

Income Tax Assessment Act 1936

Act No. 27 of 1936 as amended

This compilation was prepared on 1 January 2008
taking into account amendments up to Act No. 182 of 2007

Volume 3 includes: Table of Contents
Sections 124K – 202G

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

Part III—Liability to taxation

Contents

Part III—Liability to taxation	i
Division 10B—Industrial property	1
124K Interpretation	1
124KAA Division subject to Division 245 of Schedule 2C	4
124KA Application of Division where deduction allowable under former section 124ZAF or section 124ZAF A	4
124L Application	6
124M Annual deductions	7
124N Deductions on the disposal or lapse of a unit of industrial property	8
124P Amount to be included in assessable income on disposal of a unit of industrial property	9
124PA Roll-over relief	10
124Q Disposal of part of a unit of industrial property	12
124R Cost of a unit of industrial property	12
124S Residual value	15
124T Consideration receivable on disposal	16
124UA Effective life of certain units of industrial property	17
124V Interest by licence in patent etc.	18
124W Disposal of unit of industrial property on change of partnership etc.	19
124WA Disposal of unit of industrial property where deduction allowable under former section 124ZAF or section 124ZAF A	20
124Y Damages for infringement	25
124Z Benefit from overseas rights	25
Division 10BA—Australian films	26
Subdivision A—Preliminary	26
124ZAA Interpretation	26
124ZAB Provisional certificates	29
124ZAC Final certificates	31
124ZAD Determination of content of film	32
124ZADA A Delegation by Minister	33
124ZADAB Review of decisions of Minister	33
124ZADAD Declarations	34
124ZADBN Notification regarding non-completion of film	38
124ZAE Election that Division not apply	38
124ZAEA Transfer by way of security	39

Subdivision B—Deductions for capital expenditure	39
124ZAFASubdivision subject to Division 245 of Schedule 2C.....	39
124ZAFADeductions for capital expenditure under post 12 January 1983 contracts.....	39
124ZAG Expenditure of contributions	44
124ZAGASatisfaction of Commissioner as to the future application of certain provisions	45
124ZAH Allocation of contributions expended.....	46
124ZAJ Non-arm’s length transactions.....	47
124ZAK Amounts expended in acquiring assets.....	48
124ZAL Deduction reduced if future copyright assigned	48
124ZAMNo deduction unless expenditure at risk.....	49
Subdivision C—Miscellaneous	51
124ZAO Limitation on deductibility of revenue expenses	51
124ZAP Special provisions relating to partnerships	52
Division 10E—PDFs (pooled development funds)	54
Subdivision A—Shares in PDFs	54
124ZM Treatment distributions to shareholders in PDF	54
124ZN Exemption of income from sale of shares in a PDF.....	57
124ZO Shares in a PDF are not trading stock.....	57
124ZQ Effect of company becoming a PDF.....	57
124ZR Effect of company ceasing to be a PDF.....	58
Subdivision B—The taxable income of PDFs	58
124ZS Definitions.....	58
124ZTA Taxable income in first year as PDF if PDF component is nil.....	59
124ZT SME assessable income.....	59
124ZU SME income component	60
124ZV Unregulated investment component	60
Subdivision C—Adjustments of the tax treatment of capital gains and capital losses of PDFs	61
124ZW Definitions.....	61
124ZX Companies to which this Subdivision applies.....	62
124ZY Classes of assessable income.....	62
124ZZ Treatment of capital gains	63
124ZZA Allocation of gain amounts and loss amounts to classes of assessable income.....	63
124ZZB Assessable income etc. in relation to capital gains	64
124ZZD No net capital loss	64
Division 11—Interest paid by companies on bearer debentures	65
126 Interest paid by a company on bearer debentures	65
127 Credit for tax paid by company	65
128 Assessments of tax	66

Division 11A—Dividends, interest and royalties paid to non-residents and to certain other persons	67
Subdivision A—General	67
128AAA Application of Division to non-share dividends	67
128A Interpretation	67
128AA Deemed interest in respect of transfers of certain securities	72
128AB Certificates relating to issue price of certain securities.....	72
128AC Deemed interest in respect of hire-purchase and certain other agreements.....	74
128AD Indemnification etc. agreements in relation to bills of exchange and promissory notes	77
128AE Interpretation provisions relating to offshore banking units	78
128AF Payments through interposed entities	83
128B Liability to withholding tax	84
128C Payment of withholding tax.....	94
128D Certain income not assessable	95
128F Division does not apply to interest on certain publicly offered company debentures or debt interests.....	96
128FA Division does not apply to interest on certain publicly offered unit trust debentures or debt interests	105
128GB Division not to apply to interest payments on offshore borrowings by offshore banking units	110
128NA Special tax payable in respect of certain securities and agreements.....	110
128NB Special tax payable in respect of certain dealings by current and former offshore banking units.....	111
128NBA Credits in respect of amounts assessed under Division 16E of Part III	113
128P Objections.....	114
128Q Power of Commissioner to obtain information.....	114
128R Informal arrangements.....	115
Division 11B—Equity investments in small-medium enterprises	116
128TG Summary of this Division.....	116
128TH When Division applies.....	116
128TI Consequences of Division applying	117
128TJ Acquiring a threshold interest in an SME.....	118
128TK SME or small-medium enterprise	118
128TL Subsidiary and direct ownership group.....	119
Division 11C—Payments in respect of mining operations on Aboriginal land	120
128U Interpretation	120
128V Liability to mining withholding tax	123
128W Payment of mining withholding tax.....	123

128X	Power of Commissioner to obtain information.....	124
Division 12—Oversea ships		125
129	Taxable income of ship-owner or charterer	125
130	Master or agent to make return.....	125
131	Determination by Commissioner	125
132	Assessment of tax	125
133	Master liable to pay	125
134	Notice of assessment	126
135	Clearance of ship.....	126
135A	Freights payable under certain agreements.....	126
Division 13—International agreements and determination of source of certain income		127
136AA	Interpretation	127
136AB	Operation of Division	129
136AC	International agreements.....	129
136AD	Arm’s length consideration deemed to be received or given	130
136AE	Determination of source of income etc.	132
136AF	Consequential adjustments to assessable income and allowable deductions	138
Division 13A—Employee share schemes		141
Subdivision A—Key principle and overview of Division		141
139	The key principle.....	141
139A	Overview of Division	141
Subdivision B—Inclusion of discount in assessable income		142
139B	Discount to be included in assessable income	142
139BA	Reduction of amounts included—elections	143
Subdivision C—Key concepts: employee share scheme, discount, cessation time, qualifying shares and rights and exemption conditions		143
139C	Employee share schemes	143
139CA	Cessation time—shares.....	144
139CB	Cessation time—rights	145
139CC	Calculation of discount.....	146
139CD	Meaning of <i>qualifying shares</i> and <i>qualifying rights</i>	147
139CDA	Additional requirement for shares or rights acquired while engaged in foreign service.....	148
139CE	Exemption conditions	148
Subdivision D—Special provisions		149
139D	Discount assessable to associate if share acquired by taxpayer in respect of associate’s employment.....	149
139DA	Acquisition of legal interest in shares or rights—certain discounts not assessable.....	150

139DB	No deduction until share or right acquired	151
139DC	Deduction for provider of certain qualifying shares or rights	151
139DD	No benefit where rights lost.....	152
139DE	Amount not assessable under other provisions	153
139DF	Anti-avoidance—certain shares and rights not qualifying shares and qualifying rights.....	153
139DG	Amendment of assessments to account for reductions of amounts included in assessable income.....	153
Subdivision DA—Takeovers and restructures		154
139DP	Object of this Subdivision	154
139DQ	The effect of 100% takeovers and restructures on employee share schemes.....	154
139DR	Conditions for the continuation of shares or rights.....	155
139DS	Apportionment rules.....	156
Subdivision DB—Stapled securities		157
139DSA	Object of this Subdivision	157
139DSB	Application of Division to stapled securities.....	157
139DSC	Discount not to be included in assessable income unless stapled security or right is qualifying	158
139DSD	Division does not also apply to share part of stapled security	158
139DSE	Modifications relating to employment.....	158
139DSF	Modification relating to legal or beneficial interest.....	159
139DSG	Modification relating to voting rights.....	159
139DSH	Cessation time when stapling arrangement ceases.....	160
139DSI	Deduction to be apportioned.....	160
Subdivision E—Elections		161
139E	Taxpayer may make election	161
Subdivision F—Special provisions about the market value of a share or right		162
139F	Meaning of <i>market value</i> of a share or right.....	162
139FA	Listed shares or rights—market value	162
139FAA	Listed shares—market value where public offer	163
139FB	Unlisted shares—market value	164
139FC	Unlisted rights—market value.....	164
139FD	Conditions and restrictions to be disregarded.....	165
139FE	Value of right nil or can not be determined	165
139FF	Value of legal and beneficial interests	165
139FG	Meaning of <i>qualified person</i>	166
139FI	Provision of information about market value	166
139FJ	Outline of remainder of Subdivision	166
139FK	Step 1—calculate the calculation percentage.....	166
139FL	Step 2—how to use calculation percentage	167
139FM	Table 1 and instructions.....	167

