received.

Amending assessments affected by the look-through earnout right

- (3) The Commissioner may amend an assessment of a *tax-related liability if:
- (a) an entity provides or receives a *financial benefit under such a *look-through earnout right; and
 - (b) the amount of the tax-related liability:
 - (i) depends on that entity's taxable income for an income year in which a *CGT event, involving the *CGT asset, happens after the first CGT event but before the financial benefit is provided or received; or
 - (ii) is otherwise affected by that right's character as a look-through earnout right; and
 - (c) the Commissioner makes the amendment before the end of the 4-year period starting at the end of the income year in which the last possible financial benefit becomes or could become due under the look-through earnout right.

The tax-related liability need not be a liability of that entity.

Note: Subparagraph (b)(ii) covers changes to the amount of that tax-related liability that happen directly or indirectly because of subsection (1) or (2).

- (4) If at a particular time a right is taken never to have been a *look-through earnout right because of subsection 118-565(2), the Commissioner may amend an assessment of a *tax-related liability for up to 4 years after that time if:
- (a) an entity provides or receives a *financial benefit under the right; and
 - (b) the amount of the tax-related liability:
 - (i) depends on that entity's taxable income for an income year in which a *CGT event, involving the *CGT asset, happens after the first CGT event but before the financial benefit is provided or received; or
 - (ii) was otherwise affected by that right's character as a look-through earnout right before subsection 118-565(2) applied.

The tax-related liability need not be a liability of that entity.

Schedule 1 CGT treatment of earnout rights

Part 1 Main amendments

Note: Subsection 118-565(2) restricts look-through earnout rights to rights to financial benefits over a period not exceeding 5 years from the end of the income year in which the first CGT event happens.

- (5) If, after providing or receiving a *financial benefit under a right referred to in subsection (3) or (4):
- (a) you are dissatisfied with an assessment referred to in that subsection; and
 - (b) the Commissioner notifies you that the Commissioner has decided under that subsection not to amend your assessment; you may object against the assessment, to the extent that it does not take account of that right's character (as a *look-through earnout right or not such a right), in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

2 Section 116-25 (at the end of the cell at table item dealing with event A1, column headed "Special rules:")

Add:

If the disposal involves a
*look-through earnout
right: see section 116-120

3 At the end of Division 116

Add:

116-120 Disposals of assets involving look-through earnout rights

Consequences for capital proceeds

- (1) If *CGT event A1 happens because you *dispose of a *CGT asset, your *capital proceeds from the disposal:
- (a) do not include the value of any *look-through earnout right relating to the CGT asset and the disposal; and
 - (b) are increased by any *financial benefit that you receive under such a look-through earnout right; and
 - (c) are reduced by any financial benefit that you provide under such a look-through earnout right.

Remaking choices affected by the look-through earnout right

- (2) Despite section 103-25, you may remake any choice you made under this Part or Part 3-3 in relation to the *CGT event if:
- (a) you provide or receive a *financial benefit under such a *look-through earnout right; and
 - (b) you remake the choice at or before the time you are required to lodge your *income tax return for the income year in which the financial benefit is provided or received.

Amending assessments affected by the look-through earnout right

- (3) The Commissioner may amend an assessment of a *tax-related liability if:
- (a) an entity provides or receives a *financial benefit under such a *look-through earnout right; and
 - (b) the amount of the tax-related liability:
 - (i) depends on that entity's taxable income for the income year in which the *CGT event happens; or
 - (ii) is otherwise affected by that right's character as a look-through earnout right; and
 - (c) the Commissioner makes the amendment before the end of the 4-year period starting at the end of the income year in which the last possible financial benefit becomes or could become due under the look-through earnout right.

The tax-related liability need not be a liability of that entity.

Note: Subparagraph (b)(ii) covers changes to the amount of that tax-related liability that happen directly or indirectly because of subsection (1) or (2).

- (4) If at a particular time a right is taken never to have been a *look-through earnout right because of subsection 118-565(2), the Commissioner may amend an assessment of a *tax-related liability for up to 4 years after that time if:
- (a) an entity provides or receives a *financial benefit under the right; and
 - (b) the amount of the tax-related liability:
 - (i) depends on that entity's taxable income for the income year in which the *CGT event happens; or

- (ii) was otherwise affected by that right's character as a look-through earnout right before subsection 118-565(2) applied.

The tax-related liability need not be a liability of that entity.

Note: Subsection 118-565(2) restricts look-through earnout rights to rights to financial benefits over a period not exceeding 5 years from the end of the income year in which the CGT event happens.

- (5) If, after providing or receiving a *financial benefit under a right referred to in subsection (3) or (4):
- (a) you are dissatisfied with an assessment referred to in that subsection; and
 - (b) the Commissioner notifies you that the Commissioner has decided under that subsection not to amend your assessment;
- you may object against the assessment, to the extent that it does not take account of that right's character (as a *look-through earnout right or not such a right), in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

4 At the end of Division 118

Add:

Subdivision 118-I—Look-through earnout rights

Table of sections

118-560	Object
118-565	<i>Look-through earnout rights</i>
118-570	Extra ways a CGT asset can be an active asset
118-575	Creating and ending look-through earnout rights
118-580	Temporarily disregard capital losses affected by look-through earnout rights

118-560 Object

- (1) This Subdivision and its related provisions set out special rules for *look-through earnout rights. The object of these rules is to avoid unnecessary compliance costs and disadvantageous tax outcomes when entities involved in the sale of a business:
- (a) cannot agree on the current value of some or all of the business' assets due to uncertainty about the future economic performance of the business; and

- (b) resolve this uncertainty by agreeing to potentially provide future additional consideration linked to this performance.
- (2) These rules achieve this object by:
 - (a) disregarding any *capital gain or *capital loss relating to the creation of a *look-through earnout right; and
 - (b) for the acquirer of the business—treating any *financial benefits provided (or received) under the right as forming part of (or reducing) the cost base or reduced cost base of the business assets; and
 - (c) for the seller of the business—treating any financial benefits received (or provided) under the right as increasing (or reducing) the capital proceeds for the business assets.

