





# **Tax Laws Amendment (Loss Recoupment Rules and Other Measures) Act 2005**

**No. 147, 2005**

**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 Laws Amendment (Loss Recoupment Rules and Other Measures) Act 2005**

**No. 147, 2005**

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

*[Assented to 14 December 2005]*

The Parliament of Australia enacts:

## **1 Short title**

This Act may be cited as the *Tax Laws Amendment (Loss  
Recoupment Rules 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.	14 December 2005
2. Schedules 1 to 4	The day on which this Act receives the Royal Assent.	14 December 2005
3. Schedule 5, items 1 to 15	The day on which this Act receives the Royal Assent.	14 December 2005
4. Schedule 5, item 16	Immediately after the commencement of the provision(s) covered by table item 3.	
5. Schedule 5, items 17 to 20	The day on which this Act receives the Royal Assent.	14 December 2005
6. Schedules 6 and 7	The day on which this Act receives the Royal Assent.	14 December 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.

## 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Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.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—Loss recoupment rules for companies etc.**

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

#### **1 After subsection 80B(8)**

Insert:

(8A) A person is not prevented from:

- (a) beneficially owning shares in a company; or
- (b) having the right to exercise voting power in a company; or
- (c) having the right to receive any dividends that may be paid by a company; or
- (d) having the right to receive any distribution of capital of a company;

merely because:

- (e) the company is or becomes:
  - (i) an externally-administered body corporate within the meaning of the Corporations Law (as set out in section 82 of the *Corporations Act 1989*); or
  - (ii) a body with a similar status, under the Companies Code of the relevant State or a foreign law, to an externally-administered body corporate; or
- (f) either:
  - (i) a provisional liquidator is appointed to the company under section 472 of the Corporations Law (as set out in section 82 of the *Corporations Act 1989*); or
  - (ii) a person with a similar status, under the Companies Code of the relevant State or a foreign law, to a provisional liquidator is appointed to the company.

(8B) A company (the ***stakeholding company***) is not prevented from:

- (a) beneficially owning shares, or any other interests in shares, in another company; or
  - (b) having the right to exercise voting power in another company either directly or indirectly; or
  - (c) having the right to receive, either directly or indirectly, any dividends that may be paid by another company; or
-

- (d) having the right to receive, either directly or indirectly, any distribution of capital of another company;
- merely because:
- (e) the stakeholding company is or becomes:
    - (i) an externally-administered body corporate within the meaning of the Corporations Law (as set out in section 82 of the *Corporations Act 1989*); or
    - (ii) a body with a similar status, under the Companies Code of the relevant State or a foreign law, to an externally-administered body corporate; or
  - (f) either:
    - (i) a provisional liquidator is appointed to the stakeholding company under section 472 of the Corporations Law (as set out in section 82 of the *Corporations Act 1989*); or
    - (ii) a person with a similar status, under the Companies Code of the relevant State or a foreign law, to a provisional liquidator is appointed to the stakeholding company.

## **2 After section 160ZNR**

Insert:

### **160ZNR** Companies in liquidation

- (1) For the purposes of a test, an entity is not prevented from:
    - (a) beneficially owning shares in a company; or
    - (b) having the right to exercise, controlling, or being able to control, voting power in a company; or
    - (c) having the right to receive any dividends that a company may pay; or
    - (d) having the right to receive any distribution of capital of a company;
- merely because:
- (e) the company is or becomes:
    - (i) an externally-administered body corporate within the meaning of the Corporations Law (as set out in section 82 of the *Corporations Act 1989*); or

- (ii) an entity with a similar status, under the Companies Code of the relevant State or a foreign law, to an externally-administered body corporate; or
- (f) either:
  - (i) a provisional liquidator is appointed to the company under section 472 of the Corporations Law (as set out in section 82 of the *Corporations Act 1989*); or
  - (ii) a person with a similar status, under the Companies Code of the relevant State or a foreign law, to a provisional liquidator is appointed to the company.
- (2) For the purposes of a test, a company (the **stakeholding company**) is not prevented from:
  - (a) beneficially owning shares in another company, or any other interest in another entity; or
  - (b) having the right to exercise, controlling, or being able to control, voting power in another company or any other entity; or
  - (c) having the right to receive any dividends that another company or any other entity may pay; or
  - (d) having the right to receive any distribution of capital of another company or any other entity;merely because:
  - (e) the stakeholding company is or becomes:
    - (i) an externally-administered body corporate within the meaning of the Corporations Law (as set out in section 82 of the *Corporations Act 1989*); or
    - (ii) an entity with a similar status, under the Companies Code of the relevant State or a foreign law, to an externally-administered body corporate; or
  - (f) either:
    - (i) a provisional liquidator is appointed to the stakeholding company under section 472 of the Corporations Law (as set out in section 82 of the *Corporations Act 1989*); or
    - (ii) a person with a similar status, under the Companies Code of the relevant State or a foreign law, to a provisional liquidator is appointed to the stakeholding company.

### **3 At the end of subsection 160ZNSK(1)**

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Add:

; (g) 160ZNRA (which deals with companies in liquidation).

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

#### **4 Subsection 4-15(2) (table item 1)**

Omit “continue to carry on the same business”, substitute “satisfy the same business test”.

#### **5 Subsection 25-35(5) (table item 1)**

Omit “carried on the same business”, substitute “satisfied the same business test”.

#### **6 Section 36-25 (table item 1 in the table headed “Tax losses of companies”)**

Omit “carried on the same business”, substitute “satisfied the same business test”.

#### **7 Section 36-25 (table item 2 in the table headed “Tax losses of companies”)**

Repeal the table item, substitute:

2. A company wants to deduct a tax loss. Subdivision 165-A  
It cannot do so unless:
  - the same people owned the company during the loss year, the income year and any intervening year; and
  - no person controlled the company’s voting power at any time during the income year who did not also control it during the whole of the loss year and any intervening year;*or* the company has satisfied the same business test.

#### **8 Section 102-30 (table item 4)**

Omit “carried on the same business”, substitute “satisfied the same business test”.

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**9 Section 102-30 (table item 5)**

Repeal the table item, substitute:

- |   |           |   |                    |
|---|-----------|---|--------------------|
| 5 | A company | It cannot apply a net capital loss unless: <ul style="list-style-type: none"><li>• the same people owned the company during the loss year, the income year and any intervening year; and</li><li>• no person controlled the company's voting power at any time during the income year who did not also control it during the whole of the loss year and any intervening year;</li></ul> <i>or</i> the company has satisfied the same business test. | Subdivision 165-CA |
|---|-----------|---|--------------------|

**10 Subsection 125-60(2)**

After “in a company”, insert “that is the \*head entity of a \*demerger group”.

**11 Subparagraph 125-60(3)(a)(i)**

Repeal the subparagraph.

**12 Section 165-5**

Repeal the section, substitute:

**165-5 What this Subdivision is about**

A company cannot deduct a tax loss unless:

- (a) it has the same owners and the same control throughout the period from the start of the loss year to the end of the income year; or
- (b) it satisfies the same business test by carrying on the same business, entering into no new kinds of transactions and conducting no new kinds of business.

(Companies whose total income for the income year is more than \$100 million cannot satisfy the same business test for that year.)

**13 Paragraph 165-10(b)**

Omit “carrying on the same business”, substitute “satisfying the same business test”.

**14 Section 165-10 (note)**

Repeal the note, substitute:

- Note 1: In the case of a widely held or eligible Division 166 company, Subdivision 166-A modifies how this Subdivision applies, unless the company chooses otherwise.
- Note 2: Companies whose total income for an income year is more than \$100 million cannot meet the condition in section 165-13 for that year: see section 165-212A.

**15 At the end of subsection 165-12(1)**

Add:

- Note: See section 165-255 for the rule about incomplete test periods.

**16 Subsection 165-12(6)**

Omit “at the beginning of”, substitute “at any time during”.

**17 After subsection 165-12(7)**

Insert:

- (7A) If the company is:
- (a) a \*non-profit company; or
  - (b) a \*mutual affiliate company; or
  - (c) a \*mutual insurance company;
- during the whole of the \*ownership test period, the conditions in subsections (3) and (4) are taken to have been satisfied by the company.

**18 Section 165-13 (heading)**

Repeal the heading, substitute:

**165-13 Alternatively, the company must satisfy the same business test**

**19 Subsection 165-13(1)**

Omit “the company” (first occurring), substitute “a company (other than a company covered by section 165-212A)”.

**20 Subsection 165-13(1) (note)**

Omit “Note”, substitute “Note 1”.

**21 At the end of subsection 165-13(1)**

Add:

Note 2: Companies whose total income for the income year is more than \$100 million cannot meet the condition in this section for that year: see section 165-212A.

**22 Section 165-15 (heading)**

Repeal the heading, substitute:

**165-15 The same people must control the voting power, or the company must satisfy the same business test**

**23 At the end of subsection 165-15(1)**

Add:

Note: A person can still control the voting power in a company that is in liquidation etc.: see section 165-250.

**24 At the end of subsection 165-15(2)**

Add:

Note: Companies whose total income for the income year is more than \$100 million cannot satisfy the same business test for that year: see section 165-212A.

**25 At the end of section 165-23**

Add:

(Companies whose total income for an income year is more than \$100 million cannot satisfy the same business test for that year.)
---

**26 Section 165-30**

Repeal the section, substitute:

**165-30 Flow chart showing the application of this Subdivision**



Note: If the company was a partner during the income year, special rules apply to calculating a notional loss or notional taxable income.

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**27 Section 165-35 (heading)**

Repeal the heading, substitute:

**165-35 On a change of ownership, unless the company satisfies the same business test**

**28 Section 165-35 (notes)**

Repeal the notes, substitute:

Note 1: For the same business test, see Subdivision 165-E.

Note 2: In the case of a widely held or eligible Division 166 company, Subdivision 166-B modifies how this Subdivision applies, unless the company chooses otherwise.

Note 3: Companies whose total income for the income year is more than \$100 million cannot satisfy the same business test for the rest of the year: see section 165-212A.

**29 Subsection 165-37(3)**

Omit “at the beginning of”, substitute “at any time during”.

**30 After subsection 165-37(4)**

Insert:

(4A) If the company is:

- (a) a \*non-profit company; or
- (b) a \*mutual affiliate company; or
- (c) a \*mutual insurance company;

during the whole of the \*ownership test period, the conditions in paragraphs (1)(b) and (c) are taken to have been satisfied by the company.

**31 Section 165-40 (heading)**

Repeal the heading, substitute:

**165-40 On a change of control of the voting power in the company, unless the company satisfies the same business test**

**32 At the end of subsection 165-40(1)**

Add:

Note: A person can still control the voting power in a company that is in liquidation etc.: see section 165-250.

**33 At the end of subsection 165-40(2)**

Add:

Note: Companies whose total income for the income year is more than \$100 million cannot satisfy the same business test for the rest of the year: see section 165-212A.

**34 At the end of subsection 165-45(3)**

Add:

Note: See section 165-255 for the rule about incomplete periods.

**35 Subsection 165-45(4) (notes)**

Repeal the notes, substitute:

Note 1: For the same business test, see Subdivision 165-E.

Note 2: See section 165-225 for a special alternative to this section.

Note 3: Companies whose total income for the income year is more than \$100 million cannot satisfy the same business test for the same business test period: see section 165-212A.

**36 Section 165-93**

Repeal the section, substitute:

**165-93 What this Subdivision is about**

In working out its net capital gain for an income year, a company cannot apply a net capital loss for an earlier income year unless:

- (a) it has the same owners and the same control from the start of the loss year to the end of the income year; or
- (b) it satisfies the same business test by carrying on the same business, entering into no new kinds of transactions and conducting no new kinds of business.

(Companies whose total income for the income year is more than \$100 million cannot satisfy the same business test for that year.)

**37 Subsection 165-96(1)**

Omit “or \*net capital loss”.

**38 Subsection 165-96(1) (note 1)**

Omit “or net capital loss”.

**39 Subsection 165-96(1) (note 2)**

Omit “in the loss year or the income year”, substitute “in the period from the start of the loss year to the end of the income year”.

**40 At the end of section 165-99**

Add:

(Companies whose total income for an income year is more than \$100 million cannot satisfy the same business test for that year.)
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**41 Section 165-102 (heading)**

Repeal the heading, substitute:

**165-102 On a change of ownership, or of control of voting power,  
unless the company satisfies the same business test**

**42 Section 165-102 (note)**

Repeal the note, substitute:

Note: In the case of a widely held or eligible Division 166 company, Subdivision 166-B modifies how this Subdivision applies, unless the company chooses otherwise.

**43 At the end of section 165-115**

Add:

(Companies whose total income for an income year is more than \$100 million cannot satisfy the same business test for that year.)
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**44 At the end of subsection 165-115B(4)**

Add:

Note: Companies whose total income for an income year is more than \$100 million cannot meet the condition in section 165-13 for that year: see section 165-212A.

**45 At the end of subsection 165-115BA(4)**

Add:

Note: Companies whose total income for an income year is more than \$100 million cannot meet the condition in section 165-13 for that year: see section 165-212A.

**46 Subsection 165-115C(3)**

Omit “at the reference time”, substitute “at any time during the period from the reference time to the \*test time”.

**47 After subsection 165-115C(4)**

Insert:

(4A) If the company is:

- (a) a \*non-profit company; or
- (b) a \*mutual affiliate company; or
- (c) a \*mutual insurance company;

during the whole of the period from the reference time to the \*test time, the test time is taken not to be a \*changeover time in respect of the company because of the application of paragraphs (1)(b) and (c).

**48 At the end of subsection 165-115D(1)**

Add:

Note: A person can still control the voting power in a company that is in liquidation etc.: see section 165-250.

**49 Subsection 165-115L(4)**

Omit “at the reference time”, substitute “at any time during the period from the reference time to the \*test time”.

**50 At the end of section 165-115L**

Add:

(5) If the company is:

- (a) a \*non-profit company; or

- (b) a \*mutual affiliate company; or
  - (c) a \*mutual insurance company;
- during the whole of the period from the reference time to the \*test time, the test time is taken not to be an \*alteration time in respect of the company because of the application of paragraphs (1)(b) and (c).

### **51 At the end of subsection 165-115M(1)**

Add:

Note: A person can still control the voting power in a company that is in liquidation etc.: see section 165-250.

### **52 Section 165-117**

Repeal the section, substitute:

#### **165-117 What this Subdivision is about**

A company cannot deduct a bad debt unless:

- (a) if the debt was incurred in an earlier income year—the company had the same owners and the same control throughout the period from the day on which the debt was incurred to the end of the income year in which it writes off the debt as bad; or
- (b) if the debt was incurred in the current year—the company had the same owners and the same control during the income year both before and after the debt was incurred;

or, if there has been a change of ownership or control, the company satisfies the same business test by carrying on the same business, entering into no new kinds of transactions and conducting no new kinds of business.

(Companies whose total income for the income year is more than \$100 million cannot satisfy the same business test for the second continuity period.)

### **53 Paragraph 165-120(1)(c)**

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Omit “carrying on the same business”, substitute “satisfying the same business test”.

**54 Subsection 165-120(1) (note 1)**

Repeal the note, substitute:

Note 1: In the case of a widely held or eligible Division 166 company, Subdivision 166-C modifies how this Subdivision applies, unless the company chooses otherwise.

**55 At the end of subsection 165-120(1)**

Add:

Note 4: Companies whose total income for the current year is more than \$100 million cannot meet the condition in section 165-126 for the second continuity period: see section 165-212A.

**56 At the end of subsection 165-123(1)**

Add:

Note: See section 165-255 for the rule about incomplete test periods.

**57 Subsection 165-123(6)**

Omit “at the beginning of”, substitute “at any time during”.

**58 After subsection 165-123(7)**

Insert:

(7A) If the company is:

- (a) a \*non-profit company; or
- (b) a \*mutual affiliate company; or
- (c) a \*mutual insurance company;

during the whole of the \*ownership test period, the conditions in subsections (3) and (4) are taken to have been satisfied by the company.

**59 Section 165-126 (heading)**

Repeal the heading, substitute:

**165-126 Alternatively, the company must satisfy the same business test**

**60 Subsection 165-126(1)**

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Omit “the company” (first occurring), substitute “a company (other than a company covered by section 165-212A)”.

**61 Subsection 165-126(1) (note)**

Omit “Note”, substitute “Note 1”.

**62 At the end of subsection 165-126(1)**

Add:

Note 2: Companies whose total income for the current year is more than \$100 million cannot meet the condition in this section for the second continuity period: see section 165-212A.

**63 Section 165-129 (heading)**

Repeal the heading, substitute:

**165-129 Same people must control the voting power, or the company must satisfy the same business test**

**64 At the end of subsection 165-129(1)**

Add:

Note: A person can still control the voting power in a company that is in liquidation etc.: see section 165-250.

**65 At the end of subsection 165-129(2)**

Add:

Note: Companies whose total income for the current year is more than \$100 million cannot satisfy the same business test for the second continuity period: see section 165-212A.

**66 Paragraph 165-132(1)(b)**

Omit “carrying on the same business”, substitute “satisfying the same business test”.

**67 At the end of subsection 165-132(1)**

Add:

Note: Companies whose total income for the later income year is more than \$100 million cannot satisfy the same business test for that year: see section 165-212A.

**68 At the end of subsection 165-180(1)**

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Add:

Example: The Commissioner may treat a person as not having beneficially owned redeemable shares at a particular time if the conditions in subsections (2) and (3) are met in respect of those shares.

**69 Section 165-195**

Repeal the section.

**70 Subsection 165-200(1)**

Omit “, 165-190 and 165-195”, substitute “and 165-190”.