139FN	Table 2 and instructions.....	169
Subdivision G—Definitions		170
139G	Meaning of <i>acquiring</i> or <i>providing</i> a share or right.....	170
139GA	Meaning of <i>employee</i> and <i>employer</i>	171
139GB	Meaning of <i>permanent employee</i>	171
139GBA	Meaning of <i>foreign service</i>	172
139GC	Meaning of <i>holding company</i>	172
139GCA	Meaning of <i>subsidiary</i>	172
139GCB	Meaning of <i>100% takeover</i>	172
139GCC	Meaning of <i>restructure</i>	173
139GCD	Meaning of <i>stapled security</i> and <i>stapled entity</i>	173
139GD	Meaning of <i>approved stock exchange</i>	173
139GE	Meaning of <i>associate</i>	173
139GF	Meaning of <i>conducting a scheme on a non-discriminatory basis</i>	174
139GG	Meaning of <i>provision of financial assistance</i>	175
139GH	Index of definitions.....	175
Division 15—Insurance with non-residents		177
141	Interpretation.....	177
142	Income derived by non-resident insurer.....	177
143	Taxable income of non-resident insurer.....	178
144	Liability of agents of insurer.....	178
145	Deduction of premiums.....	178
146	Exporter to furnish information.....	178
147	Rate of tax in special circumstances.....	179
148	Reinsurance with non-residents.....	179
Division 16—Averaging of incomes		182
149	Average income.....	182
149A	Capital gains, abnormal income and certain death benefits to be disregarded.....	182
150	First average year.....	183
151	First application of Division in relation to a taxpayer.....	183
152	Taxpayer not in receipt of assessable income.....	183
153	Taxpayer with no taxable income.....	183
154	Excess of allowable deductions.....	184
155	Permanent reduction of income.....	184
156	Rebate of tax for, or complementary tax payable by, certain primary producers.....	184
157	Application of Division to primary producers.....	191
158	Application of Division.....	192
158A	Election that Division not apply.....	192

Division 16D—Certain arrangements relating to the use of property	193
159GE Interpretation	193
159GEA Division applies to certain State/Territory bodies.....	200
159GF Residual amounts.....	200
159GG Qualifying arrangements	204
159GH Application of Division in relation to property.....	207
159GJ Effect of application of Division on certain deductions etc.	208
159GK Effect of application of Division on assessability of arrangement payments.....	217
159GL Special provision relating to Division 10C or 10D property	220
159GM Special provision where cost of plant etc. is also eligible capital expenditure.....	221
159GN Effect of use of property under qualifying arrangement for producing assessable income.....	222
159GO Special provisions relating to partnerships	225
Division 16E—Accruals assessability etc. in respect of certain security payments	229
159GP Interpretation	229
159GQ Tax treatment of holder of qualifying security	234
159GQA Accrual period	234
159GQB Accrual amount	235
159GQC Implicit interest rate for fixed return security	237
159GQD Implicit interest rate for variable return security.....	237
159GR Consequences of actual payments	240
159GS Balancing adjustments on transfer of qualifying security	240
159GT Tax treatment of issuer of a qualifying security	242
159GU Effect of Division on certain transfer profits and losses	243
159GV Consequence of variation of terms of security.....	244
159GW Effect of Division in relation to non-residents.....	246
159GX Effect of Division where certain payments not assessable	247
159GY Effect of Division where qualifying security is trading stock.....	247
159GZ Stripped securities	247
Division 16J—Effect of cancellation of subsidiary’s shares in holding company	250
159GZZC Interpretation—general.....	250
159GZZD Meaning of <i>eligible entity</i> , <i>eligible interest</i> and <i>eligible proportion</i>	251
159GZZE Share cancellations to which this Division applies	251
159GZZF Effect on subsidiary of share cancellations to which this Division applies	251
159GZZG Pre-cancellation disposals of eligible interests	252
159GZZH Post-cancellation disposals of eligible interests etc.	253

159GZZZI	Additional application of sections 159GZZZG and 159GZZZH to associates	254
Division 16K	—Effect of buy-backs of shares	256
Subdivision AA	—Application of Division to non-share equity interests	256
159GZZZIA	Application of Division to non-share dividends	256
Subdivision A	—Interpretation	256
159GZZZJ	Interpretation	256
159GZZZK	Explanation of terms	256
159GZZZL	<i>Special</i> buy-backs not made in ordinary course of trading on a stock exchange	257
159GZZZM	Purchase price in respect of buy-back	257
Subdivision B	—Company buying-back shares	258
159GZZZN	Buy-back and cancellation disregarded for certain purposes	258
Subdivision C	—Off-market purchases	258
159GZZZP	Part of off-market purchase price is a dividend	258
159GZZZQ	Consideration in respect of off-market purchase	259
Subdivision D	—On-market purchases	262
159GZZZR	No part of on-market purchase price is a dividend	262
159GZZZS	Consideration in respect of on-market purchase	262
Division 16L	—Tax-exempt infrastructure borrowings	263
159GZZZD	Interpretation	263
159GZZZE	Infrastructure borrowings to be non-assessable and non-deductible	264
159GZZZF	Tax exemption to be disregarded for certain purposes	266
159GZZZG	Rebate election	266
159GZZZH	Tax payable where infrastructure borrowing certificate cancelled	269
Division 17	—Rebates	271
Subdivision A	—Concessional rebates	271
159H	Application	271
159HA	Indexation of rebate amounts in sections 159J, 159K and 159L	271
159J	Rebates for dependants	273
159K	Sole parent rebate	283
159L	Housekeeper	284
159M	Double concessional rebates	287
159N	Rebate for certain low-income taxpayers	288
159P	Rebate for medical expenses	288

Subdivision AB—Lump sum payments in arrears	291
159ZR Interpretation	291
159ZRA Eligibility for rebate	294
159ZRB Calculation of rebate.....	294
159ZRC Notional tax amount for recent accrual years	294
159ZRD Notional tax amount for distant accrual years	295
Subdivision B—Miscellaneous	296
160AAAATax rebate for low income aged persons.....	296
160AAABTax rebate for low income aged persons—trustees assessed under section 98	297
160AAA Rebate in respect of certain pensions, benefits etc.....	299
160AAB Rebate in respect of amounts assessable under section 26AH.....	300
160AD Maximum amount of rebates	303
160ADAMost tax offsets under the 1997 Assessment Act are treated as rebates	303
Part IIIB—Australian branches of foreign banks	304
Division 1—Preliminary	304
160ZZVAObject.....	304
160ZZVBAApplication.....	304
160ZZV Definitions	305
160ZZWCertain provisions to apply as if Australian branch of foreign bank were a separate legal entity	306
Division 2—Provisions relating to income tax	308
160ZZX Income of branch to have Australian source.....	308
160ZZZ Notional borrowing by branch from bank	308
160ZZZANotional payment of interest by branch to bank.....	308
160ZZZCOffshore banking units	310
160ZZZENotional derivative transactions between branch and bank	310
160ZZZFNotional foreign exchange transactions between branch and bank	310
160ZZZGLosses.....	311
160ZZZHNet capital losses	311
160ZZZICertain transactions to be disregarded	311
Division 3—Provisions relating to withholding tax	312
160ZZZJWithholding tax on interest paid by branch to bank	312
Division 4—Extension of Part to Australian branches of foreign financial entities	313
160ZZZKTreatment like Australian branches of foreign banks	313

Part IV—Returns and assessments	314
161 Annual returns	314
161A Form and content of returns.....	314
161AA Contents of returns of full self-assessment taxpayers.....	315
161G Tax agent to give taxpayer copy of notice of assessment	315
162 Further returns and information.....	315
163 Special returns	316
163A Late lodgement penalty—relevant entities, instalment taxpayers and full self-assessment taxpayers.....	316
163AA General interest charge on unpaid penalty.....	318
163B Late lodgment of returns by persons other than relevant entities, instalment taxpayers and full self-assessment taxpayers.....	318
164 Returns deemed to be duly made.....	321
166 Assessment	321
166A Deemed assessment.....	321
167 Default assessment	323
168 Special assessment.....	323
169 Assessments on all persons liable to tax	323
169A Reliance by Commissioner on returns and statements.....	324
170 Amendment of assessments.....	325
170C Power of Commissioner to reduce amount of tax payable in certain cases.....	337
171 Where no notice of assessment served.....	337
171A Limited period to make assessments for nil liability returns for the 2003-04 year of income or earlier	338
172 Refunds of amounts overpaid	340
173 Amended assessment to be an assessment.....	341
174 Notice of assessment	341
175 Validity of assessment.....	341
175A Objections against assessments	341
176 Judicial notice of signature	342
177 Evidence.....	342
Part IVA—Schemes to reduce income tax	344
177A Interpretation	344
177B Operation of Part	345
177C Tax benefits.....	345
177CA Withholding tax avoidance	350
177D Schemes to which Part applies	350
177E Stripping of company profits.....	351
177EA Creation of franking debit or cancellation of franking credits	353
177EB Cancellation of franking credits—consolidated groups	360
177F Cancellation of tax benefits etc.....	363

