



# **New International Tax Arrangements (Foreign-owned Branches and Other Measures) Act 2005**

**No. 64, 2005**

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

Note: An electronic version of this Act is available in SCALEplus  
(<http://scaleplus.law.gov.au/html/comact/browse/TOCN.htm>)



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## Contents

1	Short title .....	1
2	Commencement.....	2
3	Schedule(s) .....	2
<b>Schedule 1—Dividends received by foreign-owned branches</b>		3
<i>Income Tax Assessment Act 1936</i>		3
<i>Income Tax Assessment Act 1997</i>		4
<b>Schedule 2—Amendments relating to CFCs</b>		7
<i>Income Tax Assessment Act 1936</i>		7
<i>Income Tax Assessment Act 1997</i>		8
<b>Schedule 3—Australian permanent establishments of foreign financial entities</b>		10
Part 1—Treatment like Australian branches of foreign banks		10
<i>Income Tax Assessment Act 1936</i>		10
<i>Income Tax Assessment Act 1997</i>		11
Part 2—Transfers of losses		13
<i>Income Tax Assessment Act 1997</i>		13
Part 3—Thin capitalisation		15
<i>Income Tax Assessment Act 1997</i>		15
<i>Income Tax (Transitional Provisions) Act 1997</i>		23
<b>Schedule 4—Cross border employee shares or rights</b>		24
Part 1—Amendments		24
<i>Fringe Benefits Tax Assessment Act 1986</i>		24
<i>Income Tax Assessment Act 1936</i>		24
<i>Income Tax Assessment Act 1997</i>		30
Part 2—Application provisions		33
<b>Schedule 5—Technical correction</b>		35
<i>New International Tax Arrangements (Participation Exemption and Other Measures) Act 2004</i>		35

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**No. 64, 2005**

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

*[Assented to 26 June 2005]*

The Parliament of Australia enacts:

### **1 Short title**

This Act may be cited as the *New International Tax Arrangements (Foreign-owned Branches and Other Measures) Act 2005*.

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## 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.

<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	26 June 2005
2. Schedule 1	The day on which this Act receives the Royal Assent.	26 June 2005
3. Schedule 2	The day after this Act receives the Royal Assent.	27 June 2005
4. Schedules 3 and 4	The day on which this Act receives the Royal Assent.	26 June 2005
5. Schedule 5	Immediately after the commencement of item 140 of Schedule 2 to the <i>New International Tax Arrangements (Participation Exemption and Other Measures) Act 2004</i> .	29 June 2005

Note: This table relates only to the provisions of this Act as originally passed by the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

(2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

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## 3 Schedule(s)

Each Act 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—Dividends received by foreign-owned branches**

### ***Income Tax Assessment Act 1936***

#### **1 After paragraph 44(1)(b)**

Insert:

- ; and (c) if the shareholder is a non-resident carrying on business in Australia at or through a permanent establishment of the shareholder in Australia, and the company is a resident:
  - (i) dividends (other than non-share dividends) that are paid to the shareholder by the company and are attributable to the permanent establishment, to the extent to which they are paid out of profits derived by the company from sources outside Australia; and
  - (ii) non-share dividends that are paid to the shareholder by the company and are attributable to the permanent establishment, to the extent to which they are derived from sources outside Australia.

#### **2 At the end of section 44**

Add:

- (7) In this section:

*permanent establishment* of a person:

- (a) has the same meaning as in a double tax agreement (as defined in Part X) that relates to a foreign country and affects the person; or
- (b) has the meaning given by subsection 6(1), if there is no such agreement.

#### **3 After subsection 102L(21)**

Insert:

- (21A) 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

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attributable to a source outside Australia, to be derived from a source outside Australia.

#### **4 After subsection 102T(22)**

Insert:

(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.

#### **5 Subsection 128B(1)**

Omit “and (3D),”, substitute “, (3D) and (3E),”.

#### **6 After subsection 128B(3D)**

Insert:

(3E) This section does not apply to income that consists of a dividend that:

- is paid to a person who is a non-resident carrying on business in Australia at or through a permanent establishment of the person in Australia; and
- is attributable to the permanent establishment; and
- is not paid to the person in the person’s capacity as trustee.

Note: This subsection not only ensures that this section does not apply to that income to make withholding tax payable on it, but also (as a result) ensures that none of that income is non-assessable non-exempt income under section 128D. Subsection 44(1) makes that income assessable income.

(3F) In subsection (3E):

***permanent establishment*** of a person:

- has the same meaning as in a double tax agreement (as defined in Part X) that relates to a foreign country and affects the person; or
- has the meaning given by subsection 6(1), if there is no such agreement.

### ***Income Tax Assessment Act 1997***

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## **7 After subsection 67-25(1D)**

Insert:

(1DA) A \*tax offset is not subject to the refundable tax offset rules if:

- (a) an entity is entitled to the tax offset under Division 207 because a \*franked distribution is made, or \*flows indirectly, to the entity; and
- (b) the entity is a foreign resident and carries on business in Australia at or through a permanent establishment of the entity in Australia, being a permanent establishment within the meaning of:
  - (i) a double tax agreement (as defined in Part X of the *Income Tax Assessment Act 1936*) that relates to a foreign country and affects the entity; or
  - (ii) subsection 6(1) of that Act, if there is no such agreement; and
- (c) the distribution is attributable to the permanent establishment.