Note: Sections 112-36 and 116-120 are 2 of the more important related provisions that set out these rules.

118-565 *Look-through earnout rights*

Look-through earnout rights—main case

- (1) A ***look-through earnout right*** is a right for which the following conditions are met:
 - (a) the right is a right to future *financial benefits that are not reasonably ascertainable at the time the right is created;
 - (b) the right is created under an *arrangement that involves the *disposal of a *CGT asset;
 - (c) the disposal causes *CGT event A1 to happen;
 - (d) just before the CGT event, the CGT asset was an *active asset of the entity who disposed of the asset;
- Note: For extra ways to be an active asset, see section 118-570.
- (e) all of the financial benefits that can be provided under the right are to be provided over a period ending no later than 5 years after the end of the income year in which the CGT event happens;
 - (f) those financial benefits are contingent on the economic performance of:
 - (i) the CGT asset; or

- (ii) a business for which it is reasonably expected that the CGT asset will be an active asset for the period to which those financial benefits relate;
- (g) the value of those financial benefits reasonably relates to that economic performance;
- (h) the parties to the arrangement deal with each other at *arm's length in making the arrangement.

Matters affecting the 5-year maximum period

- (2) The condition in paragraph (1)(e) is not met, and is treated as never having been met, for the right if:
 - (a) the *arrangement includes an option to extend or renew the arrangement; or
 - (b) the parties to the arrangement vary the arrangement; or
 - (c) those parties enter into another arrangement over the *CGT asset or a business for which it is reasonably expected that the CGT asset will be an *active asset;so that a party could, or does, provide *financial benefits under the right (or one or more equivalent rights) over a total period ending later than 5 years after the end of the income year in which the *CGT event happens.
- (3) For the purposes of paragraph (1)(e) or subsection (2), in working out the period over which *financial benefits under a right can be provided, disregard any part of an *arrangement that allows for an entity to defer providing such a financial benefit if:
 - (a) the deferral is contingent on an event happening that is beyond the control of the parties to the arrangement; and
 - (b) the deferral cannot change the amount of any financial benefit provided, or to be provided, under the right; and
 - (c) when the arrangement is entered into, the contingent event is not reasonably expected to happen.

Look-through earnout rights—rights for ending other rights

- (4) A **look-through earnout right** is a right to receive one or more future *financial benefits that:
 - (a) are for ending a right to which subsection (1) applies; and
 - (b) are certain.
-

Note: This subsection will not apply if the old right ends as described in subsection (2), as subsection (2) causes the old right to be treated as if it had never been a right to which subsection (1) applies.

118-570 Extra ways a CGT asset can be an active asset

- (1) For the purposes of this Subdivision, treat a *CGT asset as if it were an active asset of an entity at a particular time, if:
- (a) the entity owns it at that time; and
 - (b) it is either a *share in a company, or an interest in a trust; and
 - (c) at that time, the entity:
 - (i) is a *CGT concession stakeholder of the company or trust; or
 - (ii) if the entity is not an individual—has a *small business participation percentage in the company or trust of at least 20%; and
 - (d) at that time, the company or trust:
 - (i) is carrying on a *business, and has been carrying on a business since the start of the most recent income year ending before that time; and
 - (ii) is not a *subsidiary member of a *consolidated group; and
 - (e) the assessable income of the company or trust for that most recent income year was greater than nil, and at least 80% of that assessable income was:
 - (i) from the carrying on of one or more businesses; but
 - (ii) not *derived (directly or indirectly) from an asset of a kind to which paragraph 152-40(4)(d) or (e) applies.

Note: Paragraphs 152-40(4)(d) and (e) refer to financial instruments and assets used to derive interest, annuities, rent, royalties or foreign exchange gains.

- (2) For the purposes of this Subdivision, treat a *CGT asset as if it were an active asset of an entity at a particular time, if subsection 152-40(3) would have been satisfied for the asset at that time had paragraph 152-40(3)(a) only required the asset to be:
- (a) a *share in a company; or
 - (b) an interest in a trust.

Schedule 1 CGT treatment of earnout rights
Part 1 Main amendments

Note: This enables shares and interests in foreign entities to be active assets for the purposes of this Subdivision.

- (3) Subsections (1) and (2) do not limit section 152-40 (about active assets).

118-575 Creating and ending look-through earnout rights

Disregard a *capital gain or *capital loss you make because:

- (a) *CGT event C2 happens in relation to a *look-through earnout right you receive; or
- (b) CGT event D1 happens when you create a look-through earnout right in another entity.