177G	Amendment of assessments.....	367
Part VA—Tax file numbers		368
Division 1—Preliminary		368
202	Objects of this Part	368
202A	Interpretation	370
202AA	Definition of <i>eligible PAYG payment</i>	373
Division 2—Issuing of tax file numbers		375
202B	Application for tax file number	375
202BA	Issuing of tax file numbers	375
202BB	Current tax file number.....	376
202BC	Deemed refusal by Commissioner.....	376
202BD	Interim notices.....	376
202BE	Cancellation of tax file numbers.....	377
202BF	Alteration of tax file numbers.....	377
Division 3—Quotation of tax file numbers by recipients of eligible PAYG payments		378
202C	TFN declarations by recipients of eligible PAYG payments.....	378
202CA	Operation of TFN declaration.....	378
202CB	Quotation of tax file number in TFN declaration	379
202CC	Making a replacement TFN declaration in place of an ineffective declaration	381
202CD	Sending of TFN declaration to Commissioner	381
202CE	Effect of incorrect quotation of tax file number	382
202CF	Payer must notify Commissioner if no TFN declaration by recipient.....	383
Division 4—Quotation of tax file numbers in connection with certain investments		385
202D	Explanation of terms: investment, investor, investment body	385
202DA	Phasing-in period for Division.....	388
202DB	Quotation of tax file numbers in connection with investments.....	388
202DC	Method of quoting tax file number	389
202DD	Investor excused from quoting tax file number in certain circumstances	389
202DDB	Quotation of tax file number in connection with indirectly held investment.....	389
202DE	Securities dealer to inform the investment body of tax file number.....	392
202DF	Effect of incorrect quotation of tax file number	392
202DG	Investments held jointly.....	393
202DH	Tax file number quoted for superannuation or surcharge purposes taken to be quoted for purposes of the taxation of eligible termination payments.....	394

202DHA	Tax file number quoted for Division 3 purposes taken to have been quoted for superannuation purposes	394
202DI	Tax file number quoted for RSA purposes taken to be quoted for purposes of the taxation of superannuation benefits	395
202DJ	Tax file number quoted for purposes of taxation of superannuation benefits taken to be quoted for surcharge purposes.....	395
Division 4A—Quotation of tax file numbers in connection with farm management deposits		397
202DK	Interpretation	397
202DL	Quotation of tax file number	397
202DM	Effect of incorrect quotation of tax file number	397
Division 5—Exemptions		399
202EA	Persons receiving certain pensions etc.—employment	399
202EB	Persons receiving certain pensions etc.—investments	400
202EC	Entities not required to lodge income tax returns	401
202EE	Non-residents.....	403
202EF	Territory residents etc.....	403
202EG	Manner of completing declarations	404
202EH	Declarations under this Division to be retained in certain circumstances	404
Division 6—Review of decisions		406
202F	Review of decisions.....	406
202FA	Statements to accompany notification of decisions	407
Division 7—Manner of providing information		408
202G	Transmission of information in accordance with specifications	408

Division 10B—Industrial property

124K Interpretation

- (1) In this Division, unless the contrary intention appears:

Australian film means a film that is certified in writing by the Minister to be a film that:

- (a) has been, or is to be, made wholly or substantially in Australia or in an external Territory and has, or will have, a significant Australian content; or
- (b) has been, or is to be, made in pursuance of an agreement or arrangement entered into between the Government of Australia or an authority of the Government of Australia and the Government of another country or an authority of the Government of another country.

film has the meaning given by subsection 995-1(1) of the *Income Tax Assessment Act 1997*.

Minister means the Minister administering the *Film Licensed Investment Company Act 2005*.

Senior Executive Service office has the meaning given by subsection 995-1(1) of the *Income Tax Assessment Act 1997*.

the owner, in relation to a unit of industrial property, means the person who possesses the rights in respect of that unit of industrial property.

unit of industrial property means:

- (a) rights possessed by a person under a law of Australia as:
 - (ii) the owner of a copyright; or
 - (iv) a licensee under such a copyright;and includes equitable rights in respect of such a patent, copyright or design or in respect of a licence under such a patent, copyright or design; or
- (b) rights possessed by a person under a law of a foreign country that are equivalent to the rights referred to in paragraph (a).

Section 124K

- (1A) In considering for the purposes of the definition of *Australian film* in subsection (1) whether a film has or will have a significant Australian content, the Minister shall have regard to:
- (a) the subject-matter of the film;
 - (b) the place or places where the film was, or is to be, made;
 - (c) the nationalities and places of residence of:
 - (i) the persons who took part, or are to take part, in the making of the film (including authors, composers, actors, scriptwriters, editors, producers, directors and technicians);
 - (ii) the persons who are, or will be, the beneficial owners of the shares or stock in the capital of any company concerned in the making of the film; and
 - (iii) the persons who are, or will be, the beneficial owners of the copyright in the film;
 - (d) the source from which moneys used, or to be used, in the making of the film were, or will be, derived; and
 - (e) any other matters that he considers to be relevant.
- (1B) The Minister may, by writing, delegate to the Secretary to the Minister's Department, or to a person holding or performing the duties of a Senior Executive Service office in the Minister's Department, all or any of the Minister's powers under this section.
- (1C) Applications may be made to the Tribunal for review of a decision:
- (a) to refuse to give a certificate of the kind referred to in the definition of *Australian film* in subsection (1); or
 - (b) to revoke such a certificate.
- (1D) Where the Minister makes a decision of the kind referred to in subsection (1C) and gives to a person whose interests are affected by the decision notice in writing of the decision, that notice shall:
- (a) in all cases—include a statement to the effect that, subject to the *Administrative Appeals Tribunal Act 1975*, application may be made to the Administrative Appeals Tribunal, by or on behalf of any person whose interests are affected by the decision, for review of the decision; and
 - (b) except where subsection 28(4) of that Act applies—include a statement to the effect that a request may be made under section 28 of that Act by or on behalf of such a person for a statement setting out the findings on material questions of

fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.

- (1E) A failure to comply with the requirements of subsection (1D) in relation to a decision does not affect the validity of the decision.
- (2) Subject to subsection (2A), a reference in this Division to expenditure of a capital nature does not include a reference to:
- (a) expenditure in respect of which a deduction has been allowed or is allowable under a provision of this Act, other than a provision of this Division, or which has been or is taken into account in ascertaining the amount of an allowable deduction under such a provision; or
 - (b) the expenditure of moneys by a taxpayer, under a contract entered into on or after 1 October 1980, in producing, or by way of contribution to the cost of producing, a film where:
 - (i) the expenditure of the moneys was expenditure of a capital nature;
 - (ii) at the time when the moneys were expended, the taxpayer was a resident;
 - (iii) at the time when the moneys were expended, a certificate under section 124ZAB or 124ZAC was in force in relation to the film;
 - (iv) the Commissioner is satisfied, in relation to the expenditure of those moneys by the taxpayer, as mentioned in former paragraph 124ZAF(1)(c) or paragraph 124ZAF(1)(c); and
 - (v) the taxpayer has not made an election under section 124ZAE in relation to that film; or
 - (c) expenditure on software (within the meaning of the *Income Tax Assessment Act 1997*).
- (2A) Where a taxpayer has expended moneys as mentioned in paragraph (2)(b) and, by reason of the operation of section 124ZAM, the taxpayer is deemed, for the purposes of Division 10BA, not to have expended those moneys or not to have expended part of those moneys, paragraph (2)(b) does not apply in respect of the expenditure of those moneys or of that part of those moneys, as the case may be.

Section 124KAA

- (3) Where a unit of industrial property is transmitted to a person by operation of law, this Division has effect as if that unit had been disposed of to that person by the last preceding owner of the unit at the time of the transmission.
- (4) In this Division, a reference to the transmission of a unit of industrial property by operation of law includes, without limiting the generality of that expression, a reference to the transmission of a unit of industrial property to a person:
 - (a) as trustee of the estate of the deceased owner of the unit;
 - (b) as a beneficiary under the will or a codicil of the deceased owner of the unit or under an order of a court that varied or modified the provisions or such a will or codicil; or
 - (c) as a beneficiary on the intestacy of the deceased owner of the unit or as a beneficiary under an order of a court that varied or modified the application, in relation to the estate of the deceased owner of the unit, of the provisions of the law relating to the distribution of the estates of persons who die intestate.
- (5) For the purpose of this Division, disregard an acquisition or disposal of property by way of the transfer of the property for the provision or redemption of a security. Consequently this Division applies as if the person who was the owner of the property before the transfer continues to be the owner after the transfer.

124KAA Division subject to Division 245 of Schedule 2C

This Division has effect subject to Division 245 of Schedule 2C.

124KA Application of Division where deduction allowable under former section 124ZAF or section 124ZAFA

- (1) Where:
 - (a) a partnership has expended capital moneys in producing, or by way of contribution to the cost of producing, a film;
 - (b) by virtue of the expenditure of those moneys by the partnership, a deduction has been allowed, or is allowable, under former section 124ZAF or section 124ZAFA to a taxpayer being a partner in the partnership;the following provisions have effect:

- (c) for the purposes of this Division other than this section, the partnership shall not be taken to have incurred any expenditure of a capital nature directly in relation to producing the film; and
- (d) where an amount (in this paragraph referred to as the **relevant amount**) of moneys expended by the partnership under a contract (in this subsection referred to as the **relevant contract**):
- (i) is taken, for the purposes of subsection 124ZAP(2), to have been expended by the partnership in producing, or by way of contribution to the cost of producing, the film; or
 - (ii) would be taken, for the purposes of that subsection, to have been expended by the partnership in producing, or by way of contribution to the cost of producing, the film if that subsection and Subdivision B of Division 10BA extended to the expenditure of moneys under contracts entered into before 1 October 1980;

a taxpayer, being a partner in the partnership, shall, subject to subsection 124K(2), be taken for the purposes of this Division to have expended capital moneys in producing the film of an amount equal to:

- (iii) so much of the relevant amount as the partners have agreed is to be borne by the taxpayer; or
- (iv) if the partners have not agreed as to the part of the relevant amount that is to be borne by the taxpayer—so much of the relevant amount as bears to the relevant amount the same proportion as the individual interest of the taxpayer in the net income of the partnership of the year of income in which the relevant amount was expended by the partnership bears to that net income or, as the case requires, the individual interest of the taxpayer in the partnership loss for that year of income bears to that partnership loss;

and the amount deemed to be expended by the taxpayer shall be deemed to have been expended under a contract entered into at the time when the relevant contract was entered into by the partnership.