## **8 Paragraph 115-280(1)(b)**

Repeal the paragraph, substitute:

- (b) when the dividend is paid, either you are an Australian resident or you are an individual who is a foreign resident and carries on business in Australia at or through your permanent establishment in Australia, being a permanent establishment within the meaning of:
  - (i) a double tax agreement (as defined in Part X of the *Income Tax Assessment Act 1936*) that relates to a foreign country and affects the individual; or
  - (ii) subsection 6(1) of that Act, if there is no such agreement; and
- (ba) if, when the dividend is paid, you are an individual who is a foreign resident and has in Australia such a permanent establishment—the dividend is attributable to the permanent establishment; and

## **9 Section 207-75**

Before “An entity”, insert “(1)”.

## **10 At the end of section 207-75**

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Add:

(2) An entity that receives a \*distribution also satisfies the **residency requirement** at the time the distribution is made if the entity at that time:

- (a) is a company or an individual; and
- (b) is a foreign resident; and
- (c) carries on business in Australia at or through a permanent establishment of the entity in Australia, being a permanent establishment within the meaning of:

- (i) a double tax agreement (as defined in Part X of the *Income Tax Assessment Act 1936*) that relates to a foreign country and affects the entity; or
- (ii) subsection 6(1) of that Act, if there is no such agreement;

and the distribution is attributable to the permanent establishment.

## **Schedule 2—Amendments relating to CFCs**

### ***Income Tax Assessment Act 1936***

#### **1 Subparagraph 384(2)(d)(iv)**

Omit “modified; and”, substitute “modified.”.

#### **2 Paragraph 384(2)(e)**

Repeal the paragraph.

#### **3 Subparagraph 385(2)(d)(v)**

Omit “modified; and”, substitute “modified.”.

#### **4 Paragraph 385(2)(e)**

Repeal the paragraph.

#### **5 Subsection 406(1)**

Repeal the subsection, substitute:

(1) For the purposes of applying this Act in calculating the attributable income of the eligible CFC, the eligible CFC’s *commencing day* is the later of:

- (a) the last day of the most recent period during which there was not an attributable taxpayer with an attribution percentage (greater than nil) in relation to the eligible CFC; and
- (b) 30 June 1990.

Example: If a taxpayer became an attributable taxpayer with an attribution percentage (greater than nil) in relation to the eligible CFC at 3 pm on 20 October 2004 and there were no other such attributable taxpayers at that time, the commencing day is 20 October 2004.

#### **6 Subsections 422(4) and (6)**

Omit “subparagraph 457(2)(a)(i)”, substitute “subparagraph 457(2)(a)(ii)”.

#### **7 Subsection 457(2) (subparagraphs (a)(i) and (ii) of the definition of *Adjusted distributable profits*)**

Repeal the subparagraphs, substitute:

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- (i) the CFC's income were its adjusted tainted income (excluding any non-portfolio dividends) derived during the period beginning on the first day of the statutory accounting period in which the residence-change time occurred and ending immediately before the time at which the residence-change time occurs; and
- (ii) the CFC's only other income were an amount that the CFC would have derived had it disposed of all of its tainted assets immediately before the residence-change time for a consideration equal to their market value; and
- (iii) the CFC's only expenses were expenses related to income covered by subparagraphs (i) and (ii); or

**8 Subsection 457(2) (subparagraph (b)(i) of the definition of *Adjusted distributable profits*)**

After “(excluding any non-portfolio dividends)”, insert “derived during the period beginning on the first day of the statutory accounting period in which the residence-change time occurred and ending immediately before the time at which the residence-change time occurs”.

**9 Subsection 457(3)**

Omit all the words after paragraph (b), substitute:

then no amount is to be included in the attributable taxpayer's assessable income under subsection (1) in relation to that change of residence.

***Income Tax Assessment Act 1997***

**10 Subsections 116-95(3) and (5)**

Omit “subparagraph 457(2)(a)(i)”, substitute “subparagraph 457(2)(a)(ii)”.

**11 Application**

(1) The amendment made by item 5 applies:

- (a) for the purposes of section 408A—to statutory accounting periods that begin on or after the day on which this Act receives the Royal Assent; and

- (b) in any other case—to CGT events that occur on or after the first 1 July that occurs after the day on which this Act receives the Royal Assent.
- (2) The amendments made by items 6, 7, 8 and 10 apply to things happening on or after 1 July 2004.

## **Schedule 3—Australian permanent establishments of foreign financial entities**

### **Part 1—Treatment like Australian branches of foreign banks**

#### *Income Tax Assessment Act 1936*

##### **1 At the end of subsection 160ZZVA(1)**

Add:

Note: This Part also:

- (a) applies to foreign entities that are financial entities in the same way as it applies to foreign banks; and
- (b) applies to permanent establishments in Australia of foreign entities that are financial entities in the same way as it applies to Australian branches of foreign banks.