**71 After section 165-200**

Insert:

**165-202 Shares held by government entities and charities etc.**

- (1) For the purposes of a test, \*shares that are beneficially owned by each of the following entities are taken to be beneficially owned instead by a person (who is not a company):
  - (a) the Commonwealth, a State or a Territory;
  - (b) a municipal corporation;
  - (c) a local governing body;
  - (d) the government of a foreign country, or of part of a foreign country;
  - (e) a company, established under a law, in which no person has a \*membership interest;
  - (f) a \*non-profit company;
  - (g) a charitable institution, a charitable fund or any other kind of charitable body (other than such an institution, fund or body that is a trust).
  
- (2) For the purposes of a test, \*shares that are beneficially owned through a charitable institution, a charitable fund, or any other kind of charitable body, that is a trust are taken to be beneficially owned instead by a person (who is neither a company nor a trustee).

### **165-203 Companies where no shares have been issued**

For the purposes of a test, if no \*shares have been issued in a company, each \*membership interest in the company is taken to be a share in the company.

### **72 Section 165-207**

Repeal the section, substitute:

### **165-207 Trustees of family trusts**

- (1) This section applies if one or more trustees of a \*family trust:
- (a) owns \*shares in a company; or
  - (b) controls, or is able to control, (whether directly, or indirectly through one or more interposed entities) voting power in a company; or
  - (c) has a right to receive (whether directly, or \*indirectly through one or more interposed entities) a \*percentage of a \*dividend or a distribution of capital of a company.

- (2) For the purposes of a primary test, a single notional entity that is a person (but is neither a company nor a trustee) is taken to own the \*shares beneficially.

Note: For a primary test, see subsections 165-150(1), 165-155(1) and 165-160(1).

- (3) For the purposes of an alternative test, a single notional entity that is a person (but is neither a company nor a trustee) is taken:
- (a) to control, or have the ability to control, the voting power in the company; or
  - (b) to have the right to receive (whether directly or \*indirectly) the percentage of the \*dividend or distribution for the entity's own benefit.

Note: For an alternative test, see subsections 165-150(2), 165-155(2) and 165-160(2).

- (4) If a trustee of the trust is subsequently replaced by another trustee of the trust, the same single notional entity is taken:
- (a) to own the \*shares beneficially; or
  - (b) to control, or have the ability to control, the voting power in the company; or

- (c) to have the right to receive (whether directly or \*indirectly) the percentage of the \*dividend or distribution for the entity's own benefit.

### 73 At the end of Subdivision 165-D

Add:

#### 165-208 Companies in liquidation etc.

- (1) For the purposes of a primary test or an alternative test, an entity is not prevented from:

- (a) beneficially owning \*shares in a company; or
- (b) having the right to exercise, controlling, or being able to control, voting power in a company; or
- (c) having the right to receive any \*dividends that a company may pay; or
- (d) having the right to receive any distribution of capital of a company;

merely because:

- (e) the company is or becomes:
  - (i) an externally-administered body corporate within the meaning of the *Corporations Act 2001*; or
  - (ii) an entity with a similar status under a \*foreign law to an externally-administered body corporate; or
- (f) either:
  - (i) a provisional liquidator is appointed to the company under section 472 of the *Corporations Act 2001*; or
  - (ii) a person with a similar status under a foreign law to a provisional liquidator is appointed to the company.

Note 1: For a primary test, see subsections 165-150(1), 165-155(1) and 165-160(1).

Note 2: For an alternative test, see subsections 165-150(2), 165-155(2) and 165-160(2).

- (2) For the purposes of a primary test or an alternative test, a company (the ***stakeholding company***) is not prevented from:

- (a) beneficially owning \*shares in another company, or any other interest in another entity; or

- (b) having the right to exercise, controlling, or being able to control, voting power in another company or any other entity;  
or
  - (c) having the right to receive any \*dividends that another company or any other entity may pay; or
  - (d) having the right to receive any distribution of capital of another company or of any other entity;
- merely because:
- (e) the stakeholding company is or becomes:
    - (i) an externally-administered body corporate within the meaning of the *Corporations Act 2001*; or
    - (ii) an entity with a similar status under a \*foreign law to an externally-administered body corporate; or
  - (f) either:
    - (i) a provisional liquidator is appointed to the stakeholding company under section 472 of the *Corporations Act 2001*; or
    - (ii) a person with a similar status under a foreign law to a provisional liquidator is appointed to the stakeholding company.

#### **165-209 Dual listed companies**

Section 165-150 does not apply to \*shares that are \*dual listed company voting shares.

#### **74 Subsection 165-210(1)**

Omit “The company”, substitute “A company (other than a company covered by section 165-212A)”.

#### **75 At the end of subsection 165-210(1)**

Add:

Note: Companies whose total income for an income year is more than \$100 million cannot satisfy the same business test for the same business test period: see section 165-212A.

#### **76 At the end of Subdivision 165-E**

Add:

### **165-212A Some companies cannot satisfy the same business test**

For the purposes of this Division and Division 166, a company does *not* satisfy the \*same business test for the whole or a part of the income year if the \*total income of the company for the income year is more than \$100 million.

Note: Section 165-212C sets out how to work out the total income of a company that is not able to work out its total income for a 12 month period.

### **165-212B Definition of *total income***

- (1) The *total income* of a company for an income year is the total of the following:
  - (a) any \*assessable income (other than any \*net capital gains) \*derived during the year by the company;
  - (b) any \*exempt income derived during the year by the company;
  - (c) any \*non-assessable non-exempt income derived during the year by the company.
- (2) In working out the amount of a company's \*non-assessable non-exempt income under paragraph (1)(c), do not include:
  - (a) any amount covered by section 17-5 (which is about GST);  
or
  - (b) any amount of non-assessable non-exempt income that is not included in the company's \*assessable income because an equivalent amount has already been included in the company's assessable income (whether in that year or an earlier income year).

Note: For example, under section 70-90, the actual amount received for trading stock disposed of outside the ordinary course of business is not included in a company's assessable income because the market value of that stock has already been included in the company's assessable income.

### **165-212C Total income of companies who cannot work out their total income for a 12 month period**

- (1) This section sets out how to apply sections 165-212A and 716-805 if:
  - (a) the company does not exist for the whole income year; or

- (b) the company is a \*subsidiary member of a \*consolidated group or a \*MEC group for a part of the income year.
- (2) The \*total income of the company for the income year is the amount that the company reasonably estimates would be the total income if:
  - (a) the company were in existence for the whole of the income year; and
  - (b) the company were not a \*subsidiary member of a \*consolidated group or a \*MEC group at any time during the year.
- (3) This section applies instead of section 716-850 (which is about grossing up threshold amounts).

**165-212D Restructure of MDOs etc.**

- (1) An \*MDO does not fail to satisfy the \*same business test merely because, before 1 July 2003:
  - (a) the MDO restructured the way it \*provides medical indemnity cover; or
  - (b) the MDO ceased to provide medical indemnity cover; in order to comply with the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003*.
- (2) A \*general insurance company which is an \*associate of an \*MDO does not fail to satisfy the \*same business test merely because, before 1 July 2003:
  - (a) the MDO restructured the way it \*provides medical indemnity cover; or
  - (b) the MDO ceased to provide medical indemnity cover; in order to comply with the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003*.

**165-212E Entry history rule does not apply for the purposes of the same business test**

For the purposes of the \*same business test, if an entity (the *joining entity*) becomes a \*subsidiary member of a \*consolidated group or a \*MEC group, section 701-5 (the entry history rule) does not operate to take the \*business of the \*head company of the group to

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include the business of the joining entity before it became a  
\*member of the group.

### 77 Paragraph 165-235(2)(c)

Omit “or net capital loss”.

### 78 At the end of Division 165

Add:

### Subdivision 165-G—Other special provisions

#### Table of sections

165-250	Control of companies in liquidation etc.
165-255	Incomplete periods

### 165-250 Control of companies in liquidation etc.

- (1) For the purposes of sections 165-15, 165-40, 165-115D, 165-115M and 165-129, a person is not prevented from controlling, or being or becoming able to control, voting power in a company merely because:
  - (a) the company is or becomes:
    - (i) an externally-administered body corporate within the meaning of the *Corporations Act 2001*; or
    - (ii) an entity with a similar status under a \*foreign law to an externally-administered body corporate; or
  - (b) either:
    - (i) a provisional liquidator is appointed to the company under section 472 of the *Corporations Act 2001*; or
    - (ii) a person with a similar status under a foreign law to a provisional liquidator is appointed to the company.
- (2) For the purposes of sections 165-15, 165-40, 165-115D, 165-115M and 165-129, a company (the *stakeholding company*) is not prevented from controlling, or being or becoming able to control, voting power in another company merely because:
  - (a) the stakeholding company is or becomes:
    - (i) an externally-administered body corporate within the meaning of the *Corporations Act 2001*; or

- (ii) an entity with a similar status under a \*foreign law to an externally-administered body corporate; or
- (b) either:
  - (i) a provisional liquidator is appointed to the stakeholding company under section 472 of the *Corporations Act 2001*; or
  - (ii) a person with a similar status under a foreign law to a provisional liquidator is appointed to the stakeholding company.

### **165-255 Incomplete periods**

- (1) If:
  - (a) this Division or Division 166 requires a company to meet or satisfy a condition or test, or work out an amount, for a period; and
  - (b) the company is only in existence after the beginning of the period;then the period is taken to start on the first day that the company is in existence.
- (2) If:
  - (a) this Division or Division 166 requires a company to meet or satisfy a condition or test, or work out an amount, for a period; and
  - (b) the company ceases to be in existence before the end of the period;then the period is taken to end on the day the company ceases to be in existence.

### **79 Division 166**

Repeal the Division, substitute:

### **Division 166—Income tax consequences of changing ownership or control of a widely held or eligible Division 166 company**

#### **Table of Subdivisions**

Guide to Division 166

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- 166-AA The object of this Division
- 166-A Deducting tax losses of earlier income years
- 166-B Working out the taxable income, tax loss, net capital gain and net capital loss for the income year of the change
- 166-C Deducting bad debts
- 166-CA Changeover times and alteration times
- 166-D Tests for finding out whether the widely held or eligible Division 166 company has maintained the same owners
- 166-E Concessional tracing rules

## **Guide to Division 166**

### **166-1 What this Division is about**

This Division modifies the way the rules in Division 165 apply to a widely held or eligible Division 166 company by making it easier for the company to apply the rules.

If the company has maintained the same owners as between certain points of time, it does not need to prove it has maintained the same owners throughout the periods in between.

In certain cases, special concessional tracing rules deem entities to hold voting, dividend or capital stakes in the company so that the company does not have to trace through to the ultimate beneficial owners of the stakes.

### **Subdivision 166-AA—The object of this Division**

#### **166-3 The object of this Division**

- (1) The object of this Division is to make it easier for a \*widely held company, or an \*eligible Division 166 company, to apply the rules in Division 165 (because of the difficulty the company might have under that Division in actually tracing through to the ultimate beneficial owners of \*voting stakes, \*dividend stakes and \*capital stakes in the company).
- (2) This Division makes it easier to apply the rules in Division 165 by:

- (a) making it unnecessary for the company to prove that it has maintained the same owners throughout a period, if the company had the same owners at certain test times; and
- (b) making it unnecessary for the company to trace through to the ultimate beneficial owners of:
  - (i) \*voting stakes, \*dividend stakes and \*capital stakes in the company held by certain entities (whether directly, or \*indirectly through one or more interposed entities); and
  - (ii) small \*voting stakes, \*dividend stakes and \*capital stakes in the company.

### **Subdivision 166-A—Deducting tax losses of earlier income years**

#### **Table of sections**

166-5	How Subdivision 165-A applies to a widely held or eligible Division 166 company
166-15	Companies can choose that this Subdivision is not to apply to them

#### **166-5 How Subdivision 165-A applies to a widely held or eligible Division 166 company**

- (1) This Subdivision modifies the way Subdivision 165-A applies to a company that is:
  - (a) a \*widely held company at all times during the income year; or
  - (b) an \*eligible Division 166 company at all times during the income year; or
  - (c) a widely held company for a part of the income year and an eligible Division 166 company for the rest of the income year.

Note 1: Subdivision 165-A is about the conditions a company must meet before it can deduct a tax loss for an earlier income year.

Note 2: A company can choose that this Subdivision is not to apply to it: see section 166-15.

Note 3: See section 165-255 for the rule about incomplete income years.

*Meaning of test period*

- (2) The company's *test period* is the period consisting of the \*loss year, the income year and any intervening period.

Note: See section 165-255 for the rule about incomplete test periods.

*Substantial continuity of ownership*

- (3) The company is taken to have met the conditions in section 165-12 (which is about the company maintaining the same owners) if there is \*substantial continuity of ownership of the company as between the start of the \*test period and:

- (a) the end of each income year in that period; and
- (b) the \*end of each \*corporate change in that period.

Note: See sections 166-145 and 166-175 to work out whether there is substantial continuity of ownership and a corporate change.

*No substantial continuity of ownership*

- (4) The company is taken to have *failed* to meet the conditions in section 165-12 if there is *no* \*substantial continuity of ownership of the company as between the start of the \*test period and:

- (a) the end of an income year in that period; or
- (b) the \*end of a \*corporate change in that period.

*Satisfies the same business test*

- (5) However, if the company satisfies the \*same business test for the income year (the *same business test period*), it is taken to have satisfied the condition in section 165-13.

Note 1: For the same business test, see Subdivision 165-E.

Note 2: Companies whose total income for the income year is more than \$100 million cannot satisfy the same business test for that year: see section 165-212A.

Note 3: See section 165-255 for the rule about incomplete test periods.

- (6) Apply the \*same business test to the \*business that the company carried on immediately before the earlier of the following times (the *test time*):

- (a) the end of the first income year;
  - (b) the first time in the test period that a \*corporate change in the company \*ends;
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for which there is no \*substantial continuity of ownership of the company as between the start of the \*test period and that time.

**166-15 Companies can choose that this Subdivision is not to apply to them**

- (1) The company can choose that Subdivision 165-A is to apply to it for the income year *without* the modifications made by this Subdivision.
- (2) The company must choose on or before the day it lodges its \*income tax return for the income year, or before a later day if the Commissioner allows.

**Subdivision 166-B—Working out the taxable income, tax loss, net capital gain and net capital loss for the income year of the change**

**Table of sections**

166-20	How Subdivisions 165-B and 165-CB apply to a widely held or eligible Division 166 company
166-25	How to work out the taxable income, tax loss, net capital gain and net capital loss
166-35	Companies can choose that this Subdivision is not to apply to them

**166-20 How Subdivisions 165-B and 165-CB apply to a widely held or eligible Division 166 company**

- (1) This Subdivision modifies how Subdivisions 165-B and 165-CB apply to a company that is:
  - (a) a \*widely held company at all times during the income year (the *test period*); or
  - (b) an \*eligible Division 166 company at all times during the income year (the *test period*); or
  - (c) a widely held company for a part of the income year and an eligible Division 166 company for the rest of the income year (the whole year being the *test period*).

Note 1: Subdivision 165-B is about when a company must calculate its taxable income and tax loss for the income year in a special way.  
Subdivision 165-CB is about when a company must calculate its net capital gain and net capital loss for the income year in a special way.

Note 2: A company can choose that this Subdivision is not to apply to it: see section 166-35.

Note 3: See section 165-255 for the rule about incomplete test periods.

*No corporate change etc.*

(2) If:

(a) *no* \*corporate change in the company \*ends at any time in the \*test period; or

(b) a corporate change in the company \*ends during the test period, but there is \*substantial continuity of ownership as between the start of the test period and immediately after the corporate change ends;

the company is taken to have met the condition in paragraph 165-35(a) (which is about there being persons having \*more than a 50% stake in it during the whole of the income year).

Note: See sections 166-145 and 166-175 to work out whether there is substantial continuity of ownership and a corporate change.

*Corporate change*

(3) If:

(a) a \*corporate change in the company \*ends at any time in the \*test period; and

(b) there is no \*substantial continuity of ownership as between the start of the test period and immediately after the corporate change ends;

then the company is taken to have *failed* to meet the condition in paragraph 165-35(a).

*Satisfies the same business test*

(4) However, if the company satisfies the \*same business test for the rest of the income year (the *same business test period*) after the first time (the *test time*) in the \*test period that a \*corporate change in the company \*ended, the company is taken to have satisfied the condition in paragraph 165-35(b).

Note 1: For the same business test, see Subdivision 165-E.

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Note 2: Companies whose total income for the income year is more than \$100 million cannot satisfy the same business test for the rest of the year: see section 165-212A.

Note 3: See section 165-255 for the rule about incomplete test periods.

- (5) Apply the \*same business test to the \*business that the company carried on immediately before the \*test time.

### **166-25 How to work out the taxable income, tax loss, net capital gain and net capital loss**

- (1) If the company must calculate its taxable income and \*tax loss for the income year under Subdivision 165-B, and its \*net capital gain and \*net capital loss under Subdivision 165-CB, then, in dividing the income year into periods, apply subsection (2) of this section instead of subsection 165-45(3).
- (2) The last period ends at the end of the income year. Each period (except the last) ends at the *earlier* of:
- (a) the *earliest* time when:
    - (i) a \*corporate change in the company \*ends; and
    - (ii) there is no \*substantial continuity of ownership of the company as between the start of the \*test period and that time; or
  - (b) the *earliest* time when a person begins to control, or becomes able to control, the voting power in the company (whether directly, or indirectly through one or more interposed entities) for the purpose, or for purposes including the purpose, of:
    - (i) getting some benefit or advantage to do with how this Act applies; or
    - (ii) getting such a benefit or advantage for someone else.

Note: See sections 166-145 and 166-175 to work out whether there is substantial continuity of ownership and a corporate change.