Section 124L

- (2) In this section, a reference to the expenditure of capital moneys is a reference to the expenditure of moneys that is expenditure of a capital nature.

124L Application

- (1A) For the purposes of assessments for the 1998-99 year of income and later years of income, this Division applies to the owner of a unit of industrial property only if:
- (a) the unit relates to a copyright in an Australian film; and
 - (b) a claim is not made for a tax offset in respect of the film under Division 376 of the *Income Tax Assessment Act 1997* (whether in that year of income or another year of income); and
 - (c) an application for a certificate of the kind referred to in the definition of **Australian film** in subsection 124K(1) in respect of the film is made before the day on which the *Tax Laws Amendment (2007 Measures No. 5) Act 2007* receives the Royal Assent; and
 - (d) the owner claims a deduction in respect of the film under this Division in relation to the 2008-09 year of income or an earlier year of income.

Note 1: For other kinds of intellectual property, see Division 40 of the *Income Tax Assessment Act 1997*.

Note 2: Paragraph (d) means that, if a taxpayer claims a deduction in respect of a film under this Division in relation to the 2008-09 year of income, the taxpayer can claim a deduction in respect of the film in relation to the 2009-10 year of income as well.

- (1) This Division applies to the owner of a unit of industrial property who:
- (a) became the owner of the unit by reason of being the first owner of the copyright to which the unit relates and, before the unit came into existence, incurred expenditure of a capital nature directly in relation to producing the work or other subject-matter in which the copyright subsists; or
 - (b) incurred expenditure of a capital nature on the purchase of the unit of industrial property; or
 - (c) acquired the unit of industrial property by virtue of the disposal (other than a disposal by way of transmission by operation of law), in whole or in part and otherwise than for valuable consideration, of a unit of industrial property by the

owner of that last-mentioned unit in a case where a deduction under this Division in respect of that unit has been allowed or is allowable in an assessment in respect of income of that last-mentioned owner or would have been so allowable if that unit, or the invention, work or other subject-matter or design to which that unit relates, had been used by that owner for the purpose of producing assessable income; or

- (d) acquired the unit of industrial property by virtue of the transmission, in whole or in part, of a unit of industrial property by operation of law, in a case where a deduction under this Division in respect of that unit has been allowed or is allowable in an assessment in respect of income of the last preceding owner of that unit or would have been so allowable if that unit, or the invention, work or other subject-matter or design to which that unit relates, had been used by that last preceding owner for the purpose of producing assessable income;

and, in the year of income or a previous year of income, has used the unit of industrial property of which he is the owner, or the invention, work or other subject-matter or design to which that unit relates, for the purpose of producing assessable income.

124M Annual deductions

- (1) Where, at any time during the year of income, a taxpayer is the owner of a unit of industrial property to whom this Division applies, an amount equal to the residual value of the unit in relation to the taxpayer as at the end of the year of income divided by a number equal to the number of whole years in the effective life of the unit in relation to the taxpayer as at the commencement of the year of income shall, subject to this Act, be an allowable deduction in respect of the unit.
- (2) Where the deduction allowable under subsection (1) would, but for this subsection, be less than \$100, the deduction allowable shall be \$100, or the amount of the residual value referred to in subsection (1), whichever is the less.
- (3) Where:
- (a) at any time during the year of income a taxpayer was the owner of a unit of industrial property to whom this Division applies;

Section 124N

- (b) the effective life of the unit in relation to the taxpayer expired before the commencement of the year of income; and
 - (c) there was a residual value of the unit in relation to the taxpayer as at the end of the year of income;
- an amount equal to that residual value shall, subject to this Act, be an allowable deduction in respect of the unit in the assessment of the taxpayer in respect of income of that year of income.
- (4) Subject to subsection (5), where, during a year of income, the owner of a unit of industrial property ceases to be the owner of the unit, a deduction under this section in respect of the unit is not allowable in his assessment in respect of income of that year of income.
 - (5) Subsection (4) extends to the case where the owner of the unit of industrial property ceases to be the owner by reason that the property ceases to exist but does not apply:
 - (a) where the owner ceases to be the owner of the unit of industrial property by virtue of the transmission of the unit by operation of law; or
 - (b) where the unit of industrial property was purchased or otherwise acquired by the owner for a specified period and he ceases to be the owner by reason that the specified period terminates.
 - (6) A reference in subsection (1) or (3) to the residual value of a unit of industrial property as at the end of a year of income in relation to a taxpayer who was the owner of the unit at any time during that year of income shall, in a case where the taxpayer ceased to be the owner of the unit by virtue of the transmission of the unit by operation of law, be read as a reference to the residual value of the unit in relation to the taxpayer immediately before the time of the transmission of the unit.

124N Deductions on the disposal or lapse of a unit of industrial property

- (1) Where, at any time during the year of income, a taxpayer who is the owner of a unit of industrial property to whom this Division applies disposes of the unit in whole and the amount of the consideration receivable in respect of the disposal is less than the residual value of the unit in relation to him at that time, the amount

of the residual value, less the amount of the consideration, shall be an allowable deduction.

(2) Where:

- (a) a unit of industrial property owned by a taxpayer who is an owner to whom this Division applies ceases to exist at any time during the year of income by reason of the copyright to which the unit relates ceasing to be in force; or
- (b) a unit of industrial property owned by a taxpayer who is an owner to whom this Division applies and became the owner by reason of the grant, by licence, to him of an interest in a copyright ceases to exist at any time during the year of income by reason of a surrender of the licence in a case where there was no consideration receivable by the taxpayer in respect of the surrender;

and there is a residual value of the unit in relation to the taxpayer as at that time, that residual value shall be an allowable deduction.

124P Amount to be included in assessable income on disposal of a unit of industrial property

(1) Where, at any time during the year of income, a taxpayer who is the owner of a unit of industrial property to whom this Division applies disposes of that unit in whole or in part (whether or not the effective life of that unit in relation to the taxpayer had expired at that time):

- (a) if there is a residual value of that unit in relation to the taxpayer at that time and the amount of the consideration receivable in respect of the disposal exceeds that residual value—the amount of the excess; or
- (b) if there is no residual value of that unit in relation to the taxpayer at that time—the amount of the consideration receivable in respect of the disposal;

shall be included in the assessable income of the taxpayer of the year of income.

(3) The amount which, under subsection (1), is required to be included in the assessable income of a taxpayer of a year of income in respect of a unit of industrial property shall not exceed the sum of the deductions which have been allowed or are allowable in respect of the unit under this Division in assessments of income of the taxpayer, less the sum of the amounts, if any, which have, under

Section 124PA

this section, been included in the assessable income of the taxpayer of a previous year, or previous years, of income in respect of that unit.

124PA Roll-over relief

- (1A) This section does not apply in respect of a disposal in respect of which Subdivision 170-D of the *Income Tax Assessment Act 1997* applies.

Roll-over relief where CGT roll-over relief allowed

- (1) This section applies to the disposal of a unit of industrial property by a taxpayer (in this section called the **transferor**) to another taxpayer (in this section called the **transferee**) if:
- (b) subject to subsection (6), deductions have been allowed or are allowable under this Division to the transferor in respect of the unit; and
 - (c) no part of the cost of the unit to the transferor is attributable to expenditure covered by subsection 124K(2A) or 124KA(1); and
 - (d) the disposal involves a CGT event; and
 - (e) the conditions in an item in the table are satisfied.

CGT roll-overs that qualify transferor for relief

Item	Type of CGT roll-over	Conditions
1	Disposal of asset to wholly-owned company	There is a roll-over under Subdivision 122-A of the <i>Income Tax Assessment Act 1997</i> for the CGT event.
2	Disposal of asset by partnership to wholly-owned company	The transferor is a partnership, the unit is partnership property, and there is a roll-over under Subdivision 122-B of the <i>Income Tax Assessment Act 1997</i> for the disposal by the partners of the CGT assets consisting of their interests in the unit.
3	Marriage breakdown	There is a roll-over under Subdivision 126-A of the <i>Income Tax Assessment Act 1997</i> for the CGT event.
4	Disposal of asset to another member of the same wholly-owned group	There is a roll-over under Subdivision 126-B of the <i>Income Tax Assessment Act 1997</i> for the CGT event.

Roll-over relief where joint election made under section 124W

- (2) This section also applies if a joint election for roll-over relief is made under subsection 124W(3) by both the transferor and the transferee referred to in that subsection in relation to the disposal of a unit of industrial property.