118-580 Temporarily disregard capital losses affected by look-through earnout rights

- (1) Temporarily disregard a portion of a *capital loss you make from *disposing of a *CGT asset if the capital loss could be reduced by you receiving one or more *financial benefits under a *look-through earnout right relating to the CGT asset and the disposal.
- (2) The portion of the *capital loss that is temporarily disregarded is:
 - (a) if those *financial benefits can never exceed a maximum amount that is certain—so much of the capital loss as is equal to that maximum amount; or
 - (b) otherwise—all of the capital loss.

Note: When you receive a financial benefit under the look-through earnout right:

- (a) you cease to disregard under this section a portion of your loss related to the amount of that financial benefit; and
- (b) your capital proceeds for the disposal increase (see paragraph 116-120(1)(b)), causing a reduction in the amount of your loss.

5 Subsection 995-1(1)

Insert:

look-through earnout right has the meaning given by subsection 118-565(1) or (4).

Part 2—Preserving small business concessions

Income Tax Assessment Act 1997

6 Paragraph 104-185(1)(a)

Omit “period (the *replacement asset period*) starting one year before, and ending 2 years after, the last CGT event in the income year for which you obtain the roll-over”, substitute “*replacement asset period”.

7 Section 104-190 (heading)

Repeal the heading, substitute:

104-190 *Replacement asset period*

8 Before subsection 104-190(1)

Insert:

- (1A) If you choose a small business roll-over under Subdivision 152-E for a *CGT event that happens in relation to a *CGT asset in an income year, the *replacement asset period* is the period:
- (a) starting one year before the last CGT event in the income year for which you obtain the roll-over; and
 - (b) ending at the later of:
 - (i) 2 years after that last CGT event; and
 - (ii) if the first-mentioned CGT event happened because you *disposed of the CGT asset—6 months after the latest time a possible *financial benefit becomes or could become due under a *look-through earnout right relating to the CGT asset and the disposal.

9 Subsections 104-190(1) and (2)

Omit “replacement asset period”, substitute “*replacement asset period*”.

10 Subsections 104-197(1), (3) and (5)

Omit “replacement asset period”, substitute “*replacement asset period”.

11 Paragraph 104-198(1)(a)

Omit “replacement asset period”, substitute “*replacement asset period”.

12 Subsections 104-198(2) and (4)

Omit “replacement asset period”, substitute “*replacement asset period”.

13 At the end of section 152-20

Add:

Effect of look-through earnout rights

(5) Despite subsections (1) to (4), in working out the **net value of the CGT assets** of an entity at the time just before the *CGT event (the **valuing time**), you can make a choice under subsection (6) if:

- (a) at the valuing time, one or more of the entity’s *CGT assets were assets for which the entity later provided, or was later provided with, one or more *financial benefits under one or more *look-through earnout rights that were in existence at the valuing time; or
- (b) at the valuing time, one or more of the entity’s CGT assets were look-through earnout rights relating to CGT assets of:
 - (i) one or more of the other entities referred to in section 152-15; or
 - (ii) one or more entities not referred to in that section; or
- (c) you are the entity, and:
 - (i) the CGT event referred to in section 152-15 happened because you *disposed of a CGT asset; and
 - (ii) your *capital proceeds from the disposal were affected by one or more financial benefits provided to, or by, you under one or more look-through earnout rights;

and no further financial benefits can be provided under any of those look-through earnout rights.

Note: For paragraph (c), capital proceeds can be affected by financial benefits provided under a look-through earnout right (see section 116-120).

- (6) You can choose to treat the *market value of each of the *CGT assets first mentioned in the applicable paragraph of subsection (5) as if it were, at the valuing time, equal to:
- (a) if paragraph (5)(a) applies—the first element of the CGT asset's *cost base at the valuing time; or
 - (b) if subparagraph (5)(b)(i) applies—nil; or
 - (c) if subparagraph (5)(b)(ii) applies—the total of the financial benefits provided under the *look-through earnout right after the valuing time; or
 - (d) if paragraph (5)(c) applies—those *capital proceeds.

Note: For paragraph (a), the first element of a CGT asset's cost base can be affected by financial benefits provided under a look-through earnout right (see section 112-36).

- (7) In working out the *net value of the CGT assets* of an entity at the valuing time, if:
- (a) you make a choice under subsection (6) about a *CGT asset of the entity that is a CGT asset covered by paragraph (5)(a) or (c); and
 - (b) a *look-through earnout right covered by that paragraph is also a CGT asset of the entity;
- treat the *market value of that right as if it were nil at the valuing time.

14 Paragraph 152-125(1)(b)

Repeal the paragraph, substitute:

- (b) the company or trust makes one or more payments relating to the exempt amount to an individual (whether directly or indirectly through one or more interposed entities) before the later of:
 - (i) 2 years after the relevant *CGT event; and
 - (ii) if the relevant CGT event happened because the company or trust *disposed of the relevant CGT asset—6 months after the latest time a possible *financial benefit becomes or could become due under a *look-through earnout right relating to that CGT asset and the disposal; and
- (c) the individual was a *CGT concession stakeholder of the company or trust just before the relevant CGT event.

15 After subsection 152-305(1A)

Insert:

- (1B) For the purposes of (but without limiting) subsection (1A), you are treated as receiving the *capital proceeds in instalments if:
- (a) the *CGT event happened because you *disposed of the *CGT asset; and
 - (b) the capital proceeds from the disposal are increased by one or more *financial benefits that you receive under a *look-through earnout right.