### **166-35 Companies can choose that this Subdivision is not to apply to them**

- (1) The company can choose that Subdivisions 165-B and 165-CB are to apply to it for the income year *without* the modifications made by this Subdivision.

- (2) The company must choose on or before the day it lodges its \*income tax return for the income year, or before a later day if the Commissioner allows.

### **Subdivision 166-C—Deducting bad debts**

#### **Table of sections**

166-40	How Subdivision 165-C applies to a widely held or eligible Division 166 company
166-50	Companies can choose that this Subdivision is not to apply to them

#### **166-40 How Subdivision 165-C applies to a widely held or eligible Division 166 company**

- (1) This Subdivision modifies the way Subdivision 165-C applies to a company that is:
- (a) a \*widely held company at all times during the \*current year; or
  - (b) an \*eligible Division 166 company at all times during the current year; or
  - (c) a widely held company for a part of the current year and an eligible Division 166 company for the rest of the current year.

Note 1: Subdivision 165-C is about the conditions a company must meet before it can deduct a bad debt.

Note 2: A company can choose that this Subdivision is not to apply to it: see section 166-50.

Note 3: See section 165-255 for the rule about incomplete current years.

#### *Meaning of test period*

- (2) The company's *test period* is the period:
- (a) that begins at whichever of the following times the company chooses:
    - (i) the start of the income year in which the debt was incurred;
    - (ii) the start of the \*first continuity period; and
  - (b) that ends at the end of the \*second continuity period; and includes any intervening period.

Note: See section 165-255 for the rule about incomplete test periods.

*Substantial continuity of ownership*

- (3) The company is taken to have met the conditions in section 165-123 (about the company maintaining the same owners) if there is \*substantial continuity of ownership of the company as between the start of the \*test period and:
- (a) the end of each income year in that period; and
  - (b) the \*end of each \*corporate change in that period.

Note: See sections 166-145 and 166-175 to work out whether there is substantial continuity of ownership and a corporate change.

*No substantial continuity of ownership*

- (4) The company is taken to have *failed* to meet the conditions in section 165-123 if there is *no* \*substantial continuity of ownership of the company as between the start of the \*test period and:
- (a) the end of an income year in that period; or
  - (b) the \*end of a \*corporate change in that period.

*Satisfies the same business test*

- (5) However, if the company satisfies the \*same business test for the \*second continuity period (the *same business test period*), it is taken to have satisfied the condition in section 165-126.

Note 1: For the same business test, see Subdivision 165-E.

Note 2: Companies whose total income for the income year is more than \$100 million cannot satisfy the same business test for the second continuity period: see section 165-212A.

Note 3: See section 165-255 for the rule about incomplete test periods.

- (6) Apply the \*same business test to the \*business that the company carried on immediately before the earlier of the following times (the *test time*):
- (a) the end of the first income year;
  - (b) the first time in the test period that a \*corporate change in the company \*ends;
- for which there is no \*substantial continuity of ownership of the company as between the start of the \*test period and that time.

**166-50 Companies can choose that this Subdivision is not to apply to them**

- (1) The company can choose that Subdivision 165-C is to apply to it for the income year *without* the modifications made by this Subdivision.
- (2) The company must choose on or before the day it lodges its \*income tax return for the income year, or before a later day if the Commissioner allows.

**Subdivision 166-CA—Changeover times and alteration times**

**Table of sections**

166-80	How Subdivision 165-CC or 165-CD applies to a widely held or eligible Division 166 company
166-90	Companies can choose that this Subdivision is not to apply to them

**166-80 How Subdivision 165-CC or 165-CD applies to a widely held or eligible Division 166 company**

- (1) This Subdivision modifies the way in which:
  - (a) Subdivision 165-CC applies in determining whether a changeover time (within the meaning of section 165-115C) has occurred; or
  - (b) Subdivision 165-CD applies in determining whether an alteration time (within the meaning of section 165-115L) has occurred;in relation to a company that is:
  - (c) a \*widely held company at all times during the income year; or
  - (d) an \*eligible Division 166 company at all times during the income year; or
  - (e) a widely held company for a part of the income year and an eligible Division 166 company for the rest of the income year.

Note 1: Subdivision 165-CC is about the conditions a company that has an unrealised net loss must satisfy before it can have capital losses taken into account or deduct revenue losses. Subdivision 165-CD provides for reductions in cost bases and certain other reductions after alterations have occurred in the ownership or control of a loss company.

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Note 2: A company can choose that this Subdivision is not to apply to it: see section 166-90.

Note 3: See section 165-255 for the rule about incomplete income years.

*Meaning of test period and test time*

- (2) The company's *test period* is the period starting at the time that is the reference time for the purposes of Subdivision 165-CC or section 165-115L, as the case may be, and ending at each of the following times (the *test time*):
- (a) the end of the income year in which the reference time occurred;
  - (b) the end of a later income year;
  - (c) the \*end of a \*corporate change in the company.

Note 1: See section 165-255 for the rule about incomplete test periods.

Note 2: See section 166-175 to work out whether there is a corporate change.

*Substantial continuity of ownership*

- (3) A changeover time or an alteration time is taken not to have occurred in respect of the company during the test period if there is \*substantial continuity of ownership of the company as between the start of the \*test period and the \*test time.

Note: See section 166-145 to work out whether there is substantial continuity of ownership.

*No substantial continuity of ownership*

- (4) Subsections (5) and (6) have effect if there is no \*substantial continuity of ownership of the company as between the start of the \*test period and the \*test time.
- (5) The \*test time is taken to have been a changeover time or an alteration time, as the case may be, in respect of the company.
- (6) No other time during the \*test period is a changeover time or an alteration time in respect of the company.

**166-90 Companies can choose that this Subdivision is not to apply to them**

- (1) The company can choose that Subdivision 165-CC or 165-CD is to apply to it in respect of a \*test period for the purposes of section 166-80 *without* the modifications made by this Subdivision.
- (2) The company must choose on or before the day it lodges its \*income tax return for the income year in which the \*test period begins, or before a later day if the Commissioner allows.

**Subdivision 166-D—Tests for finding out whether the widely held or eligible Division 166 company has maintained the same owners**

**Guide to Subdivision 166-D**

**166-135 What this Subdivision is about**

This Subdivision has the tests to work out whether a widely held or eligible Division 166 company has maintained the same owners as between different times. (Subdivision 166-E has rules which make it easier for the company to satisfy these tests.)

This Subdivision also defines when there has been a corporate change in the company.

**Table of sections**

**The ownership tests: substantial continuity of ownership**

- 166-145 The ownership tests: substantial continuity of ownership  
166-165 Relationship with rules in Division 165

**Corporate change in a company**

- 166-175 Corporate change in a company

## **The ownership tests: substantial continuity of ownership**

### **166-145 The ownership tests: substantial continuity of ownership**

- (1) There is *substantial continuity of ownership* of the company as between the start of the \*test period and another time in the test period if (and only if) the conditions in this section are met.

Note: Section 166-165, and Subdivision 166-E, affect how this section is applied.

#### *Voting power*

- (2) There must be persons (none of them companies or trustees) who had \*more than 50% of the voting power in the company at the start of the \*test period. Also, those persons must have had \*more than 50% of the voting power in the company immediately after the other time in the test period.

Note: To work out who had more than 50% of the voting power, see section 165-150.

#### *Rights to dividends*

- (3) There must be persons (none of them companies) who had rights to \*more than 50% of the company's dividends at the start of the \*test period. Also, those persons must have had rights to \*more than 50% of the company's dividends immediately after the other time in the test period.

Note: To work out who had rights to more than 50% of the company's dividends, see section 165-155.

#### *Rights to capital distributions*

- (4) There must be persons (none of them companies) who had rights to \*more than 50% of the company's capital distributions at the start of the \*test period. Also, those persons must have had rights to \*more than 50% of the company's capital distributions immediately after the other time in the test period.

Note: To work out who had rights to more than 50% of the company's capital distributions, see section 165-160.

*When to apply the test*

- (5) To work out whether a condition in this section was satisfied at a time (the ***ownership test time***), apply the alternative test for that condition.

Note: For the alternative test, see subsections 165-150(2), 165-155(2) and 165-160(2).

*Conditions in subsections (3) and (4) satisfied by non-profit and mutual companies*

- (6) If the company is:
- (a) a \*non-profit company; or
  - (b) a \*mutual affiliate company; or
  - (c) a \*mutual insurance company;
- during the whole of the \*test period, the conditions in subsections (3) and (4) are taken to have been satisfied by the company.

**166-165 Relationship with rules in Division 165**

- (1) The provisions of Subdivision 165-D (other than section 165-165) apply for the purposes of the tests in section 166-145.
- (2) The following provisions apply for the purposes of the tests in section 166-145 as if the reference to a particular time were a reference to the \*ownership test time:
- (a) section 165-180 (which is about arrangements affecting beneficial ownership of shares);
  - (b) subsection 165-185(2) (which treats some shares as never having carried rights);
  - (c) subsection 165-190(2) (which treats some shares as always having carried rights).

**Corporate change in a company**

**166-175 Corporate change in a company**

*Meaning of corporate change*

- (1) There is a ***corporate change*** in a company if:
- (a) there is a \*takeover bid for \*shares in the company; or
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- (b) there is a scheme of arrangement, involving more than 50% of the company's shares, that has been approved by a court; or
- (c) there is any other arrangement, involving the acquisition of more than 50% of the company's shares, that is regulated under the *Corporations Act 2001* or a \*foreign law; or
- (d) there is an issue of \*shares in the company that results in an increase of 20% or more in:
  - (i) the issued share capital of the company; or
  - (ii) the number of the company's shares on issue; or
- (e) there is a corporate change in another company which beneficially owns one or more of the following stakes in the first company:
  - (i) a \*voting stake that carries rights to more than 50% of the voting power of the first company;
  - (ii) a \*dividend stake that carries rights to receive more than 50% of any dividends the first company may pay;
  - (iii) a \*capital stake that carries rights to receive more than 50% of any distribution of capital of the first company;(whether the other company owns those stakes directly, or \*indirectly through one or more interposed entities).

*When a corporate change ends*

- (2) A \*corporate change *ends*:
  - (a) if paragraph (1)(a) applies (or paragraph (1)(e) applies because of paragraph (1)(a))—at the latest time when a \*bid period of the \*takeover bid ends; and
  - (b) if paragraph (1)(b) or (c) applies (or paragraph (1)(e) applies because of paragraph (1)(b) or (c))—when the scheme of arrangement or other arrangement ends; and
  - (c) if paragraph (1)(d) applies (or paragraph (1)(e) applies because of paragraph (1)(d))—when the offer period for the issue of \*shares ends.

## **Subdivision 166-E—Concessional tracing rules**

### **Guide to Subdivision 166-E**

#### **166-215 What this Subdivision is about**

This Subdivision has rules which make it easier for a widely held or eligible Division 166 company to satisfy the ownership tests in Subdivision 166-D.

Special concessional tracing rules deem entities to hold the following stakes in the company so that the company does not have to trace through to the beneficial owners of the stakes:

- (a) stakes of less than 10% in the company;
- (b) stakes of between 10% and 50% that are held by widely held companies;
- (c) stakes that are held by complying superannuation funds, complying approved deposit funds, special companies and managed investment schemes;
- (d) stakes in interposed foreign listed companies that are held as bearer shares;
- (e) stakes in interposed foreign listed companies that are held by depository entities.

#### **Table of sections**

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166-220 Application of this Subdivision

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**Application of this Subdivision**

**166-220 Application of this Subdivision**

This Subdivision applies to a company (the *tested company*) that is:

- (a) a \*widely held company at all times during the income year;  
or
- (b) an \*eligible Division 166 company at all times during the income year; or
- (c) a widely held company for a part of the income year and an eligible Division 166 company for the rest of the income year.

Note: See section 165-255 for the rule about incomplete income years.

**Stakes of less than 10% in the tested company**

**166-225 Direct stakes of less than 10% in the tested company**

- (1) This section modifies how the ownership tests in section 166-145 are applied to the tested company if:

- (a) a \*voting stake that carries rights to less than 10% of the voting power in the company is held directly in the company; or
- (b) a \*dividend stake that carries the right to receive less than 10% of any dividends that the company may pay is held directly in the company; or
- (c) a \*capital stake that carries the right to receive less than 10% of any distribution of capital of the company is held directly in the company.

Note: Other rules might affect this provision: see sections 166-270, 166-275 and 166-280.

*Notional shareholder*

- (2) The tests are applied to the tested company as if, at the \*ownership test time, a single notional entity:
  - (a) directly controlled the voting power that is carried by each such \*voting stake; and
  - (b) had the right to receive, for its own benefit and directly:
    - (i) any \*dividends the tested company may pay in respect of each such \*dividend stake; and
    - (ii) any distributions of capital of the tested company in respect of each such \*capital stake; and
  - (c) were a person (other than a company).

Note: The persons who actually control the voting power and have rights to dividends and capital are taken not to control that power or have those rights: see section 166-265.

- (3) To avoid doubt, the single notional entity mentioned in subsection (2) is a different single notional entity from the one mentioned in section 165-207 and the one mentioned in section 166-255.

**166-230 Indirect stakes of less than 10% in the tested company**

- (1) This section modifies how the ownership tests in section 166-145 are applied to the tested company if it is the case, or it is reasonable to assume that:
  - (a) an entity (the *stakeholder*) indirectly holds any of these stakes in the tested company:

- (i) a \*voting stake that carries rights to less than 10% of the voting power in the company; or
  - (ii) a \*dividend stake that carries the right to receive less than 10% of any dividends that the company may pay; or
  - (iii) a \*capital stake that carries the right to receive less than 10% of any distribution of capital of the company; and
- (b) either:
- (i) the stakeholder indirectly holds the stake in the tested company by holding \*shares directly in a company (the ***top interposed entity***) that is interposed between the stakeholder and the tested company; or
  - (ii) the stakeholder indirectly holds the stake in the tested company by holding another interest directly in an entity (the ***top interposed entity***) that is not a company and that is interposed between the stakeholder and the tested company.

Note 1: There might also be other entities interposed between the top interposed entity and the tested company.

Note 2: Other rules might affect this provision: see subsection (3) and sections 166-272, 166-275 and 166-280.

*Top interposed entity deemed to hold stakes directly in the tested company*

- (2) The tests are applied to the tested company as if, at the \*ownership test time:
- (a) if the stake is a \*voting stake—the top interposed entity controls, or is able to control, the voting power in the tested company that is carried by that stake at that time; and
  - (b) if the stake is a \*dividend stake—the top interposed entity \*indirectly had the right to receive, for its own benefit, any \*dividends the tested company may pay in respect of that stake at that time; and
  - (c) if the stake is a \*capital stake—the top interposed entity indirectly had the right to receive, for its own benefit, any distributions of capital of the tested company in respect of that stake at that time; and
  - (d) in any case—the top interposed entity were a person (other than a company).

Note: The persons who actually control the voting power and have rights to dividends and capital are taken not to control that power or have those rights: see section 166-265.

*Acquisition of top interposed entity by another entity*

- (3) If:
- (a) a new entity (the ***new interposed entity***) acquires all the \*shares or other interests in the top interposed entity (the ***old interposed entity***); and
  - (b) the new interposed entity has the same classes of shares or other interests as the old interposed entity; and
  - (c) if the new interposed entity is a company—the shares are not \*redeemable shares; and
  - (d) in any case—each stakeholder holds the same proportion of the total \*voting stakes, \*dividend stakes or \*capital stakes in the new interposed entity immediately after the acquisition as the stakeholder held in the old interposed entity immediately before the acquisition;
- then, at all times that the old interposed entity held or is taken to have held a stake in the tested company, the new interposed entity is taken to have held that stake.
- (4) Except for the purposes of determining whether a time is an alteration time (within the meaning of section 165-115L), section 166-272 (which is about the same shares or interests) is to be disregarded when applying subsection (3).

**166-235 Voting, dividend and capital stakes**

*Meaning of voting stake*

- (1) An entity holds a ***voting stake*** in a company if:
- (a) the entity is the registered holder of \*shares in the company; and
  - (b) the shares carry rights to exercise voting power in the company.
- (2) An entity (the ***stakeholder***) also holds a ***voting stake*** in a company if:
- (a) one or more other entities are interposed between the company and the stakeholder; and

- (b) the stakeholder controls, or is able to control, voting power in the company indirectly through the interposed entity or entities.

*Meaning of dividend stake*

- (3) An entity holds a *dividend stake* in a company if:
  - (a) the entity is the registered holder of \*shares in the company; and
  - (b) the shares carry rights to all or any \*dividends that the company may pay.
- (4) An entity (the *stakeholder*) also holds a *dividend stake* in a company if:
  - (a) one or more other entities are interposed between the company and the stakeholder; and
  - (b) the stakeholder has the right to receive, for its own benefit and \*indirectly through the interposed entity or entities, all or any \*dividends that the company may pay.

*Meaning of capital stake*

- (5) An entity holds a *capital stake* in a company if:
  - (a) the entity is the registered holder of \*shares in the company; and
  - (b) the shares carry rights to all or any of a distribution of capital of the company.
- (6) An entity (the *stakeholder*) also holds a *capital stake* in a company if:
  - (a) one or more other entities are interposed between the company and the stakeholder; and
  - (b) the stakeholder has the right to receive, for its own benefit and \*indirectly through the interposed entity or entities, all or any of a distribution of capital of the company.

*Stakes held by nominees*

- (7) For the purposes of sections 166-225 and 166-230, if:
    - (a) an entity (the *nominee entity*) holds a \*voting stake, a \*dividend stake, or a \*capital stake, in a company; and
    - (b) the nominee entity is itself a company; and
-

- (c) the nominee entity holds the stake as a nominee for more than one other entity;
- then, for each entity for whom a part of the stake is held by the nominee entity, that entity's part of the stake may be treated instead as a separate stake.