No balancing charges or deductions

- (3) Sections 124N and 124P (which deal with balancing charges and deductions) do not apply to the disposal of the unit by the transferor.

Transferee to inherit certain characteristics from transferor

- (4) This Division applies as if:
- (a) the cost of the unit of industrial property in relation to the transferee were equal to the residual value of the unit in relation to the transferor immediately before the disposal; and
 - (b) the effective life of the unit of industrial property determined in relation to the transferor immediately before the disposal under section 124UA were the effective life of the unit of industrial property in relation to the transferee; and
 - (c) if the transferor had not made an election under section 124UA in relation to the unit of industrial property—the transferee were not entitled to make an election under that section in relation to the unit.

Disposal by transferee where no roll-over relief—inheritance of deductions

- (5) If:
- (a) the transferee disposes of the unit of industrial property; and
 - (b) this section does not apply to the disposal;
- then, for the purposes of the application of subsection 124P(3) in relation to the disposal:
- (c) the total of:
 - (i) the deductions allowed or allowable to the transferor under this Division in relation to the unit; and
 - (ii) if there have been 2 or more prior successive applications of this section—the deductions allowed or

Section 124Q

- allowable to the prior successive transferors under this Division in relation to the unit;
are taken to have been deductions allowed or allowable to the transferee under this Division in relation to the unit; and
- (d) the total of:
- (i) the amounts included in the transferor's assessable income under section 124P in relation to the unit; and
 - (ii) if there have been 2 or more prior successive applications of this section—the amounts included in the prior successive transferors' assessable incomes under that section in relation to the unit;
- are taken to have been included in the transferee's assessable income under that section in relation to the unit.

Second or subsequent application of section—paragraph (1)(b) does not apply

- (6) If, apart from this subsection, this section has applied to the disposal of the unit to the transferee, then, in working out whether this section applies to a subsequent disposal of the unit by:
- (a) the transferee; or
 - (b) one or more subsequent successive transferees;
- this section has effect as if paragraph (1)(b) (which deals with deductions) had not been enacted.

124Q Disposal of part of a unit of industrial property

Subject to this Division, where the owner of a unit of industrial property disposes of that unit in part, that part of the unit of which he remains the owner shall, for the purposes of this Division, be deemed to be the same unit of industrial property as the unit of industrial property which he disposed of in part.

124R Cost of a unit of industrial property

- (1) For the purposes of this Division, the cost of a unit of industrial property to the owner of the unit shall, subject to subsection 124S(2), be taken to be:
- (a) in the case of an owner referred to in paragraph 124L(1)(a):
 - (i) if subsection (2) of this section is applicable—the cost ascertained in accordance with that subsection; or

- (ii) if subsection (2) of this section is not applicable—the expenditure referred to in paragraph 124L(1)(a);
 - (b) in the case of an owner referred to in paragraph 124L(1)(b):
 - (i) if subsection (3) or (5) of this section is applicable—the cost ascertained in accordance with that subsection; or
 - (ii) if neither of those subsections is applicable—the expenditure referred to in paragraph 124L(1)(b);
 - (c) in the case of an owner referred to in paragraph 124L(1)(c):
 - (i) if the owner acquired a unit of industrial property of another person in whole—the residual value of the unit in relation to the last preceding owner of the unit immediately before the time of the disposal of the unit; or
 - (ii) in any other case—such part of that residual value as the Commissioner determines; or
 - (d) in the case of an owner referred to in paragraph 124L(1)(d):
 - (i) if the owner acquired a unit of industrial property of another person in whole—an amount ascertained by deducting from the residual value of the unit in relation to the last preceding owner of the unit immediately before the time of the transmission of the unit any deductions allowed or allowable under this Division in respect of the unit in an assessment in respect of income of that last preceding owner of the year of income during which the transmission took place; or
 - (ii) in any other case—such part of that amount as the Commissioner determines.
- (2) Where, in the case of an owner referred to in paragraph 124L(1)(a), the Commissioner is satisfied, having regard to any connection between the owner and any person who supplied goods to, or provided services for, the owner in relation to the unit of industrial property concerned or to any other relevant circumstances, that:
- (a) the owner and that person were not dealing with each other at arm's length in relation to the supply of those goods or the provision of those services; and
 - (b) the expenditure of a capital nature incurred by the owner in relation to producing the work or other subject-matter in which the copyright subsists exceeds the expenditure of a capital nature that would have been incurred by the owner if

Section 124R

the owner and that person had dealt with each other at arm's length;

the cost of the unit to the owner for the purposes of this Division shall be taken to be the amount of the expenditure of a capital nature that, in the opinion of the Commissioner, would have been incurred by the owner if the owner and that person had dealt with each other at arm's length.

- (3) Where, in the case of an owner referred to in paragraph 124L(1)(b):
- (a) the Commissioner is satisfied, having regard to any connection between the owner and the person from whom the unit of industrial property concerned was purchased or to any other relevant circumstances, that the owner and that person were not dealing with each other at arm's length in relation to the purchase; and
 - (b) the expenditure of a capital nature incurred by the owner on the purchase of the unit of industrial property:
 - (i) exceeds the amount that was the cost of the unit to the last preceding owner of the unit; or
 - (ii) does not exceed the amount that was the cost of the unit to the last preceding owner of the unit but exceeds the value of the unit at the time of the purchase;

the cost of the unit to the owner for the purposes of this Division shall be taken to be the cost of the unit to the last preceding owner of the unit or the value of the unit at the time of the purchase, whichever is the less.

- (4) References in subsection (3) to the cost of a unit of industrial property to the last preceding owner of the unit or to the value of a unit of industrial property at the time of the purchase of the unit shall, if the purchase was a purchase of a part of a unit of industrial property of another person, be construed as references to such part of that cost or of that value, as the case may be, as the Commissioner determines.
- (5) Where, in the case of an owner referred to in paragraph 124L(1)(b), the unit of industrial property was purchased by the owner of the unit with other property and no separate price was allocated to the unit, the amount of the expenditure of a capital nature incurred by the owner on the purchase of the unit for the purposes of this Division shall be taken to be so much of the

purchase price of the unit and the other property as the Commissioner determines.

124S Residual value

- (1) Subject to this section, the residual value of a unit of industrial property at any time in relation to the owner of the unit shall, for the purposes of this Division, be ascertained by deducting from the cost of the unit to the owner the sum of:
 - (a) any deductions allowed or allowable under this Division in respect of the unit in assessments in respect of income of the owner of a year or years of income which ended prior to that time; and
 - (b) the consideration receivable by the owner in respect of any disposal by him of the unit in part prior to that time.
- (1A) The reference in paragraph (1)(a) to any deductions allowed or allowable under this Division in respect of a unit of industrial property shall, in the case of a deduction that has been or is to be reduced by reason of section 124Z, be read as a reference to the deduction that, but for that section, would have been allowed or would be allowable.
- (2) Where the owner of a unit of industrial property has incurred expenditure of a capital nature in obtaining the surrender to him of a licence previously granted by him in respect of the copyright to which the unit relates, then, in ascertaining the residual value of the unit in relation to the owner of the unit at any time after the surrender, the cost of the unit to the owner of the unit shall be deemed to be increased by:
 - (a) in a case to which paragraph (b) does not apply—an amount equal to the expenditure so incurred in obtaining the surrender; or
 - (b) if:
 - (i) the Commissioner is satisfied, having regard to any connection between the owner and the person who surrendered the licence or to any other relevant circumstances, that the owner and that person were not dealing with each other at arm's length in relation to the surrender; and

Section 124T

- (ii) the consideration for the surrender:
 - (A) was greater than the value of the licence at the time of the surrender; or
 - (B) was not greater than that value but was greater than the expenditure of a capital nature that was incurred by the person who surrendered the licence in obtaining the grant of the licence;an amount equal to that value or that expenditure, whichever is the less.

124T Consideration receivable on disposal

- (1) Subject to this section, for the purposes of this Division, the consideration receivable by the owner of a unit of industrial property in respect of the disposal of the unit in whole or in part shall be taken to be:
 - (a) where the unit is sold in whole or in part (whether with or without other property) for a specified price—the sale price of the unit or part of the unit, less the expenses of the sale of the unit or part of the unit or such part of the expenses of the sale of the unit or part of the unit together with the other property as the Commissioner determines;
 - (b) where the unit is sold in whole or in part together with other property and a specified price is not allocated to the unit or the part of the unit—such part of the sale price of the unit or part of the unit together with the other property as the Commissioner determines, less such part of the expenses of the sale of the unit or part of the unit together with the other property as the Commissioner determines; or
 - (c) where the unit is transmitted by operation of law:
 - (i) if the unit is transmitted in whole—an amount equal to the residual value of the unit in relation to that owner of the unit immediately before the time of the transmission of the unit; or
 - (ii) if the unit is transmitted in part—such part of that residual value as is determined by the Commissioner.
- (2) Where the owner of a unit of industrial property to whom this Division applies disposes of the unit in whole or in part to another person and:

- (a) the Commissioner is satisfied, having regard to any connection between the owner and that other person or to any other relevant circumstances, that the owner and that other person were not dealing with each other at arm's length in relation to the disposal; and
- (b) there was no amount receivable by the owner in respect of the disposal or the amount receivable by the owner in respect of the disposal was less than the value of the unit or the part of the unit at the time of the disposal;

the consideration receivable by the owner in respect of the disposal for the purposes of this Division shall be taken to be the amount that was the value of the unit or the part of the unit at the time of the disposal.