16 After subsection 152-325(2)

Insert:

- (2A) For the purposes of (but without limiting) subsection (2), the company or trust is treated as receiving the *capital proceeds in instalments if:
- (a) the *CGT event happened because the company or trust *disposed of the *CGT asset; and
 - (b) the capital proceeds from the disposal are increased by one or more *financial benefits that the company or trust receives under a *look-through earnout right.

17 Paragraph 292-100(4)(b)

Repeal the paragraph, substitute:

- (b) the entity makes a payment to you before the later of:
 - (i) 2 years after the CGT event; and
 - (ii) if the CGT event happened because the entity *disposed of the relevant *CGT asset—6 months after the latest time a possible *financial benefit becomes or could become due under a *look-through earnout right relating to that CGT asset and the disposal; and

18 Subsection 995-1(1)

Insert:

replacement asset period has the meaning given by section 104-190.

Part 3—Other consequential amendments

Income Tax Assessment Act 1997

19 Paragraph 25-85(2)(a)

Omit “*contingent on the economic performance”, substitute “*contingent on aspects of the economic performance”.

20 Paragraph 230-15(4)(a)

Omit “*contingent on the economic performance”, substitute “*contingent on aspects of the economic performance”.

21 Subsection 230-460(13)

Omit “contingent only on the economic performance”, substitute “only *contingent on aspects of the economic performance”.

22 Subsection 820-930(2) (table item 2)

Omit “*contingent on the economic performance”, substitute “*contingent on aspects of the economic performance”.

23 Subsection 974-75(1) (table item 2)

Omit “*contingent on the economic performance”, substitute “*contingent on aspects of the economic performance”.

24 Paragraph 974-80(2)(a)

Omit “*contingent on the economic performance”, substitute “*contingent on aspects of the economic performance”.

25 Subsection 974-80(2) (example)

Omit “contingent on the economic performance” (wherever occurring), substitute “contingent on aspects of the economic performance”.

26 Section 974-85 (heading)

Repeal the heading, substitute:

974-85 Right or return contingent on aspects of economic performance

27 Subsection 974-85(1)

Repeal the subsection, substitute:

- (1) A right, or the amount of a return, is *contingent on aspects of the economic performance* of an entity, or a part of the entity's activities, if the right or return is contingent on the economic performance of that entity, or that part of those activities, but not solely because of one of the following:
- (a) the ability or willingness of an entity to meet the obligation to satisfy the right to the return;
 - (b) the receipts or turnover of the entity or the turnover generated by those activities.

28 Subsection 974-85(2)

After "contingent, on", insert "aspects of".

29 Paragraph 974-85(4)(c)

Omit "*contingent on the economic performance", substitute "*contingent on aspects of the economic performance".

30 Subsection 974-140(1)

Omit "*contingent on the economic performance", substitute "*contingent on aspects of the economic performance".

31 Subsection 995-1(1) (definition of *contingent on the economic performance*)

Repeal the definition.

32 Subsection 995-1(1)

Insert:

contingent on aspects of the economic performance has the meaning given by section 974-85.

Taxation Administration Act 1953

33 After paragraph 14ZW(1)(aaa)

Insert:

- (aaaa) if the taxation objection is made under subsection 112-36(5) or 116-120(5) of the *Income Tax Assessment Act 1997*—60 days after the notice mentioned in paragraph (b) of that subsection is given to the person; or

34 At the end of section 280-100 in Schedule 1

Add:

Liability arising because of a financial benefit under a look-through earnout right

- (5) Subsection (1) does not apply if:
- (a) you provide or receive a *financial benefit under a *look-through earnout right; and
 - (b) you request the Commissioner to amend your assessment for an income year (the **taxing year**) to take account of the financial benefit; and
 - (c) you make that request at or before the time:
 - (i) you are required to lodge your *income tax return for the income year in which the financial benefit is provided or received; or
 - (ii) you would be so required if you were required to lodge an income tax return for that income year; and
 - (d) as a result of paragraph (a), you are liable to pay an additional amount of income tax for the taxing year.

35 At the end of section 280-102A in Schedule 1

Add:

Liability arising because of a financial benefit under a look-through earnout right

- (4) Subsection (1) does not apply if:
- (a) you provide or receive a *financial benefit under a *look-through earnout right; and

- (b) you request the Commissioner to amend your *excess non-concessional contributions tax assessment for a *financial year to take account of the financial benefit; and
- (c) you make that request at or before the time:
 - (i) you are required to lodge your *income tax return for the income year in which the financial benefit is provided or received; or
 - (ii) you would be so required if you were required to lodge an income tax return for that income year; and
- (d) as a result of paragraph (a), you are liable to pay an additional amount of *excess non-concessional contributions tax for the financial year.

36 At the end of section 280-102B in Schedule 1

Add:

Liability arising because of a financial benefit under a look-through earnout right

- (5) Subsection (1) does not apply if:
 - (a) you provide or receive a *financial benefit under a *look-through earnout right; and
 - (b) you request the Commissioner to amend your assessment of *Division 293 tax payable in relation to an income year (the **taxing year**) to take account of the financial benefit; and
 - (c) you make that request at or before the time:
 - (i) you are required to lodge your *income tax return for the income year in which the financial benefit is provided or received; or
 - (ii) you would be so required if you were required to lodge an income tax return for that income year; and
 - (d) as a result of paragraph (a), you are liable to pay an additional amount of Division 293 tax for the taxing year.