## **Stakes held directly and/or indirectly by widely held companies**

### **166-240 Stakes held directly and/or indirectly by widely held companies**

- (1) This section modifies how the ownership tests in section 166-145 are applied to the tested company if a \*widely held company directly or indirectly (through one or more interposed entities), or both directly and indirectly, holds any of the following:
  - (a) a \*voting stake that carries rights to between 10% and 50% (inclusive) of the voting power in the company;
  - (b) a \*dividend stake that carries the right to receive between 10% and 50% (inclusive) of any dividends that the company may pay;
  - (c) a \*capital stake that carries the right to receive between 10% and 50% (inclusive) of any distribution of capital of the company.

Note: Other rules might affect this provision: see subsections (3) and (4) and sections 166-272, 166-275 and 166-280.
- (2) The tests are applied to the tested company as if, at the \*ownership test time:
  - (a) if the stake is a \*voting stake—the \*widely held company controls, or is able to control, the voting power in the tested company that is carried by that stake at that time; and
  - (b) if the stake is a \*dividend stake—the widely held company had the right to receive (whether directly or \*indirectly), for its own benefit, any \*dividends the tested company may pay in respect of that stake at that time; and
  - (c) if the stake is a \*capital stake—the widely held company had the right to receive (whether directly or indirectly), for its own benefit, any distributions of capital of the tested company in respect of that stake at that time; and
  - (d) in any case—the widely held company were a person (other than a company).

Note: The persons who actually control the voting power and have rights to dividends and capital are taken not to control that power or have those rights: see section 166-265.

*Exception*

- (3) This section does not apply in respect of a \*widely held company if the company is not a widely held company for the whole income year in which the \*ownership test time occurs.

Note: See section 165-255 for the rule about incomplete periods.

*Acquisition of widely held company by another entity*

- (4) If:
- (a) a new company acquires all the \*shares in the \*widely held company; and
  - (b) immediately before the acquisition, the shares in the widely held company were listed for quotation in the official list of an \*approved stock exchange; and
  - (c) immediately after the acquisition, the shares in the new company are listed for quotation in the official list of an approved stock exchange; and
  - (d) the new company has the same classes of shares (not being \*redeemable shares) as the widely held company; and
  - (e) each entity that held stakes in the widely held company immediately before the acquisition holds the same proportion of the total \*voting stakes, \*dividend stakes or \*capital stakes in the new company immediately after the acquisition as the entity held in the widely held company immediately before the acquisition;
- then, at all times that the widely held company held or is taken to have held a stake in the tested company, the new company is taken to have held that stake.
- (5) Except for the purposes of determining whether a time is an alteration time (within the meaning of section 165-115L), section 166-272 (which is about same shares or interests) is to be disregarded when applying subsection (4).

### 166-245 Stakes held by other entities

- (1) This section modifies how the ownership tests in section 166-145 are applied to the tested company if:
- (a) an entity mentioned in subsection (2) directly or indirectly (through one or more interposed entities) holds a \*voting stake, a \*dividend stake or a \*capital stake in the company; and
  - (b) neither the entity nor another entity has, under section 166-225, 166-230 or 166-240, been taken to control voting power or have rights in respect of the stake; and
  - (c) the entity mentioned in subsection (2) satisfies the condition in subsection (3).

Note: Other rules might affect this provision: see sections 166-272, 166-275 and 166-280.

- (2) For the purposes of subsection (1), these are the entities:
- (a) a \*superannuation fund; and
  - (b) an \*approved deposit fund; and
  - (c) a \*special company; and
  - (d) a \*managed investment scheme; and
  - (e) any other entity, or entity of a kind, prescribed by the regulations.
- (3) For the purposes of paragraph (1)(c), an entity satisfies the condition in this subsection if at all times during the income year of the tested company in which the \*ownership test time occurs:
- (a) if the entity is a \*superannuation fund:
    - (i) the fund is a \*complying superannuation fund; or
    - (ii) the fund is a superannuation fund that is established in a foreign country and is regulated under a \*foreign law; or
  - (b) if the entity is an \*approved deposit fund—the fund is a \*complying approved deposit fund; or
  - (c) if the entity is a \*special company—the company is a special company; or
  - (d) if the entity is a \*managed investment scheme:
    - (i) the scheme is registered under the *Corporations Act 2001*; or

- (ii) the entity is recognised, under a \*foreign law relating to corporate regulation, as an entity with a similar status to a managed investment scheme; or
- (e) if the entity is an entity, or an entity of a kind, prescribed by the regulations—the entity meets any conditions prescribed by the regulations.

Note: See section 165-255 for the rule about incomplete periods.

*If the entity has 10 members or fewer*

- (4) If the entity has 10 \*members or fewer, the tests are applied to the tested company as if, at the \*ownership test time:
  - (a) if the stake is a \*voting stake—each member controls, or is able to control, an equal proportion of the voting power in the tested company that is carried by that stake at that time; and
  - (b) if the stake is a \*dividend stake—each member had the right to receive (whether directly or \*indirectly), for its own benefit, an equal proportion of any \*dividends the tested company may pay in respect of that stake at that time; and
  - (c) if the stake is a \*capital stake—each member had the right to receive (whether directly or indirectly), for its own benefit, an equal proportion of any distributions of capital of the tested company in respect of that stake at that time; and
  - (d) in any case—each member were a person (other than a company or a trustee).

Note 1: If each member's proportion of the voting power, the dividends or the distributions is less than 10%, then subsections (5) and (6) apply instead.

Note 2: The persons who actually control the voting power and have rights to dividends and capital are taken not to control that power or have those rights: see section 166-265.

*If the entity has more than 10 members etc.*

- (5) The ownership tests are applied as set out in subsection (6) if:
  - (a) the entity has more than 10 \*members; or
  - (b) under subsection (4):
    - (i) the proportion of the voting power in the company that each member controls, or is able to control, is less than 10% of the total voting power; or

- (ii) the proportion of the \*dividends that the tested company may pay for the benefit of each member is less than 10% of the total dividends; or
  - (iii) the proportion of the distributions of capital that the tested company may pay for the benefit of each member is less than 10% of the total distributions.
- (6) The ownership tests are applied to the tested company as if, at the \*ownership test time:
- (a) if the stake is a \*voting stake—the entity controls, or is able to control, the voting power in the tested company that is carried by that stake at that time; and
  - (b) if the stake is a \*dividend stake—the entity had the right to receive (whether directly or \*indirectly), for its own benefit, any \*dividends the tested company may pay in respect of that stake at that time; and
  - (c) if the stake is a \*capital stake—the entity had the right to receive (whether directly or indirectly), for its own benefit, any distributions of capital of the tested company in respect of that stake at that time; and
  - (d) in any case—the entity were a person (other than a company or a trustee).

Note: The persons who actually control the voting power and have rights to dividends and capital are taken not to control that power or have those rights: see section 166-265.

## **When identity of foreign stakeholders is not known**

### **166-255 Bearer shares in foreign listed companies**

- (1) This section modifies how the ownership tests in section 166-145 are applied to the tested company if:
- (a) at the \*ownership test time, it is the case, or it is reasonable to assume, that persons (none of them companies or trustees) hold a \*voting stake, a \*dividend stake or a \*capital stake in the tested company; and
  - (b) an entity has not, under section 166-225, 166-230, 166-240 or 166-245, been taken to control voting power or have rights in respect of the stake; and

- (c) another company (the *foreign listed company*) is interposed, at that time, between those persons and the tested company; and
- (d) at all times during the income year of the tested company in which the ownership test time occurs, the \*principal class of shares in the foreign listed company is listed for quotation in the official list of an \*approved stock exchange; and
- (e) at the ownership test time:
  - (i) voting stakes that carry rights to 50% or more of the voting power in the foreign listed company; or
  - (ii) dividend stakes that carry rights to receive 50% or more of any dividends that the foreign listed company may pay; or
  - (iii) capital stakes that carry rights to receive 50% or more of any distribution of capital of the foreign listed company; as the case requires, are directly held by way of bearer shares; and
- (f) the beneficial owners of some or all of those bearer shares have not been disclosed to the foreign listed company.

Note 1: See section 165-255 for the rule about incomplete test periods.

Note 2: Other rules might affect this provision: see sections 166-270, 166-275 and 166-280.

- (2) The tests are applied to the tested company as if, at the \*ownership test time, for each of those bearer shares whose owners have not been disclosed:
  - (a) a single notional entity controls, or is able to control, the voting power in the tested company that is carried by those shares at that time; and
  - (b) the entity \*indirectly had the right to receive, for its own benefit:
    - (i) any \*dividends the tested company may pay in respect of those shares at that time; and
    - (ii) any distributions of capital of the tested company in respect of those shares at that time; and
  - (c) the entity were a person (other than a company).

Note: The persons who actually control the voting power and have rights to dividends and capital are taken not to control that power or have those rights: see section 166-265.

- (3) To avoid doubt, the single notional entity mentioned in subsection (2) is a different single notional entity from the one mentioned in section 165-207 and the one mentioned in section 166-225.

**166-260 Depository entities holding stakes in foreign listed companies**

- (1) This section modifies how the ownership tests in section 166-145 are applied to the tested company if:
- (a) at the \*ownership test time, it is the case, or it is reasonable to assume, that persons (none of them companies or trustees) have a \*voting stake, a \*dividend stake or a \*capital stake in the tested company; and
  - (b) an entity has not, under section 166-225, 166-230, 166-240, 166-245 or 166-255, been taken to control voting power or have rights in respect of the stake; and
  - (c) another company (the *foreign listed company*) is interposed, at that time, between those persons and the tested company; and
  - (d) at all times during the income year of the tested company in which the ownership test time occurs, the \*principal class of shares in the foreign listed company is listed for quotation in the official list of an \*approved stock exchange; and
  - (e) at the ownership test time:
    - (i) voting stakes that carry rights to 50% or more of the voting power in the foreign listed company; or
    - (ii) dividend stakes that carry rights to receive 50% or more of any dividends that the foreign listed company may pay; or
    - (iii) capital stakes that carry rights to receive 50% or more of any distribution of capital of the foreign listed company; as the case requires, are directly held by one or more \*depository entities (see subsection (3)); and
  - (f) a law of a foreign country, or a part of a foreign country, in which the approved stock exchange is located, prevents the disclosure of the beneficial owners of some or all of those shares that are held by the depository entities; and

- (g) the beneficial owners of some or all of the shares held by the depository entities have not been disclosed to the foreign listed company.

Note 1: See section 165-255 for the rule about incomplete test periods.

Note 2: This rule might not apply in all circumstances: see sections 166-275 and 166-280.

- (2) The tests are applied to the tested company as if, at the \*ownership test time, for each of those \*shares held by a \*depository entity whose owners have not been disclosed, the depository entity:

- (a) controls, or is able to control, the voting power in the tested company that is carried by those shares at that time; and
- (b) \*indirectly had the right to receive, for its own benefit:
- (i) any \*dividends the tested company may pay in respect of those shares at that time; and
- (ii) any distributions of capital of the tested company in respect of those shares at that time; and
- (c) were a person (other than a company).

Note: The persons who actually control the voting power and have rights to dividends and capital are taken not to control that power or have those rights: see section 166-265.

- (3) If the effect of subsection (2) is that the \*depository entity is taken to hold:

- (a) a \*voting stake that carries rights to less than 10% of the voting power in the tested company; or
- (b) a \*dividend stake that carries the right to receive less than 10% of any dividends that the tested company may pay; or
- (c) a \*capital stake that carries the right to receive less than 10% of any distribution of capital of the tested company;

then neither section 166-225 nor section 166-230 applies in respect of that stake.

- (4) If the \*depository entity (the *old depository entity*) is subsequently replaced by another depository entity (the *new depository entity*), then, at all times that the old depository entity held or is taken to have held a stake in the tested company, the new entity is taken to have held that stake.

- (5) A *depository entity* is an entity:

- (a) that is a central securities repository; and

- (b) that provides custody of share certificates; and
- (c) that provides services for the exchange of shares.

### **Other rules relating to voting power and rights**

#### **166-265 Persons who actually control voting power or have rights are taken not to control power or have rights**

If any of sections 166-225, 166-230, 166-240, 166-245, 166-255 or 166-260 apply, the ownership tests in section 166-145 are also applied to the tested company as if, at the \*ownership test time:

- (a) the persons who control, or are able to control, the voting power in the tested company (whether directly, or indirectly through one or more interposed entities) that is carried by each \*voting stake in the tested company mentioned in that section had *not* had that control; and
- (b) the persons who have the right to receive for their own benefit (whether directly, or \*indirectly through one or more interposed entities):
  - (i) any \*dividends that the tested company may pay in respect of each \*dividend stake in the tested company mentioned in that section; and
  - (ii) any distributions of capital of the tested company in respect of each \*capital stake in the tested company mentioned in that section;had *not* had that right.

#### **166-270 Single notional entity stakeholders taken to have minimum voting control, dividend rights and capital rights**

*Minimum control of voting power*

- (1) If:
    - (a) the \*ownership test time is after the start of the \*test period; and
    - (b) a single notional entity mentioned in section 166-225 or 166-255 has voting power in a company; and
    - (c) the voting power that the entity has at the ownership test time is greater than the voting power that the entity had at the start of the test period;
-

then the entity is taken to have voting power in the company at the ownership test time only to the extent that it had it at the start of the test period.

*Minimum percentage of rights to dividends and capital*

(2) If:

- (a) the \*ownership test time is after the start of the \*test period; and
- (b) a single notional entity mentioned in section 166-225 or 166-255 has a percentage of rights to the \*dividends or distributions of capital of a company; and
- (c) the percentage that the entity has rights to at the ownership test time is greater than the percentage (the ***lower percentage***) of the dividends or distributions of capital of the company that the entity had rights to at the start of the test period;

then the entity is taken to have rights to the lower percentage of the dividends or distributions of capital at the ownership test time.

**166-272 Same shares or interests to be held**

*Application*

- (1) This section modifies how the ownership tests in section 166-145 are applied to a \*voting stake, a \*dividend stake or a \*capital stake in the tested company held by one of the following entities (the ***stakeholder***):
  - (a) a top interposed entity mentioned in section 166-230 (which is about indirect stakes of less than 10%);
  - (b) a \*widely held company mentioned in section 166-240;
  - (c) an entity mentioned in subsection 166-245(2) (which is about stakes held by other entities);
  - (d) a \*depository entity mentioned in section 166-260;(whether directly, or \*indirectly through one or more interposed entities).

*Exactly the same shares or interests must continue to be held*

- (2) For the purpose of determining whether the tested company has satisfied a condition or whether a time is a changeover time or an alteration time in respect of the tested company:
- (a) a condition that has to be satisfied is not satisfied; or
  - (b) a time that, apart from this subsection, would not be a changeover time or alteration time is taken to be a changeover time or alteration time, as the case may be;
- unless, at all relevant times:
- (c) the only \*shares in the tested company that are taken into account are exactly the same shares and are held by the same persons; and
  - (d) the only interests (including shares) in any other entity that is interposed between the stakeholder and the tested company that are taken into account are exactly the same interests and are held by the same persons.

*What happens in case of share splitting*

- (3) If:
- (a) a particular \*share (an **old share**) in a company of which the stakeholder, or an entity interposed between the stakeholder and the tested company, is the holder at the start of the \*test period is divided into 2 or more new shares during that period; and
  - (b) the stakeholder or entity becomes the holder of each of the new shares immediately after the division takes place and remains the holder until the end of that period;
- the new shares are taken to be exactly the same shares as the old share.

*What happens in case of splitting of units in a unit trust*

- (4) If:
- (a) a particular unit (an **old unit**) in a unit trust of which the stakeholder, or an entity interposed between the stakeholder and the tested company, is the holder at the start of the \*test period is divided into 2 or more new units during that period; and

- (b) the stakeholder or entity becomes the holder of each of the new units immediately after the division takes place and remains the holder until the end of that period;
- the new units are taken to be exactly the same units as the old unit.

*What happens in case of consolidation of shares*

- (5) If:
    - (a) a particular \*share (an **old share**) in a company of which the stakeholder, or an entity interposed between the stakeholder and the tested company, is the holder at the start of the \*test period, and other shares (each of which is also called an **old share**) in the company of which the stakeholder or entity is the holder at the start of that period, are consolidated into a new share during that period; and
    - (b) the stakeholder or entity becomes the holder of the new share immediately after the consolidation takes place;
- the new share is taken to be exactly the same share as the old shares.

*What happens in case of consolidation of units in a unit trust*

- (6) If:
    - (a) a particular unit (an **old unit**) in a unit trust of which the stakeholder, or an entity interposed between the stakeholder and the tested company, is the holder at the start of the \*test period and other units (each of which is also called an **old unit**) in the trust of which the stakeholder or entity is the holder at the start of that period are consolidated into a new unit during that period; and
    - (b) the stakeholder or entity becomes the holder of the new unit immediately after the consolidation takes place;
- the new unit is taken to be exactly the same unit as the old units.

*Totals of shares or rights not affected*

- (7) This section does not affect how \*shares, and rights carried by shares, are counted for the purpose of determining:
  - (a) the total voting power in the tested company; or
  - (b) the total dividends that the tested company may pay; or
  - (c) the total distributions of capital of the tested company.