(3) Where:

- (a) the owner of a unit of industrial property to whom this Division applies disposes of the unit in whole or in part; and
- (b) the whole or a part of the amount receivable by the owner in respect of the disposal has been included or is to be included in the assessable income of the owner of any year of income under any provision of this Act other than a provision of this Division;

then, for the purposes of this Division, the consideration receivable by the owner in respect of the disposal shall be reduced by so much of that amount as has been so included or is to be so included.

124UA Effective life of certain units of industrial property

- (1) Subject to this section, for the purposes of this Division, the effective life of a unit of industrial property that relates to a copyright subsisting in an Australian film shall, in relation to the owner of the unit, be deemed to have commenced at the commencement of the year of income during which the owner of the unit first used that unit, or the subject-matter to which that unit relates, for the purpose of producing assessable income and shall end:
 - (a) where the unit was purchased or otherwise acquired by him for a specified period—at the end of the year of income next succeeding the year of income during which the unit was first so used or at the end of the year of income during which the specified period will terminate, whichever will first occur; or

Section 124V

- (b) in any other case—at the end of the year of income next succeeding the year of income during which the unit was first so used.
- (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.
- (3) An election under subsection (2) must be made on or before the last day for the furnishing of the owner's return of income of the year of income during which the owner first used that unit, or the subject-matter to which the unit relates, for the purpose of producing assessable income, or within such further time as the Commissioner allows.
- (4) This section does not apply in relation to a unit of industrial property that relates to a copyright subsisting in an Australian film if the unit, or the subject-matter to which the unit relates, was used for the purpose of producing income before 22 November 1977.

124V Interest by licence in patent etc.

- (1) For the purposes of this Division, the owner of a unit of industrial property who, by licence, grants to another person an interest in the copyright to which the unit relates shall, subject to subsection (2), be deemed to have disposed of the unit in part.
- (2) For the purposes of this Division, where a person who became the owner of a unit of industrial property by reason of the grant to him, by licence, of an interest in a copyright surrenders that licence:
 - (a) that person shall not be deemed to have disposed of the unit unless the surrender was made in consideration of the payment to him of an amount; and
 - (b) the person to whom the licence was surrendered shall not, by reason only of the surrender, be deemed to have acquired a unit of industrial property.
- (3) Where a unit of industrial property arises out of the grant, by licence, of an interest in a copyright, an extension of the term of that licence shall, for the purposes of this Division, be deemed to be the grant of a new licence.

124W Disposal of unit of industrial property on change of partnership etc.

- (1) Where, for any reason, including:
 - (a) the formation or dissolution of a partnership; or
 - (b) a variation in the constitution of a partnership or in the interests of the partners;a change has occurred in the ownership of, or in the interests of persons in, a unit of industrial property and the person, or one or more of the persons, who owned the unit before the change has or have an interest in the unit after the change, then, subject to subsection 124S(2) but notwithstanding any other provision of this Division, the succeeding provisions of this section have effect.
- (2) The provisions of this Division apply as if the person or persons who owned the unit before the change (in this section called the *transferor*) had, on the day on which the change occurred, disposed of the unit in whole to the person, or all the persons, by whom the unit is owned after the change (in this section called the *transferee*).
- (3) Unless a joint election for roll-over relief has been made by both the transferor and the transferee, this Division applies as if the consideration for the disposal were equal to the market value of the unit immediately before the change.
- (4) If a joint election for roll-over relief has been made by both the transferor and the transferee, section 124PA applies to the disposal.
- (5) A joint election for roll-over relief has no effect unless it:
 - (a) is in writing; and
 - (b) is made:
 - (i) within 6 months after the later of the following:
 - (A) the end of the year of income of the transferee in which the disposal occurred;
 - (B) the commencement of this subsection; or
 - (ii) within such further period as the Commissioner allows; and
 - (c) contains such information about the transferor's holding of the unit as will enable the transferee to work out how section 124PA will apply to the transferee's holding of the unit.

Section 124WA

- (6) If a person dies before the end of the period allowed for making a joint election for roll-over relief, the trustee of the deceased person's estate may be a party to the election on the deceased person's behalf.

124WA Disposal of unit of industrial property where deduction allowable under former section 124ZAF or section 124ZAFA

- (1) Where:
- (a) for any reason, including:
 - (i) the formation or dissolution of a partnership; or
 - (ii) a variation in the constitution of a partnership or in the interests of the partners;a change has occurred in the ownership of, or in the interests of persons in, a unit of industrial property being a copyright, or an interest in a copyright, subsisting in a film;
 - (b) the person, or one or more of the persons, who owned the unit before the change has or have an interest in the unit after the change;
 - (c) a deduction has been allowed or is allowable under former section 124ZAF or section 124ZAFA to the person or to any of the persons who owned the unit before the change in respect of moneys expended in producing, or by way of contribution to the cost of producing, the film, being expenditure that relates to the unit; and
 - (d) a person to whom a deduction has been allowed or is allowable as mentioned in paragraph (c) has an interest in the unit after the change;
- section 124W does not apply to that change but subsections (2), (3) and (7) of this section have effect.
- (2) Where a person (in this subsection referred to as the *relevant person*) who had an interest in the unit before the change:
- (a) did not have an interest in the unit after the change; or
 - (b) had a lesser interest in the unit after the change;
- the following provisions have effect:
- (c) if the relevant person did not have an interest in the unit after the change, the relevant person shall be deemed, for the purposes of this Division, to have disposed of the whole of

his interest in the unit at the time when the change occurred for an amount of consideration equal to:

- (i) if the change occurred in pursuance of an agreement and the agreement specified, as the value of the unit for the purposes of the agreement, an amount greater than the value of the unit at the time when the change occurred—so much of the amount specified in the agreement as bears to that amount the same proportion as the value, at the time when the change occurred, of the interest disposed of bears to the value of the unit at the time when the change occurred; and
 - (ii) in any other case—the value, at the time when the change occurred, of the interest disposed of;
- (d) if the relevant person had a lesser interest in the unit after the change, the relevant person shall be deemed, for the purposes of this Division, to have disposed of part of his interest in the unit at the time when the change occurred for an amount of consideration equal to:
- (i) if the change occurred in pursuance of an agreement and the agreement specified, as the value of the unit for the purposes of the agreement, an amount greater than the value of the unit at the time when the change occurred—so much of the amount specified in the agreement as bears to that amount the same proportion as the value, at the time when the change occurred, of the part of the interest disposed of bears to the value of the unit at the time when the change occurred; and
 - (ii) in any other case—the value, at the time when the change occurred, of the part of the interest disposed of.
- (3) Where a person (in this subsection referred to as the *relevant person*):
- (a) did not have an interest in the unit before the change but had an interest in the unit after the change; or
 - (b) had an interest in the unit before the change and had an additional interest in the unit after the change;
- the following provisions have effect:
- (c) if the relevant person did not have an interest in the unit before the change, the relevant person shall be deemed, for the purposes of this Division, to have incurred expenditure of

a capital nature, on the purchase of the interest that the relevant person had after the change, of an amount equal to:

- (i) if the change occurred in pursuance of an agreement and the agreement specified, as the value of the unit for the purposes of the agreement, an amount less than the value of the unit at the time when the change occurred:
 - (A) so much of the amount specified in the agreement as bears to that amount the same proportion as the value, at the time when the change occurred, of the interest that the relevant person had after the change bears to the value of the unit at the time when the change occurred; or
 - (B) so much of the cost of the unit as bears to that cost the same proportion as the value, at the time when the change occurred, of the interest that the relevant person had after the change bears to the value of the unit at the time when the change occurred;

whichever is the less; and

- (ii) in any other case:
 - (A) the value, at the time when the change occurred, of the interest that the relevant person had after the change; or
 - (B) so much of the cost of the unit as bears to that cost the same proportion as the value, at the time when the change occurred, of the interest that the relevant person had after the change bears to the value of the unit at the time when the change occurred;

whichever is the less;

- (d) if the relevant person had an interest in the unit before the change and had an additional interest in the unit after the change, the relevant person shall be deemed, for the purposes of this Division, to have incurred expenditure of a capital nature on the purchase of that additional interest of an amount equal to:
 - (i) if the change occurred in pursuance of an agreement and the agreement specified, as the value of the unit for the

purposes of the agreement, an amount less than the value of the unit at the time when the change occurred:

- (A) so much of the amount specified in the agreement as bears to that amount the same proportion as the value of the additional interest, at the time when the change occurred, bears to the value of the unit at the time when the change occurred; or
- (B) so much of the cost of the unit as bears to that cost the same proportion as the value of the additional interest, at the time when the change occurred, bears to the value of the unit at the time when the change occurred;

whichever is the less; and

(ii) in any other case:

- (A) the value of the additional interest at the time when the change occurred; or
- (B) so much of the cost of the unit as bears to that cost the same proportion as the value of the additional interest, at the time when the change occurred, bears to the value of the unit at the time when the change occurred;

whichever is the less.

(4) Where:

- (a) for any reason, including:
 - (i) the formation or dissolution of a partnership; or
 - (ii) a variation in the constitution of a partnership or in the interests of the partners;

a change has occurred in the ownership of, or in the interests of persons in, a unit of industrial property being a copyright, or an interest in a copyright, subsisting in a film;

- (b) the person, or one or more of the persons, who owned the unit before the change has or have an interest in the unit after the change;
- (c) a deduction has been allowed or is allowable under section 124ZAF or 124ZAF A to the person or to any of the persons who owned the unit before the change in respect of moneys expended in producing, or by way of contribution to

Section 124WA

the cost of producing, the film, being expenditure that relates to the unit; and

- (d) no person to whom a deduction has been allowed or is allowable as mentioned in paragraph (c) has an interest in the unit after the change;

section 124W does not apply to that change but the succeeding provisions of this section have effect.

- (5) Any person who had an interest in the unit before the change shall, for the purposes of this Division, be deemed to have disposed of his interest in the unit in whole for an amount of consideration equal to:

- (a) if the change occurred in pursuance of an agreement and the agreement specified, as the value of the unit for the purposes of the agreement, an amount greater than the value of the unit at the time when the change occurred—so much of the amount specified in the agreement as bears to that amount the same proportion as the value, at the time when the change occurred, of the interest deemed to have been disposed of bears to the value of the unit at the time when the change occurred; and
- (b) in any other case—the value, at the time when the change occurred, of the interest disposed of.

- (6) For the purposes of the application of this Division to the person or persons who owned the unit after the change, that person or those persons shall be deemed to have incurred expenditure of a capital nature on the purchase of the unit of an amount equal to:

- (a) if the change occurred in pursuance of an agreement and the agreement specified, as the value of the unit for the purposes of the agreement, an amount less than the value of the unit at the time when the change occurred—the amount specified in the agreement or the cost of the unit, whichever is the less; and
- (b) in any other case—the value of the unit at the time when the change occurred or the cost of the unit, whichever is the less.

- (7) For the purposes of the application of subsection (3) or (6) in respect of a change in the ownership of, or in the interests of persons in, a unit of industrial property being a copyright, or an interest in a copyright, subsisting in a film, a reference to the cost of the unit is a reference to the cost (if any) of the unit, ascertained

in accordance with section 124R, to the person or persons who owned the unit before the change increased by so much of the expenditure incurred in relation to the film in respect of which a deduction or deductions has or have been allowed or is or are allowable under former section 124ZAF or section 124ZAF A to the person or any of the persons who owned the unit before the change as is attributable to so much of the unit as, immediately before the change occurred, was owned by the person or persons to whom that deduction or those deductions has or have been allowed or is or are allowable.

124Y Damages for infringement

Where, in pursuance of a judgment of a court or otherwise, an amount is paid to a person who is or has been the owner of a unit of industrial property in respect of an infringement, or an alleged infringement, of the copyright to which the unit relates, that person shall, for the purposes of this Division, be deemed to have disposed of the unit in part, at the time of payment, in consideration of the payment of that amount.

124Z Benefit from overseas rights

Where the owner of a unit of industrial property has obtained or is obtaining a benefit from a right exercisable in a place outside Australia, being a right which relates to the invention, work or other subject-matter or design to which the unit of industrial property relates, the Commissioner may determine that any deduction allowable under this Division in respect of the unit of industrial property shall be reduced by such amount as the Commissioner, having regard to that benefit, thinks fit, and the deduction shall be reduced accordingly.

Division 10BA—Australian films

Subdivision A—Preliminary

124ZAA Interpretation

- (1) In this Division, unless the contrary intention appears:

Australian film means a film that:

- (a) has been made wholly or substantially in Australia or in an external Territory and has a significant Australian content; or
- (b) has been made in pursuance of an agreement or arrangement entered into between the Government of Australia or an authority of the Government of Australia and the Government of another country or an authority of the Government of another country.

copyright, in relation to a film, means copyright subsisting in the film by virtue of Part IV of the *Copyright Act 1968* and includes copyright subsisting in, or in relation to, the film or in any work comprised in the film, under the law of a country other than Australia.

feature film has the meaning given by subsection 995-1(1) of the *Income Tax Assessment Act 1997*.

film has the meaning given by subsection 995-1(1) of the *Income Tax Assessment Act 1997*.

film account, in relation to a film, means an account that has been opened in relation to the film in the Film Trust Fund.

Film Trust Fund means the Australian Film Industry Trust Fund in the Trust Fund referred to in section 60 of the *Audit Act 1901*.

final certificate means a certificate issued under section 124ZAC.

future copyright means copyright to come into existence at a future time or upon the happening of a future event.

Minister means the Minister for the Arts, Sport, the Environment, Tourism and Territories.

provisional certificate means a certificate issued under section 124ZAB.

public event includes:

- (a) a sporting activity;
- (b) a theatrical performance;
- (c) an artistic performance; or
- (d) any other activity, performance or event;

to which the public is normally admitted (whether free of charge or on payment of a charge).

qualifying Australian film means a film that is:

- (a) an eligible film; and
- (b) an Australian film.

relevant 24 month period, in relation to a film, means the period of 24 months after the end of the financial year in which capital moneys were first expended in producing, or by way of contribution to the cost of producing, the film.

television broadcasting includes transmission by means of cables.

- (2) A reference in this Division to a film shall, unless the contrary intention appears, be read as including a reference to a proposed film.
- (3) In this Division, a reference to the expenditure of capital moneys is a reference to the expenditure of moneys that is expenditure of a capital nature.
- (4) Subject to subsection (5), a reference in this Division to an eligible film is a reference to a film produced wholly or principally for exhibition to the public in cinemas or by way of television broadcasting, being a feature film or a film of a like nature produced for exhibition by way of television broadcasting, a documentary or a mini-series of television drama.
- (5) Without extending by implication the generality of subsection (4), a reference in this Division to an eligible film does not include a reference to a film that is, or is to a substantial extent:
 - (a) a film for exhibition as an advertising program or a commercial;

Section 124ZAA

- (b) a film for exhibition as a discussion program, a quiz program, a panel program, a variety program or a program of a like nature;
 - (c) a film of a public event;
 - (d) a film forming part of a drama program series that is, or is intended to be, of a continuing nature; or
 - (e) a training film.
- (6) A reference in this Division to moneys expended in producing a film is a reference to moneys expended to the extent to which those moneys are expended directly in producing a film.
- (7) For the purposes of this Division, moneys withdrawn from a film account opened in relation to a film shall be taken to be dealt with in the prescribed manner if, and only if, the moneys are expended:
- (a) in producing the film;
 - (b) in payment to the Commissioner in respect of amounts paid into the film account under former paragraph 221ZN(1)(e); or
 - (c) in payment by way of refund to a person of an amount deducted under former paragraph 221ZN(1)(a), being an amount to which former subsection 221ZN(4) applied.
- (8) In the application of paragraph (7)(a) for the purposes of this Division, other than sections 124ZAG and 124ZAH, in determining whether moneys are expended in producing a film, sections 124ZAJ and 124ZAK shall be disregarded.
- (9) In determining for the purposes of the definition of **relevant 24 month period** in subsection (1) and for the purposes of section 124ZADA and subparagraph 124ZAF(1)(d)(iv) the meaning of references to the expenditure of capital moneys in producing, or by way of contribution to the cost of producing, a film, sections 124ZAJ, 124ZAK, 124ZAL and 124ZAM shall be disregarded.
- (10) For the purposes of this Division:
- (a) where a person pays moneys to another person and that other person pays the moneys into a film account:
 - (i) the first-mentioned person shall be deemed to have paid the moneys into that film account at the time when the moneys were paid to the other person; and

- (ii) the other person shall be deemed not to have paid the moneys into the film account; and
 - (b) where a person withdraws moneys from a film account and pays the moneys to another person:
 - (i) the other person shall be deemed to have withdrawn the moneys from the film account at the time when the moneys were paid to that other person; and
 - (ii) the first-mentioned person shall be deemed not to have withdrawn the moneys from the film account.
- (11) Where the Minister is satisfied that:
- (a) a proposed film, when completed, will have a significant non-Australian content; or
 - (b) a film has a significant non-Australian content;
- the Minister may treat the proposed film or film as not being a qualifying Australian film for the purposes of this Division.

