



Income Tax Assessment Amendment Regulations 2011 (No. 2)¹

Select Legislative Instrument 2011 No. 35

I, QUENTIN BRYCE, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following Regulations under the *Income Tax Assessment Act 1997*.

Dated 10 March 2011

QUENTIN BRYCE
Governor-General

By Her Excellency's Command

BILL SHORTEN
Assistant Treasurer

1 Name of Regulations

These Regulations are the *Income Tax Assessment Amendment Regulations 2011 (No. 2)*.

2 Commencement

These Regulations commence on the day after they are registered.

3 Amendment of *Income Tax Assessment Regulations 1997*

Schedule 1 amends the *Income Tax Assessment Regulations 1997*.

Schedule 1 Amendments

(regulation 3)

[1] Subregulations 974-135D (3) and (4)

omit

For

insert

In

[2] Subregulation 974-135D (5)

omit

[3] Regulation 974-135D

omit

(6) If

insert

(5) If

[4] After regulation 974-135D

insert

974-135E Perpetual cumulative subordinated note

- (1) This regulation applies to an obligation to pay interest on a relevant perpetual subordinated note at a particular time on or after 1 July 2001.
- (2) For paragraphs 974-135 (8) (a) and (b) of the Act, the fact that the obligation is subject to profitability, insolvency or negative earnings conditions does not in itself prevent the obligation from being a non-contingent obligation.
- (3) In this regulation, a ***relevant perpetual subordinated note*** is a perpetual subordinated note that:
 - (a) at the time of its issue:
 - (i) does not constitute or meet the requirements of a Tier 1 capital instrument; and
 - (ii) does not form part of the Tier 1 capital of the issuer of the note, or a connected entity, and the reason for it not doing so is not that the instrument is in excess of the Tier 1 capital required for the purposes of prudential standards that deal with capital adequacy; and
 - (b) would be a debt interest but for the obligation being subject to one or more profitability, insolvency or negative earnings conditions; and
 - (c) is subject to the condition that any deferred interest must accumulate (with or without compounding); and

- (d) was issued by:
 - (i) an ADI that is a bank or non-mutual building society and that is regulated for prudential purposes by APRA; or
 - (ii) a subsidiary of an ADI mentioned in subparagraph (i), being a subsidiary that is regulated with the ADI for prudential purposes by APRA; or
 - (iii) an entity that:
 - (A) has undertaken to comply with prudential standards, issued by APRA, that deal with capital adequacy; and
 - (B) is regulated for prudential purposes by APRA; or
 - (iv) a subsidiary of an entity mentioned in subparagraph (iii) that is covered by the undertaking mentioned in that subparagraph; or
 - (v) an entity that is regulated for prudential purposes:
 - (A) by a foreign prudential regulator that has a prudential regulatory role comparable to that of APRA; and
 - (B) under ADI capital adequacy requirements comparable to those of APRA; and
 - (e) does not give the issuer of the note an unconditional right to decline to provide a financial benefit that is equal in nominal value to the issue price of the note to settle the obligations under the note.
- (4) In this regulation, conditions applying to the obligation are ***profitability, insolvency or negative earnings conditions*** if they have the effect that the issuer of the note is able, or obliged, to defer the payment of the interest (with or without compounding) beyond the date on which it would otherwise be payable if, on that date:
- (a) profitability does not justify the payment; or
 - (b) the issuer of the note is insolvent, or would become insolvent if the payment were made; or

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- (c) a dividend has not been declared or paid on a class or classes of share capital of the issuer during a specified period that:
 - (i) immediately precedes that date; and
 - (ii) is no more than 24 months; or
 - (d) the issuer's retained earnings are negative, or would be negative if the payment were made.
- (5) If the obligation is an obligation to pay at a time before the day this regulation commences, this regulation applies only to the extent that applying it would not have the result that:
- (a) the rights of a person (other than the Commonwealth or an authority of the Commonwealth) immediately before the day this regulation commences would be affected so as to disadvantage that person; or
 - (b) liabilities would be imposed on a person (other than the Commonwealth or an authority of the Commonwealth) for anything done or omitted to be done before the day this regulation commences.

Note The application of this regulation to a perpetual subordinated note does not mean that the note, together with one or more related schemes, cannot give rise to an equity interest.

[5] Regulation 995-1.01, after definition of *defined benefit member*

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insolvent, for an issuer, means:

- (a) the issuer cannot pay its debts as they fall due; or
- (b) the issuer's liabilities exceed its assets.

Note

1. All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See <http://www.frli.gov.au>.