See Division 4.

##### **2 At the end of Part IIIB**

Add:

#### **Division 4—Extension of Part to Australian branches of foreign financial entities**

##### **160ZZZK Treatment like Australian branches of foreign banks**

###### *Objects*

(1) The main objects of this section are:

- (a) to treat foreign entities that are financial entities like foreign banks for the purposes of this Part; and
- (b) to treat Australian permanent establishments of foreign entities that are financial entities like Australian branches of foreign banks for the purposes of this Part.

*Foreign financial entities treated like foreign banks*

(2) This Part (except this Division) applies to a foreign entity that is a financial entity in the same way as this Part applies to a foreign bank.

*Australian permanent establishments treated like Australian branches*

(3) This Part (except this Division) applies to a permanent establishment in Australia of a foreign entity that is a financial entity in the same way as this Part applies to an Australian branch of a foreign bank.

*Definitions*

(4) In this section:

*financial entity* has the meaning given by section 995-1 of the *Income Tax Assessment Act 1997*.

*foreign entity* has the meaning given by section 995-1 of the *Income Tax Assessment Act 1997*.

### **3 After subsection 262A(1B)**

Insert:

(1BA) Without limiting subsection (1), a foreign entity (as defined in the *Income Tax Assessment Act 1997*) that is a financial entity (as defined in that Act) must maintain accounting records in respect of, and separately account for, money used in the activities of a permanent establishment in Australia of the entity.

### **4 Application**

The amendments of the *Income Tax Assessment Act 1936* made by this Part apply to years of income starting on or after the commencement of this Part.

### ***Income Tax Assessment Act 1997***

### **5 Section 12-5 (after the table item headed “foreign exchange”)**

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**Schedule 3** Australian permanent establishments of foreign financial entities

**Part 1** Treatment like Australian branches of foreign banks

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Insert:

**foreign financial entities' Australian permanent  
establishments**

generally.....	<b>Part IIIB</b>
thin capitalisation .....	Subdivision 820-FB
transfer of losses .....	Subdivisions 170-A and 170-B

**6 Section 12-5 (table item headed “foreign tax credits”)**

After “foreign bank”, insert “or foreign financial entity”.

## **Part 2—Transfers of losses**

### ***Income Tax Assessment Act 1997***

#### **7 At the end of subsection 170-5(2A)**

Add:

Note: This Subdivision applies to Australian permanent establishments of foreign entities that are financial entities in the same way as it applies to Australian branches of foreign banks. See section 170-75.

#### **8 At the end of Subdivision 170-A**

Add:

### **Australian permanent establishments of foreign financial entities**

#### **170-75 Treatment like Australian branches of foreign banks**

- (1) The object of this section is to let \*tax losses be transferred under this Subdivision to and from \*Australian permanent establishments of \*foreign entities that are \*financial entities in the same way as tax losses can be transferred to and from Australian branches of \*foreign banks.
- (2) This Subdivision (except this section) applies to an \*Australian permanent establishment of a \*foreign entity that is a \*financial entity in the same way as this Subdivision applies to an Australian branch (as defined in Part IIIB of the *Income Tax Assessment Act 1936*) of a \*foreign bank.

#### **9 At the end of subsection 170-105(2A)**

Add:

Note: This Subdivision applies to Australian permanent establishments of foreign entities that are financial entities in the same way as it applies to Australian branches of foreign banks. See section 170-174.

#### **10 At the end of Subdivision 170-B**

Add:

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## **Australian permanent establishments of foreign financial entities**

### **170-174 Treatment like Australian branches of foreign banks**

- (1) The object of this section is to let \*net capital losses be transferred under this Subdivision to and from \*Australian permanent establishments of \*foreign entities that are \*financial entities in the same way as net capital losses can be transferred to and from Australian branches of \*foreign banks.
- (2) This Subdivision (except this section) applies to an \*Australian permanent establishment of a \*foreign entity that is a \*financial entity in the same way as this Subdivision applies to an Australian branch (as defined in Part IIIB of the *Income Tax Assessment Act 1936*) of a \*foreign bank.

### **11 Application**

The amendments made by this Part apply in relation to losses for income years starting on or after the commencement of this Part.

## **Part 3—Thin capitalisation**

### ***Income Tax Assessment Act 1997***

#### **12 Section 820-445 (heading)**

Repeal the heading, substitute:

#### **820-445 How this Subdivision interacts with Subdivisions 820-F and 820-FA**

#### **13 Subsection 820-445(4)**

Repeal the subsection.

#### **14 Subdivision 820-FB (heading)**

Repeal the heading, substitute:

#### **Subdivision 820-FB—Grouping branches of foreign banks and foreign financial entities with a consolidated group, MEC group or single Australian resident company**

#### **15 Section 820-595**

Repeal the section, substitute:

#### **820-595 What this Subdivision is about**

If:

- (a) the head company of a consolidated group or MEC group; or
- (b) an Australian company that cannot consolidate;

is a member of the same wholly-owned group as a foreign bank or foreign financial entity, the company can choose to treat as part of itself the Australian branches of the foreign bank or foreign financial entity, affecting how the rest of this Division applies.

## **16 Group heading before section 820-597**

Repeal the heading, substitute:

### **Choice to group with branches of foreign banks and foreign financial entities**

## **17 Sections 820-597 and 820-599**

Repeal the sections, substitute:

### **820-597 Choice by head company of consolidated group or MEC group**

- (1) This section applies if there is a period (the *grouping period*) for which all these conditions are met:
  - (a) the period was all or part of an income year of the \*head company of a \*consolidated group or \*MEC group;
  - (b) the consolidated group or MEC group existed throughout the period;
  - (c) the head company and an entity (the *establishment entity*) covered by one of the following subparagraphs are both members of the same \*wholly-owned group throughout the period:
    - (i) a \*foreign bank that carried on its banking \*business in Australia through at least one \*Australian permanent establishment at each time in the period;
    - (ii) a \*foreign entity that was a \*financial entity and had at least one Australian permanent establishment at each time in the period;
  - (d) there is not a longer period in the income year for which the conditions in paragraphs (a), (b) and (c) are met in relation to the head company and the establishment entity.

Note: It does not matter whether the income year ended on the same day for the head company and the establishment entity.

- (2) The \*head company may choose to have all of the \*Australian permanent establishments of the establishment entity treated as part of the head company for the grouping period for the purposes of this Division.

(3) If the conditions in subsection (1) are met in relation to the *\*head company* and more than one other establishment entity, the head company may make a different choice in relation to each of the other establishment entities.

#### **820-599 Choice by Australian resident company outside consolidatable group and MEC group**

(1) This section applies if there is a period (also the *grouping period*) for which all these conditions are met:

- the period was all or part of an income year of a company (the *single company*);
- throughout the period the single company:
  - was an *\*Australian entity*; and
  - was not a *\*prescribed dual resident*; and
  - was not a *\*member of a \*consolidatable group*; and
  - was not a member of a *\*consolidated group*; and
  - was not a member of a *\*MEC group*;
- the single company and an entity (the *establishment entity*) covered by one of the following subparagraphs are both members of the same *\*wholly-owned group* throughout the period:
  - a *\*foreign bank* that carried on its banking *\*business* in Australia through at least one *\*Australian permanent establishment* at each time in the period;
  - a *\*foreign entity* that was a *\*financial entity* and had at least one Australian permanent establishment at each time in the period;
- there is not a longer period in the income year for which the conditions in paragraphs (a), (b) and (c) are met in relation to the single company and the establishment entity.

Note: It does not matter whether the income year ended on the same day for the single company and the establishment entity.

(2) The single company may choose to have all of the *\*Australian permanent establishments* of the establishment entity treated as part of the single company for the grouping period for the purposes of this Division.

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(3) If the conditions in subsection (1) are met in relation to the single company and more than one other establishment entity, the single company may make a different choice in relation to each of the other establishment entities.

## **18 Subsection 820-603(1)**

Omit “\*foreign bank”, substitute “establishment entity”.

## **19 Subsection 820-603(2)**

Repeal the subsection, substitute:

(2) The rest of this section applies:

(a) to each \*Australian permanent establishment that:

- (i) was an Australian permanent establishment of the establishment entity; and
- (ii) if the establishment entity was a \*foreign bank—was an Australian permanent establishment through which the entity carried on banking \*business in Australia at any time in the grouping period; and

(b) in relation to each time (the *test time*) that was in the grouping period and was when the Australian permanent establishment:

- (i) was an Australian permanent establishment of the establishment entity; and
- (ii) if the establishment entity was a foreign bank—was an Australian permanent establishment through which the entity carried on banking business in Australia.

## **20 Paragraphs 820-603(3)(b), (4)(a) and (5)(b)**

Omit “\*foreign bank”, substitute “establishment entity”.

## **21 Subparagraph 820-603(5)(c)(i)**

Omit “foreign bank”, substitute “establishment entity”.

## **22 Section 820-605 (heading)**

Repeal the heading, substitute:

**820-605 Effect on establishment entity if certain debt deductions disallowed**

**23 Paragraph 820-605(a)**

Omit “the \*foreign bank”, substitute “the establishment entity”.

**24 Section 820-605**

Omit “the foreign bank,”, substitute “the establishment entity,”.

**25 Section 820-605 (notes 1 and 2)**

Omit “foreign bank” (wherever occurring), substitute “establishment entity”.

**26 Section 820-607**

Omit “the \*foreign bank”, substitute “the establishment entity”.

**27 Section 820-609**

Repeal the section, substitute:

**820-609 Effect on classification of head company or single company**

- (1) The \*head company or single company is an *outward investing entity (ADI)* for a period (the *trial period*) that is all or part of the grouping period if:
  - (a) apart from this Subdivision, the head company or single company would be an \*outward investing entity (ADI) for the trial period; or
  - (b) apart from this Subdivision, the head company or single company would be:
    - (i) an \*outward investing entity (non-ADI) and an \*outward investor (financial) for the trial period; or
    - (ii) an \*outward investing entity (non-ADI) and an \*outward investor (general) for the trial period;and at least one of the \*Australian permanent establishments is a \*permanent establishment through which a \*foreign bank carries on banking \*business in Australia.
- (2) The \*head company is also an *outward investing entity (ADI)* for the trial period if, apart from this Subdivision:

- (a) the head company would satisfy subsection 820-585(2) for the trial period (triggering the exemption in section 820-585); or
- (b) section 820-587 would apply Subdivision 820-D to the head company as if it were an *\*outward investing entity (ADI)* for the trial period.

(3) The single company is also an *outward investing entity (ADI)* for the trial period if it is both a *\*foreign controlled Australian company* and an *\*ADI* for that period.

(4) The *\*head company* or single company is an *inward investing entity (ADI)* for the trial period if:

- (a) apart from this Subdivision, it would be an *\*inward investment vehicle (general)* or an *\*inward investment vehicle (financial)*, and not an *\*outward investor (general)* or an *\*outward investor (financial)*, for the trial period; and
- (b) at least one of the *\*Australian permanent establishments* is a *\*permanent establishment* through which a *\*foreign bank* carries on banking *\*business* in Australia.

(5) The *\*head company* or single company is an *outward investing entity (non-ADI)* and an *outward investor (financial)* for the trial period if, apart from this Subdivision, it would be an *\*outward investing entity (non-ADI)* and:

- (a) an *\*outward investor (financial)*; or
- (b) an *\*outward investor (general)*;

for that period, and:

- (c) at least one of the *\*Australian permanent establishments* is a *\*permanent establishment* of a *\*foreign entity* that is a *\*financial entity*; and
- (d) none of the *Australian permanent establishments* is a *permanent establishment* through which a *\*foreign bank* carries on banking *\*business* in Australia.

(6) The *\*head company* or single company is an *inward investing entity (non-ADI)* and an *inward investment vehicle (financial)* for the trial period if, apart from this Subdivision, it would be an *\*inward investing entity (non-ADI)* and:

- (a) an *\*inward investment vehicle (financial)*; or
- (b) an *\*inward investment vehicle (general)*;

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for that period and not an \*outward investor (general) or an \*outward investor (financial) for that period and:

- (c) at least one of the \*Australian permanent establishments is a \*permanent establishment of a \*foreign entity that is a \*financial entity; and
- (d) none of the Australian permanent establishments is a permanent establishment through which a \*foreign bank carries on banking \*business in Australia.

(7) This section has effect despite any other provision of this Division, except Subdivision 820-EA.

Note: If the head company or single company is an outward investor (financial) or inward investment vehicle (financial) under this section and satisfies subsection 820-430(5), it may choose under Subdivision 820-EA to be treated as an outward investing entity (ADI). Section 820-603 affects whether the company satisfies that subsection, by treating as part of the company each relevant foreign financial entity's Australian permanent establishment.

## **28 Section 820-613 (heading)**

Repeal the heading, substitute:

### **820-613 How Subdivision 820-D applies**

## **29 Subsection 820-613(1) (note)**

Repeal the note, substitute:

Note: Subdivision 820-D applies to the head company or single company if it is classified as an outward investing entity (ADI) because of section 820-609, either alone or in conjunction with a choice made by the company under section 820-430.

## **30 Subsections 820-613(3) and (4)**

Repeal the subsections, substitute:

- (3) The amount worked out under this subsection as at a particular day is the total of the amounts worked out under the following paragraphs for each of the establishment entity's \*Australian permanent establishments that section 820-603 treats as part of the \*head company or single company on that day:
  - (a) so much of the establishment entity's \*ADI equity capital, at the end of the day, as:

- (i) is attributable to that Australian permanent establishment; and
- (ii) has not been allocated to the \*OB activities of the entity;

(b) the amounts that, as at the end of that day:

- (i) are made available by the establishment entity to the Australian permanent establishment as loans to it; and
- (ii) do not give rise to any \*debt deductions of the entity for the income year or any other income year.

Note: The amounts are to be worked out, so far as practicable, on the basis of the information that would be contained in a set of consolidated accounts. See section 820-611.

*Risk-weighted assets*

(4) For each of the establishment entity's \*Australian permanent establishments that is covered by the choice, the \*risk-weighted assets of the \*head company or single company include that part of the entity's risk-weighted assets that:

- (a) is attributable to that Australian permanent establishment; and
- (b) is not attributable to the entity's \*OB activities.

**31 Section 820-615 (heading)**

Repeal the heading, substitute:

**820-615 How Subdivision 820-E applies**

**32 Subsection 820-615(1) (note)**

Repeal the note, substitute:

Note: Subdivision 820-E applies to the head company or single company if it is classified as an inward investing entity (ADI) because of section 820-609.

**33 Subsection 820-615(4)**

Repeal the subsection, substitute:

*Risk-weighted assets*

(4) For each of the establishment entity's \*Australian permanent establishments covered by the choice, the \*risk-weighted assets of

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the \*head company or single company include that part of the entity's risk-weighted assets that:

- (a) is attributable to that Australian permanent establishment; and
- (b) is not attributable to the entity's \*OB activities.

**34 Subsection 995-1(1) (definition of *inward investing entity (non-ADI)*)**

Omit "and 820-583", substitute ", 820-583 and 820-609".

**35 Subsection 995-1(1) (definition of *inward investment vehicle (financial)*)**

Omit "and 820-583", substitute ", 820-583 and 820-609".

**36 Subsection 995-1(1) (definition of *outward investing entity (non-ADI)*)**

Omit "and 820-583", substitute ", 820-583 and 820-609".

**37 Subsection 995-1(1) (definition of *outward investor (financial)*)**

Omit "and 820-583", substitute ", 820-583 and 820-609".

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

**38 Paragraph 701D-10(5)(c)**

Omit "820-599(2)(c)(iii)", substitute "820-599(1)(b)(iii)".

**39 Application**

The amendments made by this Part apply in relation to assessments for income years starting on or after the commencement of this Part.

## **Schedule 4—Cross border employee shares or rights**

### **Part 1—Amendments**

#### ***Fringe Benefits Tax Assessment Act 1986***

##### **1 Subsection 136(1) (paragraph (hb) of the definition of *fringe benefit*)**

Repeal the paragraph, substitute:

- (hb) a benefit constituted by the acquisition by a trust of money or other property where the sole activities of the trust are obtaining shares, or rights to acquire shares, in a company, or a holding company (within the meaning of the *Corporations Act 2001*) of the first-mentioned company, and providing those shares or rights:
  - (i) to employees, or associates of employees, of the first-mentioned company; or
  - (ii) to persons who are engaged in foreign service (within the meaning of section 139GBA of the *Income Tax Assessment Act 1936*) for the first-mentioned company, or associates of those persons; or

#### ***Income Tax Assessment Act 1936***

##### **2 Subsection 23AF(18) (paragraph (a) of the definition of *eligible foreign remuneration*)**

After “allowances”, insert “, or of amounts included in a person’s assessable income under Division 13A.”.

##### **3 Subsection 23AF(18) (paragraph (b) of the definition of *eligible foreign remuneration*)**

After “income”, insert “, or amounts included in a person’s assessable income under Division 13A.”.

##### **4 Subsection 23AG(7) (definition of *foreign earnings*)**

After “allowances”, insert “, or of amounts included in a person’s assessable income under Division 13A.”.

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## 5 After subsection 139B(1)

Insert:

(1A) However, for any period during which the taxpayer is a non-resident, the discount is not included under subsection (1) in the assessable income of the taxpayer to the extent that the discount is given in respect of, or for or in relation directly or indirectly to, the taxpayer's engagement in foreign service that relates to the acquisition of the share or right.

Note: *Foreign service* is defined in section 139GBA.

## 6 Subsection 139B(2)

Omit "subsection (3)", substitute "subsection (2A) or (3)".

## 7 After subsection 139B(2)

Insert:

(2A) Unless subsection (3) applies, if the taxpayer:

- (a) acquired the share or right while the taxpayer was not an employee; and
- (b) subsequently became an employee while holding the share or right;

the discount is included in the taxpayer's assessable income in the year of income in which, after the acquisition, the taxpayer first becomes an employee in respect of employment or services that affect the acquisition or holding of the share or right.

Note: Subsection 139GA(2) limits the meaning of *employee* in this subsection, so that engagement in foreign service is not of itself sufficient.

## 8 Subsection 139B(3)

Omit "for the year of income in which the share or right is acquired", substitute "covering the share or right".

## 9 Subsection 139CC(2)

Omit "subsection 139B(2)", substitute "subsection 139B(2) or (2A)".

Note: The heading to subsection 139CC(2) is altered by inserting "or (2A)" after "subsection 139B(2)".

## 10 Paragraphs 139CD(1)(a) and (b)

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Repeal the paragraphs, substitute:

- (a) a share in a company is a *qualifying share* if:
  - (i) the 6 conditions below are satisfied; and
  - (ii) in the case of a share that a taxpayer has acquired while engaged in foreign service—section 139CDA applies to the share; and
- (b) a right to acquire a share in a company is a *qualifying right* if:
  - (i) the first, second, third, fifth and sixth of the 6 conditions below are satisfied; and
  - (ii) in the case of a right that a taxpayer has acquired while engaged in foreign service—section 139CDA applies to the right.

## **11 Subsection 139CD(1) (note)**

Omit “Note”, substitute “Note 1”.

## **12 At the end of subsection 139CD(1)**

Add:

Note 2: *Foreign service* is defined in section 139GBA.

## **13 After section 139CD**

Insert:

### **139CDA Additional requirement for shares or rights acquired while engaged in foreign service**

This section applies to a share in a company, or a right to acquire a share in a company, if the taxpayer in question first becomes an employee, in respect of employment or services that affect the acquisition or holding of the share or right, before the cessation time for the share or right.

Note: Subsection 139GA(2) limits the meaning of *employee* in this section, so that engagement in foreign service is not of itself sufficient.

## **14 Paragraph 139D(1)(c)**

Repeal the paragraph, substitute:

- (c) apart from this section, an amount:

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- (i) would be included in respect of the acquisition in the assessable income of the taxpayer of a year of income under this Division; or
- (ii) would have been so included if the taxpayer had been a resident at the time of the acquisition.

## **15 Subsection 139D(2)**

Omit “If”, substitute “Subject to subsection (3), if”.

## **16 At the end of section 139D**

Add:

(3) If:

- (a) this section applies; and
- (b) the taxpayer acquired the share or right while the associate was not an employee; and
- (c) the associate subsequently became an employee while the taxpayer was holding the share or right;

the amount is included in the associate’s assessable income in the year of income in which, after the acquisition, the associate first becomes an employee in respect of employment or services that affect the acquisition or holding of the share or right.

Note: Subsection 139GA(2) limits the meaning of *employee* in this subsection, so that engagement in foreign service is not of itself sufficient.

## **17 At the end of Subdivision D of Division 13A of Part III**

Add:

### **139DG Amendment of assessments to account for reductions of amounts included in assessable income**

(1) If:

- (a) an amount has been included in a taxpayer’s assessable income of a particular year of income; and
- (b) that amount is reduced or increased because of a change in the extent (if any) of the application of section 23AF or 23AG or subsection 139B(1A) in relation to the amount during a subsequent year of income;

section 170 does not prevent the amendment of an assessment, for the purpose of giving effect to the reduction or increase, at any time during the period of 4 years starting immediately after the income year during which the period of employment or service relating to the acquisition of the share or right in question ends.

(2) In paragraph (1)(b):

- (a) the reference to an amount being reduced includes a reference to the amount being reduced to a nil amount; and
- (b) the reference to an amount being increased includes a reference to the amount being increased from a nil amount.

**18 Subsection 139E(2)**

Omit “The election”, substitute “An election under subsection (1)”.

**19 At the end of section 139E**

Add:

(3) If:

- (a) a taxpayer becomes an employee during a year of income (the *employment year*); and
- (b) before the employment year, the taxpayer had acquired a qualifying share or qualifying right, being an acquisition that occurred:
  - (i) while the taxpayer was not an employee; and
  - (ii) after the year of income (if any) in which the taxpayer last became an employee;

the taxpayer may make an election under this section that subsection 139B(2A) applies for each of the years of income before the employment year and after the year referred to in paragraph (b). The election covers each qualifying share or qualifying right acquired in any of those years by the taxpayer.

Note: Subsection 139GA(2) limits the meaning of *employee* in this subsection, so that engagement in foreign service is not of itself sufficient.

(4) An election under subsection (3) must be in writing in a form approved by the Commissioner and be made before the taxpayer lodges his or her return of income for the employment year, or within such further time as the Commissioner allows.

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## **20 Section 139GA**

Repeal the section, substitute:

### **139GA Meaning of *employee* and *employer***

- (1) The expression *employee*:
  - (a) has the same meaning as in section 221A; and
  - (b) includes a person who is engaged in foreign service.
- (2) However:
  - (a) subsection (1) does not apply in relation to section 139GBA; and
  - (b) paragraph (1)(b) does not apply in relation to subsection 139B(2A), section 139CDA or subsection 139D(3), 139E(3) or 139GB(1).
- (3) The expression *employer*:
  - (a) has the same meaning as in section 221A; and
  - (b) includes a person who engages another person in foreign service.

## **21 After subsection 139GB(1)**

Insert:

Note: Subsection 139GA(2) limits the meaning of *employee* in this subsection, so that engagement in foreign service is not of itself sufficient.

## **22 After section 139GB**

Insert:

### **139GBA Meaning of *foreign service***

*Foreign service* is service in a foreign country as the holder of an office or in the capacity of an employee.

## **23 Section 139GH (after table item dealing with Financial assistance)**

Insert:

Foreign service

139GBA

**24 Subsection 160AEA(1) (at the end of the definition of *passive income*)**

Add:

; or (q) an amount included in the taxpayer's assessable income under Division 13A.

**25 Before subsection 530A(1)**

Insert:

(1A) If:

- (a) a taxpayer acquired a qualifying share or right under an employee share scheme and has not made an election under section 139E covering the share or right; and
- (b) for the whole of a notional accounting period of a FIF the following conditions are satisfied:
  - (i) the taxpayer holds the share or right;
  - (ii) the share or right is an interest in the FIF;
  - (iii) the cessation time for the share or right has not occurred;

the foreign investment fund income of the taxpayer, to the extent that it relates to the share or right, for the notional accounting period is zero.

**26 Paragraph 530A(1)(a)**

Omit "for the year of income in which the share or right is acquired", substitute "covering the share or right".

**27 Paragraph 530A(1)(b)**

Omit "the whole or".

***Income Tax Assessment Act 1997***

**28 Subsection 104-160(5) (heading)**

Repeal the heading, substitute:

*Exceptions*

**29 At the end of section 104-160 (before note 1)**

Add:

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(6) A \*capital gain or \*capital loss you make is disregarded if:

- the asset is a \*qualifying share or \*qualifying right; and
- the asset is not covered by an election under section 139E of the *Income Tax Assessment Act 1936*; and
- the \*cessation time for the share or right has not occurred.

### **30 At the end of section 130-80 (after the note)**

Add:

(4) This section does not apply to a \*share or right if:

- you become an Australian resident; and
- you owned, or held a beneficial interest in, the share or right just before you became an Australian resident; and
- the share or right does not have the \*necessary connection with Australia; and
- either:
  - the share or right is not a \*qualifying share or a \*qualifying right; or
  - you have made an election under section 139E of the *Income Tax Assessment Act 1936* covering the share or right.

Note: Section 136-40 deals with shares or rights that do not have the necessary connection with Australia.

### **31 Paragraph 130-83(1)(b)**

Omit “to include an amount in your assessable income for the income year in which you \*acquired the share or right”, substitute “covering the share or right”.

### **32 Subsection 130-83(2)**

Omit “or E5”, substitute “, E5 or II”.

### **33 At the end of section 130-83**

Add:

(4) Subsection (3) does not apply to a \*share or right if:

- you become an Australian resident; and
- you owned, or held a beneficial interest in, the share or right just before you became an Australian resident; and

- (c) the share or right does not have the \*necessary connection with Australia; and
- (d) the cessation time for the share or right had occurred before you became an Australian resident.

Note: Section 136-40 deals with shares or rights that do not have the necessary connection with Australia.

### **34 At the end of section 130-85 (after the note)**

Add:

- (4) This section does not apply to a \*share or right if:
  - (a) you become an Australian resident; and
  - (b) you owned, or held a beneficial interest in, the share or right just before you became an Australian resident; and
  - (c) the share or right does not have the \*necessary connection with Australia.

Note: Section 136-40 deals with shares or rights that do not have the necessary connection with Australia.

### **35 At the end of subsection 130-90(1A)**

Add:

- ; or (c) an individual who is engaged in foreign service (within the meaning of section 139GBA of the *Income Tax Assessment Act 1936*), or an \*associate or affiliate company of such an individual.

### **36 At the end of section 136-40**

Add:

- (4) This section does not apply to a \*share or right if:
  - (a) it is a \*qualifying share or a \*qualifying right; and
  - (b) you have not made an election under section 139E of the *Income Tax Assessment Act 1936* covering the share or right; and
  - (c) the \*cessation time for the share or right has not occurred.

## **Part 2—Application provisions**

### **37 Application—amendment of the *Fringe Benefits Tax Assessment Act 1986***

The amendment made by item 1 of this Schedule applies in respect of the FBT year in which this Act receives the Royal Assent and in respect of all later FBT years.

### **38 Application—amendments of the *Income Tax Assessment Act 1936***

- (1) The amendments made by items 2 to 24 of this Schedule apply in relation to shares or rights that a person acquires, or has acquired, under an employee share scheme only in accordance with subitem (2) or (3).
- (2) The amendments apply, on and from the time of the acquisition, if the person acquired the shares or rights on or after the day on which this Act received the Royal Assent.
- (3) If:
  - (a) immediately before that day, the person was not an employee in respect of employment that affects the acquisition or holding of the share or right; and
  - (b) the person becomes an employee in respect of that employment on or after that day; and
  - (c) at the time of becoming an employee in respect of that employment, the person holds shares or rights that the person acquired under an employee share scheme; and
  - (d) this subitem has not previously applied in relation to the person;the amendments apply, on and from the time when the person becomes an employee in respect of that employment, to any shares or rights the person holds that the person acquired under an employee share scheme (whether or not the shares or rights were acquired before, on or after that day).
- (4) Subitem (3) does not limit the operation of subitem (2).
- (5) Expressions used in this item have the same meaning as they have for the purposes of Division 13A of Part III of the *Income Tax Assessment*

*Act 1936*. However, paragraph 139GA(1)(b) of that Act does not apply in relation to subitem (3).

**39 Application—amendments of section 530A of the *Income Tax Assessment Act 1936***

The amendments made by items 25 to 27 of this Schedule apply to assessments for the first year of income ending on or after the day on which this Act receives the Royal Assent and later years of income.

**40 Application—amendments of the *Income Tax Assessment Act 1997***

The amendments made by items 28 to 34 and item 36 of this Schedule apply in relation to CGT events happening on or after the day on which this Act receives the Royal Assent.

**41 Application—amendment of section 130-90 of the *Income Tax Assessment Act 1997***

The amendment made by item 35 of this Schedule applies in relation to shares or rights to which a beneficiary becomes absolutely entitled on or after the day on which this Act receives the Royal Assent.

## **Schedule 5—Technical correction**

### *New International Tax Arrangements (Participation Exemption and Other Measures) Act 2004*

#### **1 Subitem 140(2) of Schedule 2**

Repeal the subitem, substitute:

- (2) Subject to subitem (2A), the amendments made by Parts 2 and 3 of this Schedule apply to things happening after 30 June 2004.
- (2A) The amendments made by items 7, 58 and 59 of this Schedule apply to statutory accounting periods starting on or after 1 July 2004.

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*[Minister's second reading speech made in—  
House of Representatives on 17 March 2005  
Senate on 20 June 2005]*

(44/05)

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