124ZAB Provisional certificates

- (1) A person (in this section referred to as the *applicant*) may apply to the Minister for a certificate stating that a proposed film will, when completed, be a qualifying Australian film for the purposes of this Division.
- (2) An application under subsection (1):
 - (a) shall be in writing;
 - (b) shall be signed by or on behalf of the applicant; and
 - (c) shall be accompanied by such information as the Minister requires.
- (2A) An application under subsection (1) must be made before the day on which the *Tax Laws Amendment (2007 Measures No. 5) Act 2007* receives the Royal Assent.
- (3) Where an application is made to the Minister under subsection (1) and the Minister is satisfied that:
 - (a) the proposed film, when completed, will be a qualifying Australian film; and
 - (b) having regard to the role of the applicant in the proposed production of the film, the applicant is an appropriate person

Section 124ZAB

- to whom to issue a certificate under this section in respect of the proposed film;
- the Minister shall issue to the applicant a certificate under this section in respect of the proposed film.
- (3A) Where the Minister makes a decision refusing an application under subsection (1), the Minister shall, as soon as practicable, give notice in writing of the refusal to the applicant.
- (4) A person to whom a certificate in respect of a proposed film has been issued under subsection (3) shall furnish to the Minister, within a period specified by the Minister, such information in relation to the proposed film as the Minister requests.
- (5) Where a person to whom a certificate in respect of a proposed film has been issued under subsection (3) fails to comply with subsection (4) in respect of the proposed film, the Minister may, by writing under his hand, revoke the certificate and thereupon the certificate shall, for the purposes of this Act, be deemed never to have been in force.
- (6) Where:
- (a) the Minister has issued a certificate under this section stating that a proposed film will, when completed, be a qualifying Australian film for the purposes of this Division; and
 - (b) at any time after the issue of the certificate, the Minister becomes satisfied that:
 - (i) the proposed film, when completed, will not be a qualifying Australian film for the purposes of this Division; or
 - (ii) if the proposed film has been completed—the completed film is not a qualifying Australian film for the purposes of this Division;
- the Minister shall, by writing under his hand, revoke the certificate and thereupon the certificate shall, for the purposes of this Act, be deemed never to have been in force.
- (6A) The Minister may, by signed writing, revoke a certificate in respect of a proposed film that has been issued under subsection (3) if:
- (a) the person who applied for the certificate applies to the Minister for the revocation in the approved form; and

- (b) the person provides a statutory declaration stating that:
- (i) no taxpayer has claimed a deduction under this Division in respect of the film; and
 - (ii) a final certificate in respect of the film has not been issued under this Division; and
 - (iii) a taxpayer intends to claim a tax offset under Division 376 of the *Income Tax Assessment Act 1997* in respect of the film; and
 - (iv) financial assistance has not been provided by the Film Finance Corporation Australia Limited (incorporated under the *Companies Act 1981* on 12 July 1988) in respect of the film.

A certificate that is revoked under this subsection is, for the purposes of this Act, taken never to have been in force.

Note: Revocation of a certificate under this subsection allows a person to claim a tax offset under Division 376 of the *Income Tax Assessment Act 1997* in respect of the film.

- (7) Where the Minister, under subsection (5), (6) or (6A), revokes a certificate, the Minister shall, as soon as practicable, give notice in writing of the revocation to the person to whom the certificate was issued.
- (8) The revocation of a certificate issued under this section in respect of a proposed film does not prevent the issue of a further certificate under this section in respect of that proposed film.
- (9) Subject to subsections (5), (6), (6A) and (10), a certificate issued under this section shall be deemed to have been in force at all times before the time when it was issued.
- (10) If an application for a final certificate in respect of a film is not made in accordance with section 124ZAC before the expiration of 6 months after the time when the film is completed, any certificate issued under this section in respect of the film shall be deemed never to have been in force.

124ZAC Final certificates

- (1) A person (in this section referred to as the *applicant*) may apply to the Minister for a certificate stating that a film that has been completed is a qualifying Australian film for the purposes of this Division.

Section 124ZAD

- (1A) The applicant cannot apply for a certificate in respect of a film under subsection (1) unless a certificate has been issued to the applicant in respect of the film under section 124ZAB.
- (2) An application under subsection (1):
- (a) shall be in writing;
 - (b) shall be signed by or on behalf of the applicant; and
 - (c) shall be accompanied by such information as the Minister requires.
- (3) Where an application is made to the Minister under subsection (1) and the Minister is satisfied that:
- (a) the film is a qualifying Australian film; and
 - (b) having regard to the role of the applicant in the production of the film, the applicant is an appropriate person to whom to grant a certificate under this section in respect of the film; and
 - (c) a claim has not been made for a tax offset in respect of the film under Division 376 of the *Income Tax Assessment Act 1997*;
- the Minister shall issue to the applicant a certificate under this section in respect of the film.
- (4) A certificate issued under this section shall be deemed to have been in force at all times before the time when it was issued.
- (5) Where the Minister makes a decision refusing an application under subsection (1), the Minister shall, as soon as practicable, give notice in writing of the decision to the applicant.

124ZAD Determination of content of film

In determining for the purposes of this Division whether a film has, or a proposed film, when completed, will have, a significant Australian content or a significant non-Australian content, the Minister shall have regard to:

- (a) the subject matter of the film or proposed film;
- (b) the place or places where the film was, or the proposed film will be, made;
- (c) the nationalities and places of residence of:

- (i) the persons who took part, or who will take part, in the making of the film or proposed film (including authors, composers, actors, scriptwriters, editors, producers, directors and technicians);
- (ii) the persons who are, or who will be, the beneficial owners of shares in any company concerned in the making of the film or proposed film; and
- (iii) the persons who are, or who will be, the beneficial owners of the copyright in the film or proposed film;
- (d) the source from which moneys that were used in the making of the film were, or that are to be used in the making of the proposed film will be, derived;
- (e) the details of the production expenditure incurred in respect of the film or of the budgeted production expenditure to be incurred in respect of the proposed film; and
- (f) any other matters that the Minister considers to be relevant.

124ZADAA Delegation by Minister

- (1) The Minister may, by writing, delegate to the Secretary to the Minister's Department, or to an SES employee or acting SES employee in the Minister's Department, all or any of the Minister's powers under this Division.

124ZADAB Review of decisions of Minister

- (1) Applications may be made to the Tribunal for review of a decision of the Minister under this Division (other than a decision to delegate a power under section 124ZADAA).
- (2) Where the Minister makes a decision of the kind referred to in subsection (1) and gives to a person whose interests are affected by the decision notice in writing of the decision, that notice shall:
 - (a) in all cases—include a statement to the effect that, subject to the *Administrative Appeals Tribunal Act 1975*, application may be made to the Administrative Appeals Tribunal, by or on behalf of any person whose interests are affected by the decision, for review of the decision; and
 - (b) except where subsection 28(4) of that Act applies—include a statement to the effect that a request may be made under section 28 of that Act by or on behalf of such a person for a

Section 124ZADA

statement setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.

- (3) A failure to comply with the requirements of subsection (2) in relation to a decision does not affect the validity of the decision.

124ZADA Declarations

- (1) Where:

- (a) during a financial year (in this subsection referred to as the *relevant financial year*) capital moneys are expended, under a contract entered into on or after 13 January 1983, by way of contribution to the cost of producing a film; and
- (b) capital moneys have not been expended during any preceding financial year by way of contribution to the cost of producing the film;

a person may, after 30 June 1983 and before the expiration of 1 month after the end of the relevant financial year, or within such further time as the Commissioner allows, lodge with the Commissioner a declaration:

- (c) that a contract for the production of the film has been entered into under which a person has, or persons have, agreed to expend an amount that is specified in the contract as the estimated cost of producing the film;
- (d) specifying the items of expenditure that comprise the amount referred to in paragraph (c);
- (e) stating either of the following:
- (i) that a film account (in this section called the *relevant film account*) has been opened in relation to the film;
- (ii) that no film account has been opened in relation to the film;
- (f) specifying the following details:
- (i) the total amount of moneys received, being capital moneys expended by persons by way of contribution to the cost of producing the film, during the period (in this subsection referred to as the *relevant period*) commencing at the beginning of the relevant financial year and ending at the time the declaration is made;

- (ii) if subparagraph (e)(i) applies:
 - (A) the total amount of the moneys referred to in subparagraph (i) of this paragraph that were, upon receipt, paid into the relevant film account; and
 - (B) the total amount of the moneys referred to in subparagraph (i) of this paragraph that were not, upon receipt, paid into the relevant film account; and
 - (C) the total amount withdrawn from the relevant film account during the relevant period; and
 - (D) the total amount of the moneys referred to in sub-subparagraph (C) that were, upon being withdrawn from the relevant film account, expended in producing the film; and
 - (E) the total amount of the moneys referred to in sub-subparagraph (B) that were expended in producing the film; and
 - (iii) if subparagraph (e)(ii) applies—the total amount of the moneys referred to in subparagraph (i) of this paragraph that were expended in producing the film; and
 - (h) if subparagraph (e)(i) applies—that all moneys withdrawn from the relevant film account after the time the declaration is made will, upon withdrawal, be dealt with in the prescribed manner or paid to persons as refunds of capital moneys expended by way of contribution to the cost of producing the film.
- (2) Where a person lodges a declaration in respect of a film under subsection (1) or (5) and furnishes to the Commissioner such information in relation to the film as the Commissioner requires, the Commissioner shall decide whether the person making the declaration is, having regard to the role of the person in the production of the film, a person whom the Commissioner considers to be an appropriate person to make the declaration in respect of the film, and shall notify the person in writing of his decision.
- (3) Where:
- (a) at any time after a person has lodged a declaration under subsection (1) or (5) in respect of a film, any change occurs in the role of the person in the production of the film; and

Section 124ZADA

(b) before the time when the change occurs:

- (i) the person has not been notified of a decision of the Commissioner under subsection (2) in relation to the declaration; or
- (ii) the person has been notified under subsection (2) of a decision of the Commissioner that the person is an appropriate person to make the declaration and has not been notified under subsection (4) of a decision of the Commissioner in relation to the declaration;

the person shall, within 21 days after the change occurs, notify the Commissioner in writing of the change.

Penalty: 2 penalty units.

(3A) An offence under subsection (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

(4) Where, at any time (in this subsection referred to as the *relevant time*) after the Commissioner has notