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The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Presented and read a first time

**Tax Laws Amendment (Cross-Border
Transfer Pricing) Bill (No. 1) 2012**

No. , 2012

(Treasury)

**A Bill for an Act to amend the law relating to
taxation, and for related purposes**

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1 **A Bill for an Act to amend the law relating to**
2 **taxation, and for related purposes**

3 The Parliament of Australia enacts:

4 **1 Short title**

5 This Act may be cited as the *Tax Laws Amendment (Cross-Border*
6 *Transfer Pricing) Act (No. 1) 2012.*

7 **2 Commencement**

8 This Act commences on the day this Act receives the Royal
9 Assent.

10 **3 Schedule(s)**

11 Each Act that is specified in a Schedule to this Act is amended or
12 repealed as set out in the applicable items in the Schedule

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concerned, and any other item in a Schedule to this Act has effect according to its terms.

1 **Schedule 1—Amendments**
2

3 ***Income Tax Assessment Act 1936***

4 **1 At the end of subsection 136AB(1)**

5 Add:

6 Note: This Division is subject to Subdivision 815-A of the *Income Tax*
7 *Assessment Act 1997* (about cross-border transfer pricing): see
8 section 815-40 of that Act.

9 **2 Subsection 170(9B)**

10 Omit “or a relevant provision”, substitute “, a relevant provision, or
11 Subdivision 815-A of the *Income Tax Assessment Act 1997*”.

12 **3 At the end of subsection 170(9B)**

13 Add:

14 Note: Subdivision 815-A of the *Income Tax Assessment Act 1997* is about
15 cross-border transfer pricing.

16 **4 Paragraph 170(9C)(b)**

17 Omit “or the relevant provision”, substitute “, the relevant provision, or
18 Subdivision 815-A of the *Income Tax Assessment Act 1997*”.

19 ***Income Tax Assessment Act 1997***

20 **5 Section 10-5 (table item headed “profits”)**

21 Before:

profit-making undertaking or plan 15-15

22 insert:

cross-border transfer pricing 815-30

23 **6 After Division 802**

24 Insert:

25 **Division 815—Cross-border transfer pricing**

26 **Table of Subdivisions**

1 815-A Treaty-equivalent cross-border transfer pricing rules

2 **Subdivision 815-A—Treaty-equivalent cross-border transfer**
3 **pricing rules**

4 **Guide to Subdivision 815-A**

5 **815-1 What this Subdivision is about**

6

7 The cross-border transfer pricing rules in this Subdivision are
8 equivalent to, but independent of, the transfer pricing rules in
 Australia’s double tax agreements.

9 **Table of sections**

10	Operative provisions
11	815-5 Object
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13	815-15 When an entity gets a <i>transfer pricing benefit</i>
14	815-20 Cross-border transfer pricing guidance
15	815-25 Modified transfer pricing benefit for thin capitalisation
16	815-30 Determinations negating transfer pricing benefit
17	815-35 Consequential adjustments
18	815-40 No double taxation

19 **Operative provisions**

20 **815-5 Object**

21 The object of this Subdivision is to ensure the following amounts
22 are appropriately brought to tax in Australia, consistent with the
23 arm’s length principle:
24 (a) profits which would have accrued to an Australian entity if it
25 had been dealing at *arm’s length, but, by reason of
26 non-arm’s length conditions operating between the entity and
27 its foreign associated entities, have not so accrued;
28 (b) profits which an Australian permanent establishment (within
29 the meaning of the relevant *international tax agreement) of a
30 foreign entity might have been expected to make if it were a
31 distinct and separate entity engaged in the same or similar

1 activities under the same or similar conditions, but dealing
2 wholly independently.

3 **815-10 Transfer pricing benefit may be negated**

- 4 (1) The Commissioner may make a determination mentioned in
5 subsection 815-30(1), in writing, for the purpose of negating a
6 *transfer pricing benefit an entity gets.