*Conditions in section 166-145 may be treated as having been satisfied in certain circumstances*

- (8) If any of the conditions in section 166-145 have not been satisfied, those conditions are taken to have been satisfied if:
- (a) they would have been satisfied except for the operation of subsection (2) of this section; and
  - (b) the tested company has information from which it would be reasonable to conclude that less than 50% of:
    - (i) the \*tax loss; or
    - (ii) the \*notional loss; or
    - (iii) the bad debt; or
    - (iv) the unrealised net loss (within the meaning of section 165-115E);as the case requires, has been reflected in deductions, capital losses, or reduced assessable income, that occurred, or could occur in future, because of the happening of any \*CGT event in relation to any direct or indirect equity interests held in the tested company by the stakeholder, or an entity interposed between the stakeholder and the tested company, during the \*test period.

Note: See subsection (11) for the definitions of *direct equity interests* and *indirect equity interests*.

*Subsection (8) not to apply for purpose of determining whether an alteration time has occurred*

- (9) However, subsection (8) does not apply in relation to any of the conditions in section 166-145 in so far as those conditions have effect for the purpose of determining whether an alteration time (within the meaning of section 165-115L) has occurred.

*Time of happening of CGT event*

- (10) The happening of any \*CGT event in relation to a direct or indirect equity interest in the tested company that results in the failure of the tested company to satisfy a condition in section 166-145 is taken, for the purposes of paragraph (8)(b), to have occurred during the \*test period.

Note: See subsection (11) for the definitions of *direct equity interests* and *indirect equity interests*.

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*Meaning of direct and indirect equity interests*

- (11) For the purposes of subsections (8) and (10):
- (a) the *direct equity interests* in the tested company are \*shares in the tested company; and
  - (b) the *indirect equity interests* in the tested company are shares or other interests in entities interposed between the tested company and stakeholder.

**When the rules in this Subdivision do not apply**

**166-275 Rules in this Subdivision intended to be concessional**

A company is taken to have met the conditions in section 165-12, paragraph 165-35(a) or section 165-123, or a changeover time or an alteration time is taken not to have occurred in respect of a company, (as the case requires), if:

- (a) a \*tracing rule modifies how the ownership tests in section 166-145 apply to the tested company in respect of a \*voting stake, a \*dividend stake or a \*capital stake; and
- (b) the company fails the tests (whether at the time of applying the tracing rule or at another time); and
- (c) the company believes, on reasonable grounds, that if the tracing rule did not modify how the tests apply to the company in respect of that stake, it would not fail the tests.

Example: 11 people own shareholdings of 9% in the listed company. Under section 166-225, one notional shareholder is deemed to hold all of those shareholdings. 2 of the people sell their shareholdings so that 9 of the original 11 people now own shareholdings of 11%. Without the rule in this section, the company would fail the ownership tests (as the rule in section 166-225 no longer applies).

**166-280 Controlled test companies**

- (1) A \*tracing rule does not modify how the ownership tests in section 166-145 apply to the tested company in respect of all or part of the voting power in the tested company, or all or some of the rights to \*dividends of, or capital in, the tested company, if:
- (a) either:
    - (i) an entity (the *controlling entity*) directly holds that power or has those rights; or

- (ii) an entity (the *controlling entity*) indirectly holds that power or has those rights through one or more interposed entities; and
- (b) the tested company is sufficiently influenced (within the meaning of paragraph 318(6)(b) of the *Income Tax Assessment Act 1936*) by the controlling entity.

Note: However, a tracing rule can modify how the ownership tests in section 166-145 apply to the tested company in respect of voting power or dividend or capital rights held by entities other than controlling entities.

- (2) A \*tracing rule does not modify how the ownership tests in section 166-145 apply to the tested company in respect of all or part of the voting power in the tested company if:
  - (a) the tested company is a \*widely held company; and
  - (b) that voting power:
    - (i) is more than 25% of the total voting power in the tested company and is controlled (whether directly, or indirectly through one or more interposed entities) by a natural person, together with his or her \*associates; or
    - (ii) is more than 50% of the total voting power in the tested company and is controlled (whether directly, or indirectly through one or more interposed entities) by a trustee or company, together with its associates.

### **80 Paragraph 175-5(2)(b)**

Omit “carrying on the same business”, substitute “satisfying the same business test”.

### **81 At the end of subsection 175-5(2)**

Add:

Note: Companies whose total income for an income year is more than \$100 million cannot meet the condition in section 165-13 in respect of that year: see section 165-212A.

### **82 At the end of subsection 175-10(2)**

Add:

Note: Section 175-100 allows the Commissioner to disallow an excluded loss of an insolvent company.

### **83 At the end of subsection 175-15(2)**

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Add:

Note: Section 175-100 allows the Commissioner to disallow an excluded loss of an insolvent company.

**84 At the end of subsection 175-20(2)**

Add:

Note: Section 175-100 allows the Commissioner to disallow the whole or part of any deductions of an insolvent company.

**85 At the end of subsection 175-25(2)**

Add:

Note: Section 175-100 allows the Commissioner to disallow a deduction of an insolvent company.

**86 At the end of subsection 175-30(4)**

Add:

Note: Section 175-100 allows the Commissioner to disallow the whole or part of any deductions of an insolvent company.

**87 Subsection 175-40(1)**

Omit “or \*net capital loss”.

**88 Subsection 175-40(1) (note)**

Omit “or net capital loss”.

**89 Paragraph 175-40(2)(b)**

Omit “carrying on the same business”, substitute “satisfying the same business test”.

**90 Subsection 175-40(2) (note)**

Repeal the note, substitute:

Note 1: Subdivision 165-A deals with the deductibility of a company’s tax loss for an earlier income year if there has been a change in the ownership or control of the company in the period from the start of the loss year to the end of the income year.

Note 2: Companies whose total income for an income year is more than \$100 million cannot meet the condition in section 165-13 in respect of that year: see section 165-212A.

**91 Subsection 175-45(1)**

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Omit “or \*net capital loss”.

**92 At the end of subsection 175-45(2)**

Add:

Note: Section 175-100 allows the Commissioner to disallow an excluded loss of an insolvent company.

**93 Paragraph 175-50(1)(b)**

Omit “or \*net capital loss”.

**94 At the end of subsection 175-50(2)**

Add:

Note: Section 175-100 allows the Commissioner to disallow an excluded loss of an insolvent company.

**95 At the end of subsection 175-60(2)**

Add:

Note: Section 175-100 allows the Commissioner to disallow capital losses or parts of capital losses of an insolvent company.

**96 At the end of subsection 175-65(2)**

Add:

Note: Section 175-100 allows the Commissioner to disallow a capital loss of an insolvent company.

**97 At the end of subsection 175-70(4)**

Add:

Note: Section 175-100 allows the Commissioner to disallow the whole or part of any capital losses of an insolvent company.

**98 Paragraph 175-80(2)(b)**

Omit “carrying on the same business”, substitute “satisfying the same business test”.

**99 At the end of subsection 175-80(2)**

Add:

Note: Companies whose total income for an income year is more than \$100 million cannot meet the condition in section 165-126 for the second continuity period: see section 165-212A.

**100 At the end of subsection 175-85(2)**

Add:

Note: Section 175-100 allows the Commissioner to disallow some or all of a deduction of an insolvent company.

**101 At the end of subsection 175-90(2)**

Add:

Note: Section 175-100 allows the Commissioner to disallow some or all of a deduction of an insolvent company.

**102 Subdivision 175-D (heading)**

Repeal the heading, substitute:

**Subdivision 175-D—Common rules**

**103 At the end of Subdivision 175-D**

Add:

**175-100 Commissioner may disallow excluded losses etc. of insolvent companies**

Despite a subsection listed in column 1, the Commissioner may, under a subsection listed in column 2, disallow some or all of an \*excluded loss, deduction, or \*capital loss, of a company (as the case requires) if:

- (a) the company is or becomes:
  - (i) an externally-administered body corporate within the meaning of the *Corporations Act 2001*; or
  - (ii) an entity with a similar status under a \*foreign law to an externally-administered body corporate; and
- (b) the company is insolvent (within the meaning of section 9 of the *Corporations Act 2001*) when the administration begins.

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**Commissioner may disallow excluded losses etc. for insolvent companies**

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<b>Item</b>	<b>Column 1</b>	<b>Column 2</b>
	<b>Despite this subsection...</b>	<b>the Commissioner may disallow under this subsection:</b>
1	Subsection 175-10(2)	Subsection 175-10(1)
2	Subsection 175-15(2)	Subsection 175-15(1)

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**Commissioner may disallow excluded losses etc. for insolvent companies**

<b>Item</b>	<b>Column 1 Despite this subsection...</b>	<b>Column 2 the Commissioner may disallow under this subsection:</b>
3	Subsection 175-20(2)	Subsection 175-20(1)
4	Subsection 175-25(2)	Subsection 175-25(1)
5	Subsection 175-30(4)	Subsection 175-30(1) or (2)
6	Subsection 175-45(2)	Subsection 175-45(1)
7	Subsection 175-50(2)	Subsection 175-50(1)
8	Subsection 175-60(2)	Subsection 175-60(1)
9	Subsection 175-65(2)	Subsection 175-65(1)
10	Subsection 175-70(4)	Subsection 175-70(1) or (2)
11	Subsection 175-85(2)	Subsection 175-85(1)
11	Subsection 175-90(2)	Subsection 175-90(1)

**104 Paragraph 180-5(2)(c)**

Omit “or \*net capital loss”.

**105 At the end of section 701-5**

Add:

Note 3: Section 165-212E overrides this rule for the purposes of the same business test.

**106 Subsection 701-30(3A) (note)**

Omit “Note”, substitute “Note 1”.

**107 At the end of subsection 701-30(3A)**

Add:

Note 2: Companies whose total income for an income year is more than \$100 million cannot satisfy the same business test for that year (even if the company carries on the same business): see section 165-212A.

**108 At the end of subsection 707-120(3)**

Add:

Note: Companies whose total income for an income year is more than \$100 million cannot satisfy the same business test throughout the trial year (even if the company carries on the same business): see section 716-805.

**109 Paragraph 707-125(1)(b)**

Omit “166-5(4) or (5)”, substitute “166-5(5) or (6)”.

**110 At the end of subsections 707-125(2) and (3)**

Add:

Note: Companies whose total income for an income year is more than \$100 million cannot satisfy the same business test for the same business test period: see section 716-805.

**111 Paragraph 707-125(4)(a)**

Omit “subsection 166-5(4)”, substitute “subsection 166-5(5)”.

**112 Paragraph 707-125(4)(b)**

Omit “subsection 166-5(5)”, substitute “subsection 166-5(6)”.

**113 Subsection 707-125(4) (note)**

Repeal the note, substitute:

Note 1: Subdivision 166-A applies to widely held companies and eligible Division 166 companies unless they choose that Subdivision 165-A apply to them without the modifications made by Subdivision 166-A.

Note 2: Companies whose total income for an income year is more than \$100 million cannot satisfy the same business test for the same business test period: see section 716-805.

**114 Paragraph 707-125(5)(a)**

Repeal the paragraph, substitute:

(a) the income year in which occurred the first time mentioned in subsection 166-5(6); or

**115 At the end of subsection 707-135(2)**

Add:

Note: Companies whose total income for an income year is more than \$100 million cannot satisfy the same business test for the same business test period: see section 716-805.

**116 Subsection 707-205(2) (note 1)**

Omit “subsection 166-5(1)”, substitute “subsection 166-5(2)”.

**117 Subsection 707-205(2) (note 2)**

Omit “or abnormal trading”.

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**118 Paragraph 707-210(5)(b)**

Omit “subsection 166-5(5)”, substitute “subsection 166-5(6)”.

**119 Subsection 707-210(6)**

Repeal the subsection, substitute:

*Same business test applying to latest transferee under Division 166*

- (6) If subsection 166-5(5) affects whether the latest transferee can \*utilise the loss for the income year because the latest transferee is a \*widely held company or an \*eligible Division 166 company, or both, during the year, subsection 166-5(6) operates as if it required the \*same business test to be applied to the \*business the latest transferee carried on just before the time described in subsection (5) of this section.

Note: Companies whose total income for an income year is more than \$100 million cannot satisfy the same business test (even if the company carries on the same business): see section 165-212A.

**120 Subsection 715-15(1) (note)**

Omit “Note”, substitute “Note 1”.

**121 At the end of subsection 715-15(1)**

Add:

Note 2: Companies whose total income for the income year is more than \$100 million cannot satisfy the same business test for the same business test period: see section 716-805.

**122 At the end of subsection 715-50(1)**

Add:

Note: Companies whose total income for the income year is more than \$100 million cannot satisfy the same business test for the same business test period: see section 716-805.

**123 Subsection 715-55(1) (note)**

Omit “Note”, substitute “Note 1”.

**124 At the end of subsection 715-55(1)**

Add:

Note 2: Companies whose total income for the income year is more than \$100 million cannot satisfy the same business test for the same business test period: see section 716-805.

**125 Subsection 715-60(1) (note)**

Omit “Note”, substitute “Note 1”.

**126 At the end of subsection 715-60(1)**

Add:

Note 2: Companies whose total income for the income year is more than \$100 million cannot satisfy the same business test for the same business test period: see section 716-805.

**127 Subsection 715-70(2) (note)**

Omit “Note”, substitute “Note 1”.

**128 At the end of subsection 715-70(2)**

Add:

Note 2: Companies whose total income for the income year is more than \$100 million cannot satisfy the same business test for the same business test period: see section 716-805.

**129 Subsection 715-95(3) (note)**

Repeal the note, substitute:

Note 1: For provisions about making one of these choices, see sections 715-175 to 715-185.

Note 2: Companies whose total income for the income year is more than \$100 million cannot satisfy the same business test for the same business test period: see section 716-805.

**130 Subsection 715-355(3) (note)**

Omit “Note”, substitute “Note 1”.

**131 At the end of subsection 715-355(3)**

Add:

Note 2: Companies whose total income for the income year is more than \$100 million cannot satisfy the same business test for the same business test period: see section 716-805.

**132 At the end of subsection 715-360(3)**

Add:

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Note 3: Companies whose total income for the income year is more than \$100 million cannot satisfy the same business test for the same business test period: see section 716-805.

### **133 After section 716-800**

Insert:

#### **716-805 Some companies cannot satisfy the same business test**

- (1) For the purposes of this Part (other than subparagraphs 707-125(2)(a)(ii) and (4)(a)(ii), Subdivision 709-D and Division 715), a company does *not* satisfy the \*same business test for the \*same business test period if the \*total income of the company for the income year mentioned in paragraph (a) or (b) is more than \$100 million:
  - (a) unless paragraph (b) applies—the income year whose last day falls within the \*trial year; or
  - (b) if there is no such day in the trial year—the income year in which the joining time occurs.

Note: Section 165-212C sets out how to work out the total income of a company that is not able to work out its total income for a 12 month period.

- (2) For the purposes of subparagraph 707-125(2)(a)(ii) or (4)(a)(ii), a company does *not* satisfy the \*same business test for the \*same business test period if the \*total income of the company for the income year mentioned in that subparagraph is more than \$100 million.
- (3) For the purposes of Subdivision 709-D, a company does *not* satisfy the \*same business test for the \*same business test period if the \*total income of the company for the following income year is more than \$100 million:
  - (a) if item 1 of the table in subsection 709-215(3) applies—the income year in which the write-off time occurs;
  - (b) if item 2 of the table in subsection 709-215(3) applies—the income year in which the debt test period ends.
- (4) For the purposes of Division 715, a company does *not* satisfy the \*same business test for the \*same business test period if the \*total income of the company for the following income year is more than \$100 million:

- (a) for the purposes of section 715-95 (unless paragraph (c) of this section applies)—the income year whose last day falls within the 12 months before the leaving time;
- (b) for the purposes of the rest of Division 715 (unless paragraph (c) of this subsection applies)—the income year whose last day falls within the \*trial year;
- (c) if paragraph (a) or (b) of this subsection applies but there is no such day in those 12 months or the trial year—the income year in which the joining time or the leaving time occurs.

**134 Subsection 716-850(1) (note)**

Omit “Note”, substitute “Note 1”.

**135 At the end of section 716-850**

Add:

Note 2: This section does not apply to section 165-212A or 716-805: see section 165-212C.

**136 Paragraph 719-260(2)(b)**

Omit “subsection 166-5(5)”, substitute “subsection 166-5(6)”.

**137 Subsection 719-260(2) (at the end of the note)**

Add “(However, companies whose total income for the claim year is more than \$100 million cannot satisfy the same business test for that year: see section 165-212A.)”.

**138 Subsection 719-260(3)**

Repeal the subsection, substitute:

*Same business test for focal company under Division 166*

- (3) If subsection 166-5(5) affects whether the focal company can \*utilise the loss for the claim year because the focal company is a \*widely held company or an \*eligible Division 166 company, or both, during the year, subsection 166-5(6) operates as if it required the \*same business test to be applied to the \*business the focal company carried on just before the time described in subsection (2) of this section.

Note: Companies whose total income for an income year is more than \$100 million cannot satisfy the same business test for the same business test

period (even if the company carries on the same business): see section 165-212A.

**139 Subsection 719-260(4) (note)**

Omit “subsection 166-5(5)”, substitute “subsection 166-5(6)”.

**140 Section 719-285 (at the end of note 1)**

Add “(Companies whose total income for an income year is more than \$100 million cannot satisfy the same business test for the same business test period: see section 165-212A.)”.

**141 Subsection 995-1(1)**

Insert:

*bid period* has the meaning given by section 9 of the *Corporations Act 2001*.

**142 Subsection 995-1(1) (definition of *capital shareholding of less than 1%*)**

Repeal the definition.

**143 Subsection 995-1(1)**

Insert:

*capital stake* has the meaning given by section 166-235.

**144 Subsection 995-1(1)**

Insert:

*corporate change* has the meaning given by section 166-175.

**145 Subsection 995-1(1)**

Insert:

*depository entity* has the meaning given by section 166-260.

**146 Subsection 995-1(1) (definition of *dividend shareholding of less than 1%*)**

Repeal the definition.

**147 Subsection 995-1(1)**

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Insert:

*dividend stake* has the meaning given by section 166-235.

**148 Subsection 995-1(1)**

Insert:

*eligible Division 166 company* means a company:

- (a) that is *not* a \*widely held company; and
- (b) in which:
  - (i) \*voting stakes that carry rights to more than 50% of the voting power in the company; or
  - (ii) \*dividend stakes that carry rights to receive more than 50% of any dividends that the company may pay; or
  - (iii) \*capital stakes that carry rights to receive more than 50% of any distribution of capital of the company; are beneficially owned (whether directly, or \*indirectly through one or more interposed entities) by:
    - (iv) a widely held company; or
    - (v) an entity mentioned in subsection 166-245(2) that satisfies the condition in subsection 166-245(3); or
    - (vi) a \*non-profit company; or
    - (vii) a charitable institution, a charitable fund or any other kind of charitable body; or
    - (viii) 2 or more entities mentioned in subparagraphs (iv) to (vii).

**149 Subsection 995-1(1)**

Insert:

*ends*, in relation to a \*corporate change, has the meaning given by section 166-175.

**150 Subsection 995-1(1) (definition of *interposed company*)**

Repeal the definition.

**151 Subsection 995-1(1)**

Insert:

*managed investment scheme* means an entity, with more than 20 members, that is:

- (a) a managed investment scheme for the purposes of the *Corporations Act 2001*; or
- (b) an entity with a similar status to a managed investment scheme under a \*foreign law relating to corporate regulation.

**152 Subsection 995-1(1)**

Insert:

*MDO* has the meaning given by section 5 of the *Medical Indemnity Act 2002*.

**153 Subsection 995-1(1) (definition of *more than 50% of the listed public company's capital distributions*)**

Repeal the definition.

**154 Subsection 995-1(1) (definition of *more than 50% of the listed public company's dividends*)**

Repeal the definition.

**155 Subsection 995-1(1) (definition of *more than 50% of the voting power in the listed public company*)**

Repeal the definition.

**156 Subsection 995-1(1)**

Insert:

*non-profit company* has the meaning given by section 3 of the *Income Tax Act 1986*.

**157 Subsection 995-1(1) (definition of *notional shareholder*)**

Repeal the definition.

**158 Subsection 995-1(1) (definition of *part of a substantial shareholding*)**

Repeal the definition.

**159 Subsection 995-1(1)**

Insert:

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*principal class of shares* in a company means:

- (a) those ordinary or common shares of the company that represent the majority of the voting power and value of the company; or
- (b) if no single class of ordinary or common shares represents the majority of the voting power and value of the company—those classes of ordinary or common shares that represent the majority of the voting power and value of the company.

**160 Subsection 995-1(1)**

Insert:

*provides medical indemnity cover* has the meaning given by section 5 of the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003*.

**161 Subsection 995-1(1)**

Insert:

*takeover bid* means a takeover bid under Chapter 6 of the *Corporations Act 2001*, or under a \*foreign law relating to corporate regulation.

**162 Subsection 995-1(1) (definition of test period)**

Omit “166-170”, substitute “166-80”.

**163 Subsection 995-1(1) (definition of test time)**

Omit “166-85,”.

**164 Subsection 995-1(1)**

Insert:

*total income* has the meaning given by section 165-212B.

**165 Subsection 995-1(1)**

Insert:

*tracing rule* means a rule in one of the following sections:

- (a) section 166-225;
- (b) section 166-230;
- (c) section 166-240;

- (d) section 166-245;
- (e) section 166-255;
- (f) section 166-260.

**166 Subsection 995-1(1) (definition of *voting shareholding of less than 1%*)**

Repeal the definition.

**167 Subsection 995-1(1)**

Insert:

*voting stake* has the meaning given by section 166-235.

**168 Subsection 995-1(1)**

Insert:

*widely held company* means:

- (a) a company, \*shares in which (except shares that carry a right to a fixed rate of \*dividend) are listed for quotation in the official list of an \*approved stock exchange; or
- (b) a company with more than 50 members, other than a company where at least one of the following conditions is met during an income year:
  - (i) no more than 20 persons held, or had the right to acquire or become the holders of, shares representing at least 75% of the value of the shares in the company (other than shares that only carry a right to a fixed rate of dividend);
  - (ii) at least 75% of the voting power in the company was capable of being exercised by no more than 20 persons;
  - (iii) at least 75% of the amount of any dividend paid by the company during the year was paid to no more than 20 persons;
  - (iv) if no dividend was paid by the company during the year—the Commissioner is of the opinion that, if a dividend had been paid by the company during the year, at least 75% of the amount of the dividend would have been paid to no more than 20 persons.

**169 Application of items relating to companies in liquidation**

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- (1) The amendments made by items 1, 2 and 3 of this Schedule apply to assessments, made on or after 1 July 1997, for any year of income.
- (2) The amendments made by items 73 and 78 of this Schedule (other than section 165-209 of the *Income Tax Assessment Act 1997* as inserted by item 73) apply:
  - (a) to any tax loss that is claimed in an income year commencing on or after 1 July 1997; and
  - (b) to any net capital loss that is applied in an income year commencing on or after 1 July 1998; and
  - (c) to any deduction in respect of a bad debt that is claimed in an income year commencing on or after 1 July 1998; and
  - (d) in determining whether any changeover time or alteration time occurs at or after 1 pm (by legal time in the Australian Capital Territory) on 11 November 1999.

**170 Application of items relating to the continuity of ownership test**

- (1) The amendments made by items 10, 11, 17, 30, 47, 50, 58, 68 to 71, 73, 79, 109, 111, 112, 114, 118, 119, 136, 138, 139, 141 to 151, 153 to 158, 159, 161, 162, 163 and 165 to 168 of this Schedule (other than section 165-208 of the *Income Tax Assessment Act 1997* as inserted by item 73) apply:
  - (a) to any tax loss that is incurred in an income year commencing on or after 1 July 2002; and
  - (b) to any net capital loss that is made in an income year commencing on or after 1 July 2002; and
  - (c) to any deduction in respect of a bad debt that is claimed in an income year commencing on or after 1 July 2002; and
  - (d) in determining whether any changeover time or alteration time occurred on or after 1 July 2002.
- (2) However, if:
  - (a) a tax loss of a company is incurred; or
  - (b) a net capital loss of a company is made; or
  - (c) a deduction in respect of a bad debt of a company is claimed;  
or
  - (d) a changeover time or alteration time in respect of a company occurs;

in an income year that ends before this Act receives the Royal Assent, then the company may choose that the amendments made by the items mentioned in subitem (1) not apply in respect of the loss, deduction or time.

- (3) The company must make the choice under subitem (2) on or before the day it lodges its first income tax return after this Act receives the Royal Assent, or before a later day if the Commissioner allows.
- (4) The amendments made by items mentioned in subitem (1) also apply to:
- (a) any tax loss of a company:
    - (i) that is incurred in an income year commencing on or before 30 June 2002; and
    - (ii) that could have been deducted, in accordance with Divisions 165 and 166 as in force at that time, in the first income year commencing after 30 June 2002 if the deduction had not been limited by the company's income for that income year; and
  - (b) any net capital loss of a company:
    - (i) that is made in an income year commencing on or before 30 June 2002; and
    - (ii) that could have been applied, in accordance with Divisions 165 and 166 as in force at that time, in the first income year commencing after 30 June 2002 if the application of the loss had not been limited by the company's capital gains for that income year.

### **171 Application of items relating to alternative test**

- (1) The amendments made by items 16, 29 and 57 of this Schedule apply to:
- (a) any tax loss that is claimed in an income year ending after 21 September 1999; and
  - (b) any net capital loss that is applied in an income year ending after 21 September 1999; and
  - (c) any deduction in respect of a bad debt that is claimed in an income year ending after 21 September 1999.
- (2) The amendment made by item 46 of this Schedule applies in determining whether a changeover time occurs at or after 1 pm (by legal time in the Australian Capital Territory) on 11 November 1999.

- (3) The amendment made by item 49 of this Schedule applies in determining whether an alteration time occurs at or after 1 pm (by legal time in the Australian Capital Territory) on 11 November 1999.

### **172 Application of items relating to the same business test**

- (1) The amendments made by items 19, 60, 74, 76, 133 and 164 of this Schedule (other than sections 165-212D and 165-212E of the *Income Tax Assessment Act 1997* as inserted by item 76) apply in respect of:
- (a) any tax loss that is incurred in an income year commencing on or after 1 July 2005; and
  - (b) any net capital loss that is made in an income year commencing on or after 1 July 2005; and
  - (c) any deduction in respect of a bad debt that is incurred in an income year commencing on or after 1 July 2005.

#### *Exceptions*

- (2) However, the amendments made by the items mentioned in subitem (1) do not apply to:
- (a) a loss that is incurred by a head company in an income year commencing on or after 1 July 2005 because of the operation of section 707-140 of the *Income Tax Assessment Act 1997* if the loss was actually incurred by the joining entity or another entity in an income year commencing before that date; or
  - (b) any tax loss or net capital loss, incurred or made in an income year commencing on or after 1 July 2005, but only to the extent that it would be taken to be a tax loss or net capital loss of the company for an earlier income year under subsection 165-115B(1) or (2) of the *Income Tax Assessment Act 1997* if:
    - (i) the day before the start of that year were a changeover time for the purposes of Subdivision 165-CC of that Act; and
    - (ii) no changeover time actually occurred after that time.

Note: Section 707-140 of the *Income Tax Assessment Act 1997* is about the effect of transferring a loss from a joining entity to a head company of a consolidated group.

### **173 Application of item relating to trustees of family trusts**

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The amendment made by item 72 of this Schedule applies in accordance with subitem 17(3) of Schedule 10 to the *Taxation Laws Amendment Act (No. 2) 2000*.

**174 Application of amendments relating to MDOs**

Section 165-212D of the *Income Tax Assessment Act 1997* (as inserted by item 76 of this Schedule), and items 152 and 160 of this Schedule, apply in respect of:

- (a) any tax loss that is incurred in an income year (whether before or after the commencement of this item); and
- (b) any net capital loss that is made in an income year (whether before or after the commencement of this item); and
- (c) any deduction in respect of a bad debt that is claimed in an income year (whether before or after the commencement of this item).

**175 Application of amendment relating to entry history rule**

Section 165-212E of the *Income Tax Assessment Act 1997* (as inserted by item 76 of this Schedule) applies on and after 1 July 2002.

**176 Application of amendment relating to disallowing excluded losses etc. of insolvent companies**

The amendment made by item 103 of this Schedule applies in respect of administrations that begin on or after the day on which this Act receives the Royal Assent.

## **Schedule 2—Foreign residents' income with an underlying foreign source**

### **Part 1—Main amendment**

#### *Income Tax Assessment Act 1997*

#### **1 Before Division 820**

Insert:

### **Division 802—Foreign residents' income with an underlying foreign source**

#### **Table of Subdivisions**

802-A Conduit foreign income

#### **Subdivision 802-A—Conduit foreign income**

#### **Guide to Subdivision 802-A**

#### **802-5 What this Subdivision is about**

A distribution that an Australian corporate tax entity makes to a foreign resident is not subject to dividend withholding tax, and is not assessable income, to the extent that the entity declares it to be conduit foreign income.

An Australian corporate tax entity has an amount that is non-assessable non-exempt income if it receives a distribution including conduit foreign income from another such entity and it makes a distribution including conduit foreign income.

This Subdivision sets out the method of working out an entity's conduit foreign income.

It also discourages streaming of distributions to entities that can take advantage of the receipt of conduit foreign income.

## Table of sections

### Operative provisions

802-10	Objects
802-15	Foreign residents—exempting CFI from Australian tax
802-20	Distributions between Australian corporate tax entities—non-assessable non-exempt income
802-25	Conduit foreign income of an Australian corporate tax entity
802-30	Foreign source income amounts
802-35	Capital gains and losses
802-40	Effect of foreign tax credits on conduit foreign income
802-45	Previous declarations of conduit foreign income
802-50	Receipt of an unfranked distribution from another Australian corporate tax entity
802-55	No double benefits
802-60	No streaming of distributions

## Operative provisions

### 802-10 Objects

The objects of this Subdivision are:

- (a) to encourage the establishment in Australia of regional holding companies for foreign groups; and
- (b) to improve Australia's attractiveness as a continuing base for its multinational companies;

by providing relief from tax on \*distributions by \*Australian corporate tax entities to \*members who are foreign residents or other Australian corporate tax entities if those distributions relate to \*conduit foreign income.

### 802-15 Foreign residents—exempting CFI from Australian tax

- (1) So much of the \*unfranked part of a \*frankable distribution made by an \*Australian corporate tax entity that the entity declares, in its \*distribution statement, to be \*conduit foreign income:
  - (a) is not assessable income and is not \*exempt income of a foreign resident; and
  - (b) is an amount to which section 128B (Liability to withholding tax) of the *Income Tax Assessment Act 1936* does not apply.

- (2) The declaration must be made on or before the day on which the \*distribution is made.

Note: For a private company, this rule may bring forward the time at which the company is required to make its distribution statement: see section 202-75.

**802-20 Distributions between Australian corporate tax entities—  
non-assessable non-exempt income**

- (1) An \*Australian corporate tax entity (the *receiving entity*) has an amount that is not assessable income and is not \*exempt income for an income year if:
- (a) it receives from another Australian corporate tax entity a \*frankable distribution that has an \*unfranked part; and
  - (b) the \*distribution statement for the \*distribution declares an amount (a *received CFI amount*) of the unfranked part to be \*conduit foreign income; and
  - (c) the receiving entity, after the start of the income year but before the due day for lodging its \*income tax return for that income year:
    - (i) makes a frankable distribution that has an unfranked part; and
    - (ii) declares an amount (a *declared CFI amount*) of the unfranked part to be conduit foreign income.
- (2) The amount that is not assessable income and is not \*exempt income is the lesser of:
- (a) the sum of the received CFI amounts that the receiving entity receives during the income year (the *total received CFI amounts*); and
  - (b) the amount worked out using this formula:

$$\text{Total received CFI amounts} \times \frac{\text{Total declared CFI amounts}}{\text{Total received CFI amounts} - \text{Related expenses}}$$

where:

*related expenses* means the receiving entity's expenses that are reasonably related to the total received CFI amounts.

***total declared CFI amounts*** means the sum of the declared CFI amounts in distributions made by the receiving entity before the due day for lodging its \*income tax return for the income year.

Example: AusCo 1 and AusCo 2 are both Australian corporate tax entities.

AusCo 1 pays an unfranked dividend of \$80 to AusCo 2. AusCo 1 declares all of the \$80 to be its conduit foreign income (so the \$80 is a received CFI amount).

AusCo 2 has \$5 of deductible expenses relating to the \$80 dividend.

AusCo 2 pays an unfranked dividend of \$30. AusCo 2 declares \$15 of the \$30 to be conduit foreign income (so the \$15 is a declared CFI amount).

The amount that is not assessable income and is not exempt income for AusCo 2 (assuming there are no other received CFI amounts or declared CFI amounts) is:

$$\$80 \times \frac{\$15}{\$75} = \$16$$

The remaining \$64 is included in AusCo 2's assessable income and it can deduct \$4 (the part of the expenses related to the \$64).

- (3) If the receiving entity's expenses that are reasonably related to the total received CFI amounts equal or exceed the total received CFI amounts for an income year, the total received CFI amounts is not assessable income and is not \*exempt income of the receiving entity for the income year.
- (4) If a declared CFI amount is taken into account in working out an amount of \*non-assessable non-exempt income of an entity for an income year, that amount cannot be taken into account for the entity for a later income year.
- (5) Work out how much \*conduit foreign income in a \*frankable distribution flows through a trust or a partnership in the same way that you work out the \*share of a \*franking credit on a \*franked distribution that flows through a trust or a partnership. That amount is treated as a received CFI amount under this section.

Note: See sections 207-50, 207-55 and 207-57 for the share of a franking credit on a franked distribution that flows through a trust or a partnership.

## 802-25 Conduit foreign income of an Australian corporate tax entity

An \*Australian corporate tax entity's *conduit foreign income* at a particular time (the *relevant time*) is worked out by applying sections 802-30 to 802-55.

Note: Subdivision 715-U modifies the single entity and the entry history rule for the purposes of working out conduit foreign income for consolidated groups and MEC groups.

## 802-30 Foreign source income amounts

- (1) Work out the amount of the entity's \*ordinary income and \*statutory income derived by the entity that has been, is or will be included in an income statement or similar statement of the entity or of another entity and that would not be included in the entity's assessable income if the entity:
  - (a) for a company or a \*corporate limited partnership—were a foreign resident at the relevant time; or
  - (b) for a \*corporate unit trust or \*public trading trust—were not a \*resident unit trust for the income year in which the relevant time occurs.
- Note: Income statements are prepared under the Framework for the Preparation and Presentation of Financial Statements (which is referred to in the Australian Accounting Standards).
- (2) Reduce the subsection (1) amount by any part of that amount that is or will be included in the entity's assessable income (apart from section 802-20).
- (3) Add to the amount remaining after subsection (2) these amounts:
  - (a) if the entity receives from another \*Australian corporate tax entity a \*frankable distribution that has an \*unfranked part—any amount declared in the \*distribution statement for that \*distribution to be \*conduit foreign income;
  - (b) an amount that is treated as a received CFI amount for the purposes of section 802-20 because of subsection 802-20(5);
  - (c) an amount that is \*non-assessable non-exempt income under section 23AJ of the *Income Tax Assessment Act 1936* and that would be not be included under subsection (1).
- (4) Reduce the amount remaining after subsection (3) by these amounts:

- (a) an amount that is \*non-assessable non-exempt income under section 23AI or 23AK of the *Income Tax Assessment Act 1936*;
- (b) an amount that is not included in the entity's assessable income because of the operation of paragraph 99B(2)(e) of that Act;
- (c) the amount worked out using the formula:

$$\text{Available franking credit} \times \frac{(1 - \text{*General company tax rate})}{\text{General company tax rate}}$$

where:

**available franking credit** means any part of the amount remaining after subsection (3) to the extent to which a \*franking credit arises or will arise for the entity.