Taxation (Interest on Overpayments and Early Payments)
Act 1983

37 After subsection 9(1A)

Insert:

- (1B) Subsection (1) does not apply to an overpayment to the extent that the overpayment results from the person providing or receiving a financial benefit (within the meaning of the *Income Tax Assessment Act 1997*) under a look-through earnout right (within the meaning of that Act).

Part 4—Application and transitional provisions

38 Application of amendments

The amendments made by Parts 1 to 3 apply in relation to look-through earnout rights created on or after 24 April 2015.

39 Transitional—protection for anticipating announcement

- (1) Section 170B of the *Income Tax Assessment Act 1936* also applies as if the following additional announcement were listed in the table in subsection (8) of that section:
 - 14 Budget Paper No. 2, Budget Measures 2010-11, Part 1, 11 May 2010
topic headed “Capital gains tax—look-through
treatment for earnout arrangements”.
- (2) Subsection 170B(3) and paragraph 170B(8)(b) of that Act also apply in relation to that announcement as if references in those provisions to 14 December 2013 were references to 23 April 2015.

Part 5—Amendments relating to foreign resident capital gains withholding payments

Taxation Administration Act 1953

40 Subparagraph 14-200(3)(a)(i) in Schedule 1

Repeal the subparagraph, substitute:

- (i) the first element of the *CGT asset's *cost base just after the *acquisition, ignoring paragraphs 112-36(1)(b) and (c) of the *Income Tax Assessment Act 1997* (about the effect of look-through earnout rights); less

41 After section 14-200 in Schedule 1

Insert:

14-205 Effect of look-through earnout rights

Acquisitions of taxable Australian property from foreign residents

- (1) You must pay to the Commissioner an amount if:
 - (a) you are required under section 14-200 to pay an amount to the Commissioner in relation to your *acquisition of a *CGT asset; and
 - (b) under a *look-through earnout right relating to the CGT asset and the acquisition, you provide a *financial benefit to one or more entities; and
 - (c) subsection 14-210(1) (about foreign residents) would apply to at least one of those entities at the time you provide the financial benefit if section 14-210 were modified as described in subsection (2) of this section; and
 - (d) an amount is not already required to be withheld from a *withholding payment relating to the financial benefit.

Note 1: To work out the amount payable, see subsection (4).

Note 2: You must pay the amount on account of income tax possibly payable by the entities on their increased capital proceeds from receiving the financial benefit.

Schedule 1 CGT treatment of earnout rights

Part 5 Amendments relating to foreign resident capital gains withholding payments

Modifications of the relevant foreign residents test

(2) The modifications of section 14-210 are as follows:

Modifications to section 14-210 for the purposes of this section		
	Column 1	Column 2
Item	For a reference in that section to:	substitute a reference to:
1	transaction is entered into	*financial benefit is provided
2	transaction (other than a reference covered by item 1)	*financial benefit
3	14-200	14-205

When you must pay the amount

(3) You must pay the amount to the Commissioner on or before the day you provide the *financial benefit.

Note: There are penalties for failing to pay the amount (see Division 16).

(4) The amount to be paid to the Commissioner is:

- (a) unless paragraph (b) applies—an amount equal to 10% of the *market value of the *financial benefit; or
- (b) the varied amount applying under section 14-235.

42 Subsection 250-10(2) in Schedule 1 (table item 101)

After “14-200”, insert “or 14-205”.

43 Application of amendments

The amendments made by this Part, to the extent that they relate to acquisitions of a kind described in subsection 14-205(1) in Schedule 1 to the *Taxation Administration Act 1953* (as inserted by this Part), apply in relation to acquisitions on or after the later of:

- (a) 1 July 2016; and
- (b) the commencement of this Part.

Note: For working out when a CGT asset is acquired, see Division 109 of the *Income Tax Assessment Act 1997*.

Schedule 2—Foreign resident capital gains withholding payments

Part 1—Main amendments

Taxation Administration Act 1953

1 At the end of Division 14 in Schedule 1

Add:

Subdivision 14-D—Capital proceeds involving foreign residents and taxable Australian property

Table of sections

14-200	Certain acquisitions of taxable Australian property from foreign residents
14-210	Whether an entity is a relevant foreign resident
14-215	Excluded transactions
14-220	Commissioner clearance certificates
14-225	Entity declarations
14-230	Administrative penalties for false or misleading declarations
14-235	Varying amounts to be paid to the Commissioner

14-200 Certain acquisitions of taxable Australian property from foreign residents

- (1) You must pay to the Commissioner an amount if:
 - (a) you become the owner of a *CGT asset as a result of *acquiring it from one or more entities under one or more transactions; and
 - (b) subsection 14-210(1) (about foreign residents) applies to at least one of those entities at the time one of those transactions is entered into; and
 - (c) at that time, the CGT asset is:
 - (i) *taxable Australian real property; or
 - (ii) an *indirect Australian real property interest; or
 - (iii) an option or right to acquire such property or such an interest;

Schedule 2 Foreign resident capital gains withholding payments

Part 1 Main amendments

unless a transaction referred to in paragraph (a) is excluded under section 14-215.