7 *Treaty requirement*

- 8 (2) However, this section only applies to an entity if:
9 (a) the entity gets the *transfer pricing benefit under subsection
10 815-15(1) at a time when an *international tax agreement
11 containing an *associated enterprises article applies to the
12 entity; or
13 (b) the entity gets the transfer pricing benefit under subsection
14 815-15(2) at a time when an international tax agreement
15 containing a *business profits article applies to the entity.

16 **815-15 When an entity gets a *transfer pricing benefit***

17 *Transfer pricing benefit—associated enterprises*

- 18 (1) An entity gets a ***transfer pricing benefit*** if:
19 (a) the entity is an Australian resident; and
20 (b) the requirements in the *associated enterprises article for the
21 application of that article to the entity are met; and
22 (c) an amount of profits which, but for the conditions mentioned
23 in the article, might have been expected to accrue to the
24 entity, has, by reason of those conditions, not so accrued; and
25 (d) had that amount of profits so accrued to the entity:
26 (i) the amount of the taxable income of the entity for an
27 income year would be *greater* than its actual amount; or
28 (ii) the amount of a tax loss of the entity for an income year
29 would be *less* than its actual amount; or
30 (iii) the amount of a *net capital loss of the entity for an
31 income year would be *less* than its actual amount.

1 The amount of the *transfer pricing benefit* is the difference
2 between the amounts mentioned in subparagraph (d)(i), (ii) or (iii)
3 (as the case requires).

4 *Transfer pricing benefit—business profits*

- 5 (2) A foreign resident entity gets a *transfer pricing benefit* if:
- 6 (a) the entity has a permanent establishment (within the meaning
7 of the *international tax agreement) in Australia; and
 - 8 (b) the amount of profits attributed to the permanent
9 establishment falls short of the amount of profits the
10 permanent establishment might be expected to make if it
11 were a distinct and separate entity engaged, and dealing, in
12 the manner mentioned in the *business profits article; and
 - 13 (c) had the profits attributed to the permanent establishment
14 included that shortfall:
 - 15 (i) the amount of the taxable income of the entity for an
16 income year would be *greater* than its actual amount; or
 - 17 (ii) the amount of a tax loss of the entity for an income year
18 would be *less* than its actual amount; or
 - 19 (iii) the amount of a *net capital loss of the entity for an
20 income year would be *less* than its actual amount.

21 The amount of the *transfer pricing benefit* is the difference
22 between the amounts mentioned in subparagraph (c)(i), (ii) or (iii)
23 (as the case requires).

24 *Nil amounts*

- 25 (3) For the purposes of working out whether an entity gets a *transfer
26 pricing benefit, and of negating that benefit under subsection
27 815-30(1):
- 28 (a) treat an entity that has no taxable income for an income year
29 as having a taxable income for the year of a nil amount; and
 - 30 (b) treat an entity that has no tax loss for an income year as
31 having a tax loss for the year of a nil amount; and
 - 32 (c) treat an entity that has no *net capital loss for an income year
33 as having a net capital loss for the year of a nil amount.

1 *Multiple transfer pricing benefits*

- 2 (4) To avoid doubt, an entity may get 2 or more *transfer pricing
3 benefits, in one or more income years, in relation to one amount of
4 profits, or one shortfall of profits.

5 *Meaning of associated enterprises article*

- 6 (5) An *associated enterprises article* is:
7 (a) Article 9 of the United Kingdom convention (within the
8 meaning of the *International Tax Agreements Act 1953*); or
9 (b) a corresponding provision of another *international tax
10 agreement.

11 *Meaning of business profits article*

- 12 (6) A *business profits article* is:
13 (a) Article 7 of the United Kingdom convention (within the
14 meaning of the *International Tax Agreements Act 1953*); or
15 (b) a corresponding provision of another *international tax
16 agreement.

17 **815-20 Cross-border transfer pricing guidance**

- 18 (1) For the purpose of determining the effect this Subdivision has in
19 relation to an entity:
20 (a) work out whether an entity gets a *transfer pricing benefit
21 consistently with the documents covered by this section, to
22 the extent the documents are relevant; and
23 (b) interpret a provision of an *international tax agreement
24 consistently with those documents, to the extent they are
25 relevant.
- 26 (2) The documents covered by this section are as follows:
27 (a) the Model Tax Convention on Income and on Capital, and its
28 Commentaries, as adopted by the Council of the Organisation
29 for Economic Cooperation and Development and last
30 amended on 22 July 2010;
31 (b) the Transfer Pricing Guidelines for Multinational Enterprises
32 and Tax Administrations, as approved by that Council and
33 last amended on 22 July 2010;

1 (c) a document, or part of a document, prescribed by the
2 regulations for the purposes of this paragraph.

3 (3) However, a document, or a part of a document, mentioned in
4 paragraph (2)(a) or (b) is not covered by this section if the
5 regulations so prescribe.

6 (4) Regulations made for the purposes of paragraph (2)(c) or
7 subsection (3) may prescribe different documents or parts of
8 documents for different circumstances.

9 **815-25 Modified transfer pricing benefit for thin capitalisation**

10 (1) This section modifies the *transfer pricing benefit an entity gets, or
11 apart from this section would get, in an income year if:

12 (a) Division 820 (about thin capitalisation) applies to the entity
13 for the income year; and

14 (b) the transfer pricing benefit relates to profits, or a shortfall of
15 profits, referable to costs that are *debt deductions of the
16 entity for the income year.

17 (2) If working out what those costs might have been, or might be
18 expected to be, involves applying a rate to a *debt interest:

19 (a) work out the rate by applying section 815-15, having regard
20 to section 815-20; but

21 (b) apply the rate to the debt interest the entity actually issued.

22 Note: Division 820 may apply to further reduce debt deductions.

23 **815-30 Determinations negating transfer pricing benefit**

24 (1) The determinations the Commissioner may make are as follows:

25 (a) a determination of an amount by which the taxable income of
26 the entity for an income year is increased;

27 (b) a determination of an amount by which the tax loss of the
28 entity for an income year is decreased;

29 (c) a determination of an amount by which the *net capital loss
30 of the entity for an income year is decreased.

31 (2) If the Commissioner makes a determination under subsection (1),
32 the determination is taken to be attributable, to the relevant extent,
33 to such of the following as the Commissioner may determine:

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- 1 (a) an increase of a particular amount in assessable income of the
 2 entity for an income year under a particular provision of this
 3 Act;
- 4 (b) a decrease of a particular amount in particular deductions of
 5 the entity for an income year;
- 6 (c) an increase of a particular amount in particular capital gains
 7 of the entity for an income year;
- 8 (d) a decrease of a particular amount in particular capital losses
 9 of the entity for an income year.

- 10 (3) If the Commissioner makes a determination under subsection (1),
 11 the Commissioner must make a determination under
 12 subsection (2), unless it is not possible or practicable for the
 13 Commissioner to do so.

14 Example: If section 815-25 is relevant in working out the transfer pricing benefit
 15 an entity gets, this subsection requires the Commissioner to make a
 16 determination relating to the debt deductions of the entity.

- 17 (4) Nothing done under subsection (2) affects the validity of a
 18 determination made under subsection (1).
- 19 (5) The Commissioner may take such action as the Commissioner
 20 considers necessary to give effect to a determination under this
 21 section.
- 22 (6) The Commissioner must give a copy of a determination under this
 23 section to the entity.
- 24 (7) A failure to comply with subsection (6) does not affect the validity
 25 of the determination.
- 26 (8) To avoid doubt, the Commissioner may include all or any
 27 determinations under this section in relation to a particular entity,
 28 including determinations of different kinds, in the same document.

29 **815-35 Consequential adjustments**

30 *Consequential adjustment—associated enterprises*

- 31 (1) The Commissioner may make a determination under subsection (4)
 32 in relation to an entity (the *disadvantaged entity*) if:

- 1 (a) the Commissioner makes a determination under subsection
2 815-30(1) in relation to a *transfer pricing benefit an entity
3 gets under subsection 815-15(1); and
4 (b) the Commissioner considers that, but for the conditions
5 mentioned in the *associated enterprises article:
6 (i) the amount of the taxable income of the disadvantaged
7 entity for an income year might have been expected to
8 be *less* than its actual amount; or
9 (ii) the amount of a tax loss of the disadvantaged entity for
10 an income year might have been expected to be *greater*
11 than its actual amount; or
12 (iii) the amount of a *net capital loss of the disadvantaged
13 entity for an income year might have been expected to
14 be *greater* than its actual amount; or
15 (iv) an amount of *withholding tax payable in respect of
16 interest or royalties by the disadvantaged entity might
17 have been expected to be *less* than its actual amount;
18 and
19 (c) the Commissioner considers that it is fair and reasonable that
20 the actual amount mentioned in subparagraph (b)(i), (ii), (iii)
21 or (iv) (as the case requires) be adjusted accordingly.

22 *Consequential adjustment—business profits*

- 23 (2) The Commissioner may make a determination under subsection (4)
24 in relation to an entity (the *disadvantaged entity*) if:
25 (a) the Commissioner makes a determination under subsection
26 815-30(1) in relation to a *transfer pricing benefit an entity
27 gets under subsection 815-15(2); and
28 (b) the Commissioner considers that, if the permanent
29 establishment were a distinct and separate entity engaged,
30 and dealing, in the manner mentioned in the *business profits
31 article:
32 (i) the amount of the taxable income of the disadvantaged
33 entity for an income year might have been expected to
34 be *less* than its actual amount; or
35 (ii) the amount of a tax loss of the disadvantaged entity for
36 an income year might have been expected to be *greater*
37 than its actual amount; or

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- 1 (iii) the amount of a *net capital loss of the disadvantaged
2 entity for an income year might have been expected to
3 be *greater* than its actual amount; or
4 (iv) an amount of *withholding tax payable in respect of
5 interest or royalties by the disadvantaged entity might
6 have been expected to be *less* than its actual amount;
7 and
8 (c) the Commissioner considers that it is fair and reasonable that
9 the actual amount mentioned in subparagraph (b)(i), (ii), (iii)
10 or (iv) (as the case requires) be adjusted accordingly.

11 *Nil amounts*

- 12 (3) For the purposes of this section:
13 (a) treat an entity that has no taxable income for an income year
14 as having a taxable income for the year of a nil amount; and
15 (b) treat an entity that has no tax loss for an income year as
16 having a tax loss for the year of a nil amount; and
17 (c) treat an entity that has no *net capital loss for an income year
18 as having a net capital loss for the year of a nil amount.

19 *Consequential adjustment—determinations*

- 20 (4) The Commissioner may make one or more of the following
21 determinations, in writing, for the purpose of adjusting an amount
22 as mentioned in paragraph (1)(c) or (2)(c):
23 (a) a determination of an amount by which the taxable income of
24 the disadvantaged entity for an income year is decreased;
25 (b) a determination of an amount by which the tax loss of the
26 disadvantaged entity for an income year is increased;
27 (c) a determination of an amount by which the *net capital loss
28 of the disadvantaged entity for an income year is increased;
29 (d) a determination of an amount by which the *withholding tax
30 payable by the disadvantaged entity in respect of interest or
31 royalties is decreased.
32 (5) The Commissioner may take such action as the Commissioner
33 considers necessary to give effect to a determination under this
34 section.

- 1 (6) The Commissioner must give a copy of a determination under this
2 section to the disadvantaged entity.
- 3 (7) A failure to comply with subsection (6) does not affect the validity
4 of the determination.
- 5 (8) To avoid doubt, the Commissioner may include all or any
6 determinations under this section in relation to a particular entity,
7 including determinations of different kinds, in the same document.
- 8 (9) An entity may give the Commissioner a written request to make a
9 determination under this section relating to the entity. The
10 Commissioner must decide whether or not to grant the request, and
11 give the entity notice of the Commissioner's decision.
- 12 (10) If an entity is dissatisfied with the Commissioner's decision, the
13 entity may object, in the manner set out in Part IVC of the *Taxation*
14 *Administration Act 1953*, against that decision.

15 **815-40 No double taxation**

- 16 (1) The amount of a *transfer pricing benefit that is negated under this
17 Subdivision for an entity is not to be taken into account again
18 under another provision of this Act to increase the entity's
19 assessable income, reduce the entity's deductions or reduce a *net
20 capital loss of the entity.
- 21 (2) Subsection (1) has effect despite section 136AB of the *Income Tax*
22 *Assessment Act 1936*.
- 23 (3) Nothing in this Subdivision limits Division 820 (about thin
24 capitalisation) in its application to further reduce *debt deductions
25 of an entity.

26 **7 At the end of section 820-30**

27 Add:

28 Note: This Division applies in relation to debt deductions of an entity as
29 reduced, if required, in accordance with Subdivision 815-A (about
30 cross-border transfer pricing).

31 **8 Subsection 995-1(1)**

32 Insert:

1 *associated enterprises article* has the meaning given by subsection
2 815-15(5).

3 **9 Subsection 995-1(1)**

4 Insert:

5 *business profits article* has the meaning given by subsection
6 815-15(6).

7 **10 Subsection 995-1(1)**

8 Insert:

9 *international tax agreement* means an agreement (within the
10 meaning of the *International Tax Agreements Act 1953*) to which
11 that Act gives the force of law.

12 **11 Subsection 995-1(1)**

13 Insert:

14 *transfer pricing benefit* has the meaning given by section 815-15.

15 ***Income Tax (Transitional Provisions) Act 1997***

16 **12 After Division 770**

17 Insert:

18 **Division 815—Cross-border transfer pricing**

19 **Table of Subdivisions**

20 815-A Treaty-equivalent cross-border transfer pricing rules

21 **Subdivision 815-A—Treaty-equivalent cross-border transfer**
22 **pricing rules**

23 **Table of sections**

24 815-1 Application of Subdivision 815-A of the *Income Tax Assessment Act 1997*
25 815-5 Cross-border transfer pricing guidance
26 815-10 Scheme penalty applies in pre-commencement period as if only the old law
27 applied

1 **815-1 Application of Subdivision 815-A of the *Income Tax***
2 ***Assessment Act 1997***

3 Subdivision 815-A of the *Income Tax Assessment Act 1997* applies
4 to income years starting on or after 1 July 2004.

5 **815-5 Cross-border transfer pricing guidance**

6 Despite section 815-20 of the *Income Tax Assessment Act 1997*,
7 the documents covered by that section for an income year that
8 starts before 1 July 2012 are taken to be as follows:

- 9 (a) the Model Tax Convention on Income and on Capital, and its
10 Commentaries, as adopted by the Council of the Organisation
11 for Economic Cooperation and Development and last
12 amended before the start of the income year;
- 13 (b) the Transfer Pricing Guidelines for Multinational Enterprises
14 and Tax Administrations, as approved by that Council and
15 last amended before the start of the income year.

16 **815-10 Scheme penalty applies in pre-commencement period as if**
17 **only the old law applied**

- 18 (1) This section applies if:
- 19 (a) a determination under subsection 815-30(1) of the *Income*
20 *Tax Assessment Act 1997* has effect in relation to an entity in
21 an income year; and
22 (b) the income year starts before 1 July 2012.
- 23 (2) Subdivision 284-C in Schedule 1 to the *Taxation Administration*
24 *Act 1953* applies in relation to the entity and the income year as if:
- 25 (a) Subdivision 815-A of the *Income Tax Assessment Act 1997*
26 had not been enacted; and
27 (b) each other provision of a taxation law applied in relation to
28 the entity in the way it would have if that Subdivision had not
29 been enacted.

30 ***Taxation Administration Act 1953***

31 **13 After subsection 284-145(2) in Schedule 1**

32 Insert:

- 1 (2A) You are also liable to an administrative penalty if:
2 (a) you would, apart from a determination under section 815-30
3 of the *Income Tax Assessment Act 1997* (also the ***adjustment***
4 ***provision***), get a *scheme benefit from a *scheme; and
5 (b) subparagraph (1)(b)(i) is not satisfied for the scheme.

6 **14 Application**

7 The amendment made by item 13 applies to income years starting on or
8 after 1 July 2012.