- (5) Reduce the amount remaining after subsection (4) by any of the entity's expenses that are reasonably related to that amount, except expenses the entity has deducted or can deduct under this Act. In applying this subsection to an amount covered by paragraph (3)(a), assume that amount is \*non-assessable non-exempt income.
- (6) The result is an amount included in the entity's **conduit foreign income**.
- (7) This section applies to an entity as if it had derived an amount if the amount has been applied for its benefit (including by discharging all or part of a debt it owes) or as it directs.

## 802-35 Capital gains and losses

### *Capital gains*

- (1) The entity's **conduit foreign income** includes these amounts:
    - (a) the amount by which a \*capital gain of the entity is reduced because of the operation of section 768-505;
    - (b) a capital gain that is disregarded because of the operation of subsection 23AH(3) of the *Income Tax Assessment Act 1936*;
    - (c) the amount of a capital gain that is disregarded as a result of the operation of an international tax sharing treaty (as defined in subsection 136AA(1) of the *Income Tax Assessment Act 1936*).
-

*Capital losses*

- (2) The entity's *conduit foreign income* is reduced by these amounts:
- (a) the amount by which a \*capital loss of the entity is reduced because of the operation of section 768-505;
  - (b) a capital loss that is disregarded because of the operation of subsection 23AH(4) of the *Income Tax Assessment Act 1936*;
  - (c) the amount of a capital loss that is disregarded as a result of the operation of an international tax sharing treaty (as defined in subsection 136AA(1) of the *Income Tax Assessment Act 1936*).

*Timing rule*

- (3) The adjustments are made under this section at the end of the income year in which the \*CGT event occurred.

**802-40 Effect of foreign tax credits on conduit foreign income**

The entity's *conduit foreign income* includes an amount if a credit arose for the entity under section 160AF of the *Income Tax Assessment Act 1936* for the income year immediately before the one in which the relevant time occurs. The amount is worked out using the formula:

$$\text{Credit} \times \frac{(1 - \text{*General company tax rate})}{\text{General company tax rate}}$$

**802-45 Previous declarations of conduit foreign income**

The entity's *conduit foreign income* is reduced if:

- (a) the entity makes a \*frankable distribution that has an \*unfranked part; and
- (b) the entity declares an amount of the unfranked part to be conduit foreign income.

The amount of the reduction is the amount so declared.

Note: If the amount declared is less than the amount available for declaration, the difference is available for a later declaration.

### **802-50 Receipt of an unfranked distribution from another Australian corporate tax entity**

- (1) The entity's *conduit foreign income* is reduced if:
  - (a) the entity (the *receiving entity*) receives from another \*Australian corporate tax entity a \*frankable distribution that has an \*unfranked part; and
  - (b) the \*distribution statement for the \*distribution declares an amount (the *declared amount*) of the unfranked part to be conduit foreign income; and
  - (c) some or all of the declared amount is not \*non-assessable non-exempt income under section 802-20.
- (2) The amount of the reduction is the amount that is not \*non-assessable non-exempt income under section 802-20 less any expenses reasonably related to that amount.

### **802-55 No double benefits**

An amount cannot be both:

- (a) an unfranked non-portfolio dividend credit for an entity under section 46FB of the *Income Tax Assessment Act 1936*; and
- (b) counted towards:
  - (i) the entity's \*conduit foreign income; and
  - (ii) the entity's \*non-assessable non-exempt income under section 802-20.

### **802-60 No streaming of distributions**

- (1) Subsection (2) has effect if:
    - (a) an \*Australian corporate tax entity makes one or more \*frankable distributions in a \*franking period; and
    - (b) at least one of the \*distributions has an \*unfranked part; and
    - (c) the entity declares an amount of the unfranked part to be \*conduit foreign income.
  - (2) If the entity does not, for that \*franking period, declare the same proportion of \*conduit foreign income for all \*membership interests and \*non-share equity interests then, instead of the amount that it declared to be conduit foreign income on those \*distributions, it is
-

taken to have declared under section 802-45 the greater amount that it would have declared had it declared that same proportion on all those distributions.

Note: Breaching subsection (2) may make the entity subject to a penalty under section 288-80 in Schedule 1 to the *Taxation Administration Act 1953* (about over declaring conduit foreign income).

Example: There are 10,000 membership interests in AusCo Limited, 7,500 held by foreign residents and 2,500 held by Australian residents. It has \$1,800 of conduit foreign income.

AusCo makes an unfranked distribution of 50 cents per membership interest to all of its members. It declares \$1,500 of the distribution to be conduit foreign income for its 7,500 foreign membership interests (20 cents per membership interest or 40% of each distribution) and none for its Australian membership interests.

AusCo is taken to have declared the same proportion (40% of each distribution) of conduit foreign income for its Australian membership interests (which amounts to \$500 of conduit foreign income). It is therefore taken to have declared \$2,000 of conduit foreign income. This is an over-declaration of \$200 and a penalty under section 288-80 in Schedule 1 to the *Taxation Administration Act 1953* will apply.

- (3) For the purposes of subsection (2), ignore \*membership interests and \*non-share equity interests that do not carry a right to receive \*distributions (other than distributions on winding up).
- (4) Despite subsection (2), an entity that receives a \*frankable distribution that has an \*unfranked part is entitled to rely on the \*distribution statement made by the entity that made the distribution.

## Part 2—Other amendments

### *Income Tax Assessment Act 1936*

#### **2 Subsection 44(1) (note)**

Omit “Note”, substitute “Note 1”.

#### **3 At the end of subsection 44(1)**

Add:

Note 2: An amount declared to be conduit foreign income is not included in assessable income under paragraph (1)(b) or (c): see section 802-15 of the *Income Tax Assessment Act 1997*.

#### **4 Subsection 102AAW(1)**

After “459A”, insert “of this Act and section 802-15 of the *Income Tax Assessment Act 1997*”.

#### **5 Subsection 121G(12)**

After “128D”, insert “of this Act and section 802-15 of the *Income Tax Assessment Act 1997*”.

#### **6 At the end of subsection 128B(1)**

Add:

Note: An amount declared to be conduit foreign income is an amount to which this section does not apply: see section 802-15 of the *Income Tax Assessment Act 1997*.

#### **7 Paragraph 128B(3)(gaa)**

Repeal the paragraph.

#### **8 Section 128D**

Omit “or (gaa)”.

#### **9 Subdivision B of Division 11A of Part III**

Repeal the Subdivision.

#### **10 Subparagraph 159GZZZQ(4)(b)(i)**

After “128D”, insert “of this Act and section 802-15 of the *Income Tax Assessment Act 1997*”.

**11 At the end of paragraph 202EE(1)(d)**

Add “of this Act or subsection 802-15(1) of the *Income Tax Assessment Act 1997*”.

***Income Tax Assessment Act 1997***

**12 Section 11-55 (table item headed “foreign aspects of income taxation”)**

After:

branch profits of Australian companies..... **23AH**

insert:

distributions of conduit foreign income..... 802-20

**13 Paragraphs 703-75(3)(c) and (d)**

Repeal the paragraphs, substitute:

- (c) for the purposes of determining the respective balances of the \*franking accounts of the original company and the interposed company at and after the completion time.

**14 Subparagraph 118-12(2)(a)(vi)**

Repeal the subparagraph, substitute:

- (vi) section 240-40 (treatment of arrangement payments);
- (vii) section 802-15 (foreign residents—exempting CFI from Australian tax); or

**15 Before Subdivision 715-V**

Insert:

**Subdivision 715-U—Effect on conduit foreign income**

**Table of sections**

715-875	Extension of single entity rule and entry history rule
715-880	No CFI for leaving entity

**715-875 Extension of single entity rule and entry history rule**

- (1) Subsection 701-1(1) (Single entity rule) and section 701-5 (Entry history rule) also have effect for all the purposes of Subdivision 802-A (about conduit foreign income).
- (2) This section is not intended to limit the effect that subsection 701-1(1) and section 701-5 have apart from this section.

**715-880 No CFI for leaving entity**

Despite section 701-40 (the exit history rule), an entity that ceases to be a \*subsidiary member of a \*consolidated group at a time has no \*conduit foreign income at that time.

**16 Subdivisions 717-J and 719-X**

Repeal the Subdivisions.

**17 Subsection 995-1(1)**

Insert:

*Australian corporate tax entity*: an entity is an *Australian corporate tax entity* at a particular time if the entity is:

- (a) a \*corporate tax entity at that time; and
- (b) for a company or a \*corporate limited partnership—an Australian resident at that time; and
- (c) for a \*corporate unit trust or a \*public trading trust—a \*resident unit trust for the income year in which that time occurs.

**18 Subsection 995-1(1)**

Insert:

*conduit foreign income* has the meaning given by Subdivision 802-A.

**19 Subsection 995-1(1) (definition of *FDA credit*)**

Repeal the definition.

**20 Subsection 995-1(1) (definition of *FDA debit*)**

Repeal the definition.

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**21 Subsection 995-1(1) (definition of *FDA declaration*)**

Repeal the definition.

**22 Subsection 995-1(1) (definition of *FDA declaration percentage*)**

Repeal the definition.

**23 Subsection 995-1(1) (definition of *FDA surplus*)**

Repeal the definition.

**24 Subsection 995-1(1) (definition of *foreign dividend account*)**

Repeal the definition.

***Taxation Administration Act 1953***

**25 After section 288-75 in Schedule 1**

Insert:

**288-80 Administrative penalty for over declaring conduit foreign income**

- (1) An \*Australian corporate tax entity is liable to an administrative penalty if:
  - (a) the entity makes a \*frankable distribution that has an \*unfranked part; and
  - (b) the entity declares an amount of the unfranked part to be \*conduit foreign income; and
  - (c) the sum of the amounts declared exceeds the amount of the entity's conduit foreign income at:
    - (i) if the entity declares the distribution before making the distribution—the time of the declaration; or
    - (ii) otherwise—the time the distribution is made.
- (2) The amount of the penalty is the sum of the amounts worked out under subsections (3) and (4).
- (3) The amount is:

$$\text{*General company tax rate} \times \text{Excess referred to in paragraph (1)(c)} \times \frac{\text{Australian membership interests}}{\text{Total membership interests}}$$

where:

**Australian membership interests** means the number of \*membership interests or \*non-share equity interests in the entity that are not covered by the definition of **foreign membership interests** in subsection (4).

**total membership interests** means the number of \*membership interests or \*non-share equity interests in the entity held by entities that are entitled to receive the \*distribution.

(4) The amount is:

$$\text{Applicable withholding tax rate} \times \text{Excess referred to in paragraph (1)(c)} \times \frac{\text{Foreign membership interests}}{\text{Total membership interests}}$$

where:

**applicable withholding tax rate** means 50% of the rate of tax set out in subparagraph 7(a)(ii) of the *Income Tax (Dividends, Interest and Royalties Withholding Tax) Act 1974*.

**foreign membership interests** means the number of \*membership interests or \*non-share equity interests in the entity held by entities that are entitled to receive the \*distribution and in relation to whom the entity is required to withhold amounts under section 12-210 disregarding the operation of section 12-300 (about limits on the amount withheld).

**total membership interests** means the number of \*membership interests or \*non-share equity interests in the entity held by entities that are entitled to receive the \*distribution.

## **Part 3—Application and transitional**

### **26 General application**

The amendments made by Part 1, and items 15, 17 and 18, of this Schedule apply to income years starting on or after 1 July 2005.

### **27 Income years starting on 1 July 2005 or after that day and before Royal Assent**

- (1) This item applies to an entity for whom an income year (the *first year*) starts:
  - (a) on 1 July 2005; or
  - (b) after that day and before the day on which this Act receives the Royal Assent.
- (2) The entity can only declare an amount to be conduit foreign income under Subdivision 802-A of the *Income Tax Assessment Act 1997* on or after the day on which this Act receives the Royal Assent.
- (3) An FDA surplus that exists for the entity under Subdivision B of Division 11A of Part III of the *Income Tax Assessment Act 1936* at the end of the day before the day on which this Act receives the Royal Assent has effect as if it were the entity's conduit foreign income under Subdivision 802-A of the *Income Tax Assessment Act 1997*.
- (4) Any FDA credit under section 128TA of the *Income Tax Assessment Act 1936* that arises during the period starting on 1 July 2005 and ending on the day before the day on which this Act receives the Royal Assent cannot also be conduit foreign income.
- (5) Section 802-40 of the *Income Tax Assessment Act 1997*, as inserted by item 1, does not apply to the first year.

### **28 Later starting income years**

- (1) This item applies to an entity for whom an income year (also the *first year*) starts on or after the day on which this Act receives the Royal Assent and before 1 July 2006.
- (2) The amendments made by items 7, 8, 9, 13 and 16, and 19 to 24, of this Schedule apply from the start of the first year.

- (3) An FDA surplus that exists for the entity under Subdivision B of Division 11A of Part III of the *Income Tax Assessment Act 1936* at the start of the first year has effect as if it were the entity's conduit foreign income under Subdivision 802-A of the *Income Tax Assessment Act 1997*.
- (4) Section 802-40 of the *Income Tax Assessment Act 1997*, as inserted by item 1, does not apply to the first year.

## Schedule 3—Denying deductions for illegal activity

### *Income Tax Assessment Act 1997*

#### 1 Section 12-5

Insert in its appropriate alphabetical position, determined on a letter-by-letter basis:

**illegal activities** 26-54

#### 2 After section 26-53

Insert:

#### 26-54 Expenditure relating to illegal activities

- (1) You cannot deduct under this Act a loss or outgoing to the extent that it was incurred in the furtherance of, or directly in relation to, a physical element of an offence against an \*Australian law of which you have been convicted if the offence was, or could have been, prosecuted on indictment.
- (2) Despite section 170 of the *Income Tax Assessment Act 1936*, the Commissioner may amend your assessment at any time within 4 years after you are convicted of the relevant offence for the purpose of giving effect to subsection (1) of this section.

#### 3 After section 110-37

Insert:

#### 110-38 Exclusions

Expenditure does *not* form part of any element of the *cost base* to the extent that section 26-54 prevents it being deducted (even if some other provision also prevents it being deducted).

Note: Section 26-54 prevents deductions for expenditure related to certain offences.

#### 4 After subsection 110-55(9)

Insert:

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(9A) Expenditure does *not* form part of the ***reduced cost base*** to the extent that section 26-54 prevents it being deducted (even if some other provision also prevents it being deducted).

Note: Section 26-54 prevents deductions for expenditure related to certain offences.

## **5 Application**

The amendments made by this Schedule apply to amounts incurred after 29 April 2005.

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## Schedule 4—Film copyright

### *Income Tax Assessment Act 1936*

#### **1 Paragraph 124PA(4)(b)**

Omit “whichever of sections 124U and 124UA is applicable”, substitute “section 124UA”.

#### **2 Section 124U**

Repeal the section.

#### **3 Subsection 124UA(2)**

Repeal the subsection, substitute:

- (2) The owner of a unit of industrial property that relates to a copyright subsisting in an Australian film may elect that this Division does not apply in relation to that unit.

### *Income Tax Assessment Act 1997*

#### **4 Paragraph 40-70(2)(b)**

After “intellectual property”, insert “(except copyright in a \*film)”.

#### **5 Subsection 40-95(7) (table item 5)**

After “Copyright”, insert “(except copyright in a \*film)”.

#### **6 Subsection 40-95(7) (table item 7)**

After “copyright”, insert “(except copyright in a \*film)”.

#### **7 Subsection 40-100(4)**

After “\*non-assessable non-exempt income”, insert “and, if relevant for the asset”.

#### **8 Subsection 40-105(1)**

After “\*non-assessable non-exempt income”, insert “and, if relevant for the asset”.

#### **9 Subsection 40-105(4)**

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Omit “mentioned in the table in subsection 40-95(7)”, substitute “to which an item in the table in subsection 40-95(7) applies”.

### **10 Subsection 40-110(1) (example)**

Repeal the example, substitute:

Example: Some examples of changes in circumstances that may result in your recalculating the effective life of a depreciating asset are:

- your use of the asset turns out to be more or less rigorous than you expected (or was anticipated by the Commissioner’s determination);
- there is a downturn in demand for the goods or services the asset is used to produce that will result in the asset being scrapped;
- legislation prevents the asset’s continued use;
- changes in technology make the asset redundant;
- there is an unexpected demand, or lack of success, for a film.

### **11 Subsection 40-110(5)**

Omit “mentioned in the table in subsection 40-95(7)”, substitute “to which an item in the table in subsection 40-95(7) applies”.

### **12 Application**

The amendments made by this Schedule apply to copyright in a film acquired on or after 1 July 2004.

## Schedule 5—Employee share schemes

### *Income Tax Assessment Act 1936*

#### **1 Subsections 26AAC(1) and (2)**

After “this section”, insert “and section 26AAD”.

#### **2 Subsection 26AAC(4AA)**

Omit “does”, substitute “and section 26AAD do”.