Note: You must pay the amount on account of income tax possibly payable by the entities on their capital proceeds resulting from your acquisition of the CGT asset.

- (2) You must pay the amount to the Commissioner on or before the day you became the *CGT asset's owner.

Note: There are penalties for failing to pay the amount (see Division 16).

- (3) The amount to be paid to the Commissioner is:

(a) unless paragraph (b) applies—an amount equal to 10% of:

- (i) the first element of the *CGT asset's *cost base just after the *acquisition; less
- (ii) if the acquisition is the result of you exercising an option—any payment you made, and the *market value of any property you gave, for the option (or to renew or extend it); or

(b) the varied amount applying under section 14-235.

- (4) This section does not apply if the amount that would otherwise be payable is nil.

14-210 Whether an entity is a relevant foreign resident

Is the entity a foreign resident at the time of the transaction?

- (1) This subsection applies to an entity at the time a transaction is entered into if, at that time:

- (a) you know that the entity is a foreign resident; or
- (b) you reasonably believe that the entity is a foreign resident; or
- (c) you do not reasonably believe that the entity is an Australian resident, and either:
- (i) the entity has an address outside Australia (according to any record that is in your possession, or is kept or maintained on your behalf, about the transaction); or
- (ii) you are authorised to provide a related financial benefit to a place outside Australia (whether to the entity or to anyone else); or

- (d) the entity has a connection outside Australia of a kind specified in the regulations; or
- (e) the *CGT asset to which the transaction relates is:
 - (i) *taxable Australian real property; or
 - (ii) an *indirect Australian real property interest, the holding of which causes a company title interest (within the meaning of Part X of the *Income Tax Assessment Act 1936*) to arise.

Note: This subsection is relevant to whether you must pay an amount to the Commissioner under section 14-200.

Exception—the entity gives you a clearance certificate

- (2) Despite subsection (1), that subsection does not apply to the entity in relation to the transaction if:
 - (a) before you pay the Commissioner under section 14-200 in relation to the *CGT asset to which the transaction relates, the entity gives you a certificate about the entity that:
 - (i) was issued under subsection 14-220(1); and
 - (ii) is for a period covering the time the transaction is entered into; and
 - (b) the CGT asset is of a kind described in paragraph (1)(e) of this section.

Exception—the entity gives you a residency or interests declaration

- (3) Despite subsection (1), that subsection does not apply to the entity in relation to the transaction if:
 - (a) before you pay the Commissioner under section 14-200 in relation to the *CGT asset to which the transaction relates, the entity gives you a declaration that:
 - (i) is about the entity or the CGT asset; and
 - (ii) was given under subsection 14-225(1) or (2); and
 - (iii) is for a period covering the time the transaction is entered into; and
 - (b) when you are given the declaration, you do not know the declaration to be false; and

- (c) for a declaration given under subsection 14-225(1)—the CGT asset is not of a kind described in paragraph (1)(e) of this section.

14-215 Excluded transactions

Kinds of excluded transactions

- (1) A transaction that results in the *acquisition of a *CGT asset is excluded under this section if:
- (a) just after the transaction, the CGT asset:
 - (i) is *taxable Australian real property; or
 - (ii) is an *indirect Australian real property interest, the holding of which causes a company title interest (within the meaning of Part X of the *Income Tax Assessment Act 1936*) to arise;and the *market value of the CGT asset is less than \$2 million; or
 - (b) the transaction is on an *approved stock exchange; or
 - (c) the transaction is conducted using a crossing system (within the meaning of the *market integrity rules); or
 - (d) an amount is already required to be withheld from a *withholding payment relating to the transaction; or
 - (e) subsection 26BC(3) of the *Income Tax Assessment Act 1936* (about securities lending arrangements) applies in relation to the transaction as a result of the transaction being covered by subparagraph (a)(ii) of that subsection; or
 - (f) any of the entities to which subsection 14-210(1) (about foreign residents) applies at the time of the transaction:
 - (i) is a company for which any of the conditions in paragraph 161A(1)(a) of the *Corporations Act 2001* (about insolvency and external administration) is satisfied; or
 - (ii) is, under a *foreign law, in the same or a similar position to a company covered by subparagraph (i); or
 - (g) the transaction arises from any of the following:
 - (i) the administration of the estate of a bankrupt;

- (ii) a composition or scheme of arrangement accepted under Division 6 of Part IV of the *Bankruptcy Act 1966*;
- (iii) a debt agreement under Part IX of that Act;
- (iv) a personal insolvency agreement under Part X of that Act;
- (v) circumstances that are, under a foreign law, the same or similar to those in any of the above subparagraphs.

Note: This section is relevant to whether you must pay an amount to the Commissioner under section 14-200.

Dealing with joint ownership etc. of certain CGT assets

- (2) For the purposes of paragraph (1)(a), if:
 - (a) the *CGT asset is an interest in real property, or an interest in a *mining, quarrying or prospecting right; and
 - (b) just after the transaction, there are one or more similar interests in the same real property or right;treat the *market value of the CGT asset just after the transaction as including the market value of each of those similar interests.
- (3) Without limiting subsection (2):
 - (a) treat an interest as being similar to the *CGT asset if it is specified in regulations made for the purposes of this paragraph in relation to CGT assets of that kind; and
 - (b) treat an interest as not being similar to the CGT asset if it is specified in regulations made for the purposes of this paragraph in relation to CGT assets of that kind.

14-220 Commissioner clearance certificates

- (1) The Commissioner may certify that, based on information before the Commissioner, there is nothing to suggest that an entity is or will be a foreign resident during a specified period.

Note: Such a certificate could result in you not being required to pay an amount under this Subdivision (see subsection 14-210(2)).

- (2) A certificate under subsection (1):
 - (a) may be issued on application to the Commissioner in the *approved form; and
 - (b) is to be in writing; and

(c) applies only for the purposes of this Subdivision.

- (3) For the purposes of (but without limiting) paragraph 388-50(1)(c), the Commissioner may require an application for a certificate under subsection (1) to state:
- (a) whether the applicant holds or will hold specified *CGT assets on behalf of another entity during any part of the period for which the certificate is sought; and
 - (b) whether the applicant knows or reasonably believes that the other entity is or will be a foreign resident during that period.

Note: Section 388-50 sets out when an application is in the approved form.

- (4) A certificate issued under subsection (1) is not a legislative instrument.

14-225 Entity declarations

Declaration that an entity is an Australian resident

- (1) An entity may, in writing, declare that, for a specified period, the entity is and will be an Australian resident.

Note: Such a declaration could result in you not being required to pay an amount under this Subdivision (see subsection 14-210(3)).

Declaration that asset not an indirect Australian real property interest

- (2) An entity may, in writing, declare that, for a specified period, specified *CGT assets are *membership interests but not *indirect Australian real property interests.

Note: Such a declaration could result in you not being required to pay an amount under this Subdivision (see subsection 14-210(3)).

Limit on the periods for which declarations have effect

- (3) A period specified in a declaration under this section is of no effect to the extent that it includes days later than 6 months after the day the declaration is made.

Declarations are not legislative instruments

- (4) A declaration under this section is not a legislative instrument.

14-230 Administrative penalties for false or misleading declarations

Knowingly making false or misleading declarations

- (1) You are liable to pay the Commissioner a penalty of 120 penalty units if:
- (a) you make a statement; and
 - (b) the statement is, or purports to be, a declaration under section 14-225; and
 - (c) the statement is false or misleading in a material particular, whether because of things in it or omitted from it; and
 - (d) you know, at the time of making the statement, that it is so false or misleading.

Note: Division 298 contains machinery provisions for administrative penalties.

Recklessly making false or misleading declarations

- (2) You are liable to pay the Commissioner a penalty of 80 penalty units if:
- (a) you make a statement; and
 - (b) the statement is, or purports to be, a declaration under section 14-225; and
 - (c) the statement is false or misleading in a material particular, whether because of things in it or omitted from it; and
 - (d) you were reckless in connection with the making of the statement.

Note: Division 298 contains machinery provisions for administrative penalties.

Not taking reasonable care in making declarations

- (3) You are liable to pay the Commissioner a penalty of 40 penalty units if:
- (a) you make a statement; and

- (b) the statement is, or purports to be, a declaration under section 14-225; and
- (c) the statement is false or misleading in a material particular, whether because of things in it or omitted from it; and
- (d) you did not take reasonable care in connection with the making of the statement.

Note: Division 298 contains machinery provisions for administrative penalties.

14-235 Varying amounts to be paid to the Commissioner

Policies relevant to varying amounts

- (1) In exercising a power under this section to vary an amount, the Commissioner must have regard to the need to protect a creditor's right to recover a debt.

Varying particular amounts

- (2) The Commissioner may, in writing, vary a particular amount payable by you to the Commissioner under this Subdivision. The variation takes effect when you become aware of it.

Note: Decisions to vary, or not to vary, are reviewable (see section 20-80).

- (3) Any of the following entities may apply to the Commissioner in the *approved form for a variation under subsection (2):
 - (a) you;
 - (b) an entity from which you *acquire, or could acquire, the *CGT asset;
 - (c) an entity that is owed a debt by an entity covered by paragraph (b).
- (4) A variation made under subsection (2) is not a legislative instrument.

Varying classes of amounts

- (5) The Commissioner may, by legislative instrument, vary classes of amounts payable to the Commissioner under this Subdivision.
-

Amounts may be reduced to nil

- (6) The Commissioner's power under subsection (2) or (5) to vary an amount includes the power to reduce the amount to nil.

Part 2—Consequential amendments

Income Tax Assessment Act 1936

2 At the end of section 202

Add:

; and (s) to facilitate the administration of Subdivision 14-D in Schedule 1 to the *Taxation Administration Act 1953*.

Income Tax Assessment Act 1997

3 Section 855-15 (note)

Omit “Note:”, substitute “Note 1:”.

4 At the end of section 855-15

Add:

Note 2: Payments may need to be made to the Commissioner for acquisitions of some kinds of taxable Australian property if foreign residents are involved (see Subdivision 14-D in Schedule 1 to the *Taxation Administration Act 1953*).

5 Subsection 995-1(1) (paragraph (b) of the definition of *amount required to be withheld*)

Omit “*non-cash benefit of which the withholding payment consists”, substitute “*non-cash benefit or *capital proceeds to which the withholding payment relates”.

6 Subsection 995-1(1) (paragraph (b) of the definition of *amount withheld*)

Omit “*non-cash benefit of which the withholding payment consists”, substitute “*non-cash benefit or *capital proceeds to which the withholding payment relates”.

7 Subsection 995-1(1) (paragraph (c) of the definition of *withholding payment, first occurring*)

After “*non-cash benefit”, insert “, or the *capital proceeds,”.

8 Subsection 995-1(1) (note 2 at the end of the definition of *withholding payment*, first occurring)

Omit “or non-cash benefit”, substitute “, non-cash benefit or capital proceeds”.

9 Subsection 995-1(1) (at the end of the definition of *withholding payment* covered by a particular provision in Schedule 1 to the *Taxation Administration Act 1953*)

Add:

; or (d) the *capital proceeds in respect of which Subdivision 14-D in that Schedule requires an amount to be paid to the Commissioner.

Taxation Administration Act 1953

10 Paragraph 8WA(1AA)(b)

Omit “or (r)”, substitute “, (r) or (s)”.

11 Paragraph 8WB(1A)(a)

Omit “or (r)”, substitute “, (r) or (s)”.

12 Paragraph 8WB(1A)(b)

Omit “or (r)”, substitute “, (r) or (s)”.

13 Paragraph 10-5(2)(b) in Schedule 1

Repeal the paragraph, substitute:

(b) non-cash benefits, and capital proceeds involving foreign residents and certain kinds of taxable Australian property (see Division 14).

14 Subsection 10-5(2) in Schedule 1 (note)

After “non-cash benefit”, insert “or capital proceeds”.

15 Section 16-20 in Schedule 1

Before “An”, insert “(1)”.

16 At the end of section 16-20 in Schedule 1

Add:

- (2) An entity is discharged from all liability to pay so much of the total amount payable to *acquire a *CGT asset as is equal to any amount the entity pays to the Commissioner under Subdivision 14-D in relation to the acquisition.

17 Subsections 16-70(3) and (4) in Schedule 1

Repeal the subsections, substitute:

- (3) An entity that must pay an amount to the Commissioner under Subdivision 14-B, 14-C or 14-D must do so in accordance with sections 16-80 and 16-85.

Note: For provisions about the collection and recovery of amounts payable to the Commissioner under this Part, see Part 4-15.

18 Section 16-80 in Schedule 1

Omit “16-70(1), (3) or (4)”, substitute “16-70(1) or (3)”.

19 Paragraph 16-140(1)(b) in Schedule 1

After “non-cash benefits”, insert “or capital proceeds”.

20 Paragraph 16-143(2)(b) in Schedule 1

Omit “non-cash benefits”, substitute “*non-cash benefits or *capital proceeds”.

21 Paragraph 16-150(b) in Schedule 1

After “non-cash benefits”, insert “or capital proceeds”.

22 Subparagraph 18-65(1)(a)(ii) in Schedule 1

After “Division 14”, insert “(other than Subdivision 14-D)”.

23 Paragraph 18-65(6)(c) in Schedule 1

After “14”, insert “(other than Subdivision 14-D)”.

24 Subparagraph 18-70(1)(a)(ii) in Schedule 1

Omit “recipient; and”, substitute “recipient; or”.

25 At the end of paragraph 18-70(1)(a) in Schedule 1

Add:

- (iii) paid to the Commissioner an amount purportedly under Subdivision 14-D for *capital proceeds provided to, or applied on behalf of, the recipient; and

26 Paragraph 18-70(1)(c) in Schedule 1

Before “section 18-65”, insert “if subparagraph (a)(i), (ia) or (ii) applies—”.

27 Section 20-80 in Schedule 1 (after table item 10)

Insert:

- | | |
|----|--|
| 14 | Decision under subsection 14-220(1) not to issue a certificate on application under subsection 14-220(2) |
| 15 | Decision under subsection 14-220(1) to issue a certificate |
| 16 | Decision under subsection 14-235(2) not to vary an amount on application under subsection 14-235(3) |
| 17 | Decision under subsection 14-235(2) to vary an amount |

28 Subsection 250-10(2) in Schedule 1 (after table item 100)

Insert:

- | | | | |
|-----|-----------------------------------|----------------------|---|
| 101 | payment of amount to Commissioner | 14-200 in Schedule 1 | <i>Taxation Administration Act 1953</i> |
|-----|-----------------------------------|----------------------|---|

29 Paragraph 298-5(c) in Schedule 1

After “Subdivision 12-H”, insert “or 14-D”.

30 Application of amendments

The amendments made by Part 1 and this Part, to the extent that they relate to acquisitions of a kind described in section 14-200 in Schedule 1 to the *Taxation Administration Act 1953* (as inserted by Part 1), apply in relation to acquisitions on or after 1 July 2016.

Note: For working out when a CGT asset is acquired, see Division 109 of the *Income Tax Assessment Act 1997*.

Part 3—Contingent amendments

Tax Laws Amendment (New Tax System for Managed Investment Trusts) Act 2016

31 Item 14 of Schedule 3 (heading)

Repeal the heading, substitute:

14 Paragraph 16-20(1)(b) in Schedule 1

Note: This Part only commences if Schedule 3 to the *Tax Laws Amendment (New Tax System for Managed Investment Trusts) Act 2016* commences after the other Parts of this Schedule.

[Minister's second reading speech made in—
House of Representatives on 3 December 2015
Senate on 4 February 2016]

(217/15)