#### **3 After section 26AAC**

Insert:

#### **26AAD The effect of 100% takeovers and restructures on the operation of section 26AAC**

*Treating acquisitions as continuations of existing shares etc.*

(1) To the extent that:

(a) a taxpayer acquires:

- (i) shares in a company (the *new company*) that can reasonably be regarded as matching shares in another company (the *old company*) that the taxpayer had acquired under a scheme for the acquisition of shares by employees; or
- (ii) rights to acquire shares in a company (the *new company*) that can reasonably be regarded as matching rights in another company (the *old company*) that the taxpayer had acquired under a scheme for the acquisition of shares by employees; and

(b) the acquisition occurs in connection with a 100% takeover, or a restructure, of the old company; and

(c) as a result of the takeover or restructure, the taxpayer ceased to hold the shares or rights in the old company;

then, if the conditions in subsections (3) to (5) are met, the matching shares or rights are treated, for the purposes of section 26AAC, as if they were a continuation of the shares or rights in the old company.

Note: In determining to what extent something can reasonably be regarded as matching shares or rights in the old company, one of the factors to consider is the respective market values of that thing and of those shares or rights.

*Treating acquisitions as disposals of existing shares etc.*

- (2) However, to the extent that, in connection with the takeover or restructure, the taxpayer acquires anything that:
- (a) can reasonably be regarded as matching any shares or rights in the old company that the taxpayer had acquired under a scheme for the acquisition of shares by employees; but
  - (b) is not a matching share or right to which subsection (1) applies;
- the taxpayer is treated, for the purposes of section 26AAC, as having disposed of shares, or disposed of rights (other than by exercising them), that the taxpayer held, under a scheme for the acquisition of shares by employees, in the old company immediately before the takeover or restructure.

*Conditions for the continuation of shares or rights*

- (3) The first condition is that, immediately before the takeover or restructure, the taxpayer held shares, or rights to acquire shares, in the old company under a scheme for the acquisition of shares by employees.
- (4) The second condition is that:
- (a) to the extent that the matching shares or rights are shares, they are ordinary shares; or
  - (b) to the extent that the matching shares or rights are rights, they are rights to acquire ordinary shares.
- (5) The third condition is that the matching shares or rights are subject to:
- (a) the same conditions or restrictions as; or
  - (b) conditions or restrictions that have the same effect as;
- the conditions or restrictions (if any) that attached to the shares or rights in the old company that they can reasonably be regarded as matching.

*Apportionment rules*

- (6) If:
- (a) subsection (1) applies to shares or rights that the taxpayer has acquired; and
  - (b) the taxpayer had paid or given consideration (the **original consideration**) for an acquisition, under a scheme for the acquisition of shares by employees, of any of the shares or rights in the old company (the **original shares or rights**);
- the taxpayer is treated as having paid or given, for any of the apportionable assets for the original shares or rights, consideration of an amount worked out by spreading the original consideration proportionately among all the apportionable assets according to their market values immediately after the takeover or restructure.
- (7) The **apportionable assets** for the original shares or rights are:
- (a) all matching shares or rights held by the taxpayer that are treated because of this section as a continuation of the original shares or rights; and
  - (b) anything else that the taxpayer acquired in connection with the takeover or restructure and that can reasonably be regarded as matching the original shares or rights; and
  - (c) in the case of a restructure—any shares or rights in the old company that the taxpayer held immediately before, and continues to hold immediately after, the restructure and that can reasonably be regarded as matching the original shares or rights.

*Definitions*

- (8) In this section:

**100% takeover** has the same meaning as in section 139GCB.

**conditions or restrictions**, in relation to shares or rights, means conditions or restrictions (if any) relating to:

- (a) the shares or rights, or shares acquired as a result of the exercise of the rights; or
- (b) the issue or disposal of the shares or rights, or shares acquired as a result of the exercise of the rights.

*employee*, in relation to a company, includes a director of the company.

*holding company* has the same meaning as in the *Corporations Act 2001*.

*market value* has the same meaning as in Subdivision F of Division 13A, as that Subdivision applies for the purposes of section 139DS.

Note: Subsection 139FA(4) alters the meaning of market value of a share or right for the purposes of section 139DS.

*restructure* has the same meaning as in section 139GCC.

*subsidiary* has the same meaning as in the *Corporations Act 2001*.

#### **4 Subsection 139CE(1)**

After “that”, insert “, subject to subsection (3A),”.

#### **5 After subsection 139CE(3)**

Insert:

- (3A) Subsection (3) does not apply in relation to a share or right that, because of section 139DQ, is treated, for the purposes of this Division, as if it were a continuation of a share or right acquired under an employee share scheme.

#### **6 Subsection 139DD(2A)**

Repeal the subsection, substitute:

- (2A) To avoid doubt:
- (a) the taxpayer does not lose the right if, because of section 139DQ, another right is treated, for the purposes of this Division, as if it were a continuation of that right; but
  - (b) the taxpayer loses the right if the taxpayer loses the other right without having exercised it.

#### **7 Subsection 139DD(3)**

Omit “is” (second occurring), substitute “was, at the time the right was acquired,”.

#### **8 After subsection 139DD(3A)**

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Insert:

- (3B) If, but for subsection 139DR(2), rights acquired by the taxpayer would, because of section 139DQ, be treated for the purposes of this Division as a continuation of other rights, the rights are to be treated for the purposes of this section as if they were a continuation of the other rights.

**9 Subsection 139DR(2)**

Omit “at or about the time the taxpayer acquires the matching shares or rights, the taxpayer is”, substitute “if the taxpayer has not made an election under section 139E covering the share or right, the taxpayer is, at or about the time the taxpayer acquires the matching shares or rights,”.

**10 Subsection 139DR(4)**

Repeal the subsection.

**11 Subsection 139DR(5)**

Omit “fifth”, substitute “fourth”.

**12 Subsection 139DR(6)**

Omit “sixth”, substitute “fifth”.

***Income Tax Assessment Act 1997***

**13 After subsection 115-30(1)**

Insert:

- (1A) A \*share or right that, under section 139DQ of the *Income Tax Assessment Act 1936*, is treated as if it were a continuation of another share or right for the purposes of Division 13A of Part III of that Act is treated in the same way for the purposes of item 8 of the table in subsection (1) of this section.

**14 At the end of subsection 130-80(1)**

Add:

Note: The fact that you made an election under section 139E of the *Income Tax Assessment Act 1936* does not prevent a share or right from being treated as a continuation of a share or right acquired under an employee share scheme.

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

### **15 At the end of section 130-80**

Add:

- (3) Shares, or rights to acquire shares, that, under section 26AAD of the *Income Tax Assessment Act 1936*, are treated as a continuation of shares, or rights to acquire shares, in a company for the purposes of section 26AAC of that Act:
  - (a) are treated in the same way for the purposes of this section; and
  - (b) are taken, for the purposes of this section, to have been acquired at the time of the last acquisition of the shares or rights that was not treated as such a continuation for the purposes of section 26AAC of that Act.

### **16 At the end of section 130-80**

Add:

- (4) Shares or rights that, under section 139DQ of the *Income Tax Assessment Act 1936*, are treated as a continuation of shares or rights in a company for the purposes of Division 13A of Part III of that Act:
  - (a) are treated in the same way for the purposes of this section; and
  - (b) are taken, for the purposes of this section, to have been acquired at the time of the last acquisition of the shares or rights that was not treated as such a continuation for the purposes of that Division.

### **17 At the end of section 130-95**

Add:

- (3) Shares, or rights to acquire shares, that, under section 26AAD of the *Income Tax Assessment Act 1936*, are treated as a continuation of shares, or rights to acquire shares, in a company for the purposes of section 26AAC of that Act:
    - (a) are treated in the same way for the purposes of this Subdivision; and
    - (b) are taken, for the purposes of this Subdivision, to have been acquired at the time of the last acquisition of the shares or
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rights that was not treated as such a continuation for the purposes of section 26AAC of that Act.

### **18 Subsection 130-110(5)**

Repeal the subsection, substitute:

(5) Either:

- (a) there must have been an acquisition of a share or a right to acquire a share by the PAYE earner or associate under a scheme for the acquisition of shares by employees to which section 26AAC of the *Income Tax Assessment Act 1936* applies; or
- (b) there must be a share or right that, because of section 26AAD of that Act, was treated, for the purposes of section 26AAC of that Act, as if it were a continuation of a share or right in a company.

### ***Taxation Laws Amendment Act (No. 3) 2003***

#### **19 At the end of item 12 of Schedule 2**

Add:

- (4) A share or right that, under section 139DQ of the *Income Tax Assessment Act 1936*, is treated as if it were a continuation of another share or right for the purposes of Division 13A of Part III of that Act:
  - (a) is treated in the same way for the purposes of subitem (3) of this item; and
  - (b) is taken, for the purposes of that subitem, to have been acquired at the time of the last acquisition of the share or right that was not treated as such a continuation for the purposes of that Division.

#### **20 Application**

- (1) The amendments made by this Schedule apply, and are taken to have applied, to acquisitions of shares or rights on or after 1 July 2004.
- (2) In this item:  
***acquisition***, of a share or right:

- (a) in relation to the application of items 1 to 3, 15, 17 and 18 of this Schedule, has the same meaning as in section 26AAC of the *Income Tax Assessment Act 1936*; or
- (b) in relation to the application of items 4 to 14, 16 and 19 of this Schedule, has the same meaning as in Division 13A of Part III of the *Income Tax Assessment Act 1936*.

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## Schedule 6—Superannuation guarantee charge

### *Income Tax Assessment Act 1997*

#### **1 Section 12-5 (table item headed “superannuation guarantee charge”)**

Repeal the item, substitute:

**superannuation guarantee charge**

no deduction for .....	<b>51(9)</b>
late contribution offset, no deduction for .....	26-85

#### **2 At the end of Division 26**

Add:

#### **26-85 Amounts offset against superannuation guarantee charge**

You cannot deduct under this Act a contribution made for an employee of yours if you elect under subsection 23A(1) of the *Superannuation Guarantee (Administration) Act 1992* that the contribution be offset against your liability to pay superannuation guarantee charge.

### *Superannuation Guarantee (Administration) Act 1992*

#### **3 Subsection 5(3)**

Repeal the subsection, substitute:

- (3) Part 8 has effect as if any superannuation guarantee charge for a quarter in respect of a superannuation guarantee shortfall of the Commonwealth had been paid on:
- (a) for a quarter beginning on 1 January—28 May in the next quarter; and
  - (b) for a quarter beginning on 1 April—28 August in the next quarter; and
  - (c) for a quarter beginning on 1 July—28 November in the next quarter; and

- (d) for a quarter beginning on 1 October—28 February in the next quarter.

#### **4 Subsection 6(1)**

Insert:

*approved form* has the meaning given by section 388-50 in Schedule 1 to the *Taxation Administration Act 1953*.

#### **5 After section 23**

Insert:

#### **23A Offsetting late payments against charge**

- (1) A contribution to a complying superannuation fund or an RSA made by an employer for the benefit of an employee is offset under subsection (3) if:
    - (a) the contribution is made:
      - (i) after the end of the period of 28 days after the end of a quarter; and
      - (ii) before the end of the 28th day of the second month after the end of the quarter; and
    - (b) the employer elects, in the approved form, that the contribution be offset.
  - (2) The election must be made within 4 years after the employer's superannuation guarantee charge for the quarter became payable. The election cannot be revoked.
  - (3) The contribution is offset against the employer's liability to pay superannuation guarantee charge to the extent that the liability relates to:
    - (a) that part of the employer's nominal interest component for the quarter that relates to the employee; or
    - (b) the employer's individual superannuation guarantee shortfall for the employee for the quarter.
  - (4) The contribution is offset against that part of the employer's nominal interest component for the quarter that relates to the employee before any remainder is offset against the employer's individual superannuation guarantee shortfall for the employee for the quarter.
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- (5) A contribution to a superannuation fund or an RSA made by an employer for the benefit of an employee that is taken into account under this section in relation to a quarter is not to be taken into account:
- (a) under this section in relation to any other quarter; or
  - (b) under section 22 or 23.

## 6 Subsection 33(1)

Repeal the subsection, substitute:

- (1) An employer who has a superannuation guarantee shortfall for a quarter must lodge a superannuation guarantee statement for the quarter on or before:
- (a) for a quarter beginning on 1 January—28 May in the next quarter; and
  - (b) for a quarter beginning on 1 April—28 August in the next quarter; and
  - (c) for a quarter beginning on 1 July—28 November in the next quarter; and
  - (d) for a quarter beginning on 1 October—28 February in the next quarter.

## 7 Paragraph 35(1)(d)

Repeal the paragraph, substitute:

- (d) the assessment is taken to have been made on the later of the day on which the statement was lodged and the following day:
- (i) for a quarter beginning on 1 January—28 May in the next quarter; and
  - (ii) for a quarter beginning on 1 April—28 August in the next quarter; and
  - (iii) for a quarter beginning on 1 July—28 November in the next quarter; and
  - (iv) for a quarter beginning on 1 October—28 February in the next quarter.

## 8 Subsection 46(2) (definition of *lodgment day*)

Repeal the definition, substitute:

*lodgment day* for a quarter means:

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- (a) for a quarter beginning on 1 January—28 May in the next quarter; and
- (b) for a quarter beginning on 1 April—28 August in the next quarter; and
- (c) for a quarter beginning on 1 July—28 November in the next quarter; and
- (d) for a quarter beginning on 1 October—28 February in the next quarter.

## **9 At the end of Part 7**

Add:

### **62A Offsets to be disregarded**

In working out the amount of superannuation guarantee charge payable by an employer for a quarter for the purposes of this Part, disregard the amount of any offset under section 23A (about offsetting late payments against charge).

## **10 Application**

- (1) The amendments made by items 1, 2, 4, 5 and 9 of this Schedule apply to contributions made on or after 1 January 2006.
- (2) The amendments made by items 3, 6, 7 and 8 of this Schedule apply to obligations relating to the quarter beginning on 1 October 2005 and later quarters.

## Schedule 7—Superannuation on back payments

### *Income Tax Assessment Act 1936*

#### **1 Subsection 82AAC(1)**

Repeal the subsection (not including the notes), substitute:

- (1) The amount of a contribution made by a taxpayer is allowable as a deduction to the taxpayer for the year of income of the taxpayer in which the contribution was made if:
  - (a) the contribution was made to a fund for the purpose of making provision for superannuation benefits payable for another person (whether or not the benefits are payable to a dependant of the other person if the other person dies before or after becoming entitled to receive the benefits); and
  - (b) the fund is a complying superannuation fund, within the meaning of Part IX, in relation to the year of income of the fund in which the contribution is made; and
  - (c) one or more of these applies:
    - (i) the other person was an eligible employee;
    - (ii) the contribution reduces the taxpayer's charge percentage in respect of the other person under section 22 or 23 of the *Superannuation Guarantee (Administration) Act 1992*;
    - (iii) the other person was an employee for the purposes of that Act.

#### **2 Subsection 82AAC(2)**

Omit "particular employee", substitute "particular person".

#### **3 Subsection 82AAC(2)**

Omit "employee's", substitute "person's".

#### **4 Subsection 82AAC(2A)**

Omit "An employee's", substitute "A person's".

#### **5 Paragraphs 82AAC(2A)(a) and (b)**

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Omit “employee”, substitute “person”.

**6 Paragraph 82AAD(1)(a)**

Omit “an eligible employee”, substitute “another person”.

**7 Section 82AADA**

Omit “an eligible employee”, substitute “another person”.

**8 Subsection 82AAF(1)**

After “eligible employee”, insert “, another person where the deposit reduces the taxpayer’s charge percentage in respect of the other person under section 22 or 23 of the *Superannuation Guarantee (Administration) Act 1992* or another person who is an employee for the purposes of that Act”.

**9 Subsection 82AAF(2)**

Omit “particular employee”, substitute “particular person”.

**10 Subsection 82AAQ(1)**

Omit “an employee”, substitute “another person”.

**11 Paragraph 82AAQ(2)(a)**

Omit “an employee”, substitute “another person”.

**12 Subsections 82AAR(1) and (2)**

After “an employee or employees”, insert “, another person or persons where the amount paid reduces the taxpayer’s charge percentage in respect of the other person under section 22 or 23 of the *Superannuation Guarantee (Administration) Act 1992* or another person or persons who are employees for the purposes of that Act”.

**13 Subsection 82AAR(4)**

After “an employee”, insert “, another person where the amount paid reduces the taxpayer’s charge percentage in respect of the other person under section 22 or 23 of the *Superannuation Guarantee (Administration) Act 1992* or another person who is an employee for the purposes of that Act”.

***Income Tax Assessment Act 1997***

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**14 Paragraph 26-80(2)(b)**

Repeal the paragraph, substitute:

- (b) you pay the contribution in respect of the other person on or before the day that is 28 days after the end of the month in which the other person turns 70 years old.

**15 Paragraphs 26-80(4)(b) and (5)(b)**

Omit “an eligible employee (within the meaning of section 82AAA of that Act)”, substitute “another person”.

**16 Paragraph 26-80(5)(c)**

Omit “employee”, substitute “other person”.

***Superannuation Guarantee (Administration) Act 1992***

**17 Before section 16**

Insert:

**15B Application of Part to former employees**

This Part applies to salary or wages paid to, and contributions for the benefit of, a former employee as if the former employee were an employee of the person who was the former employee’s employer.

**18 After subsection 63A(1)**

Insert:

- (1A) This Part applies to a former employee as if the former employee were an employee of the person who was the former employee’s employer.

**19 Previous interpretation preserved**

The amendments made by this Schedule are not to be taken to affect by implication the interpretation of a provision amended by this Schedule at a time before the commencement of this Schedule.

**20 Application**

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**TSchedule 7T Superannuation on back paymentsT**  
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The amendments made by this Schedule apply to payments made on or after the first day of the first quarter after the quarter in which this Act receives the Royal Assent.

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*[Minister's second reading speech made in—  
House of Representatives on 14 September 2005  
Senate on 12 October 2005]*

(159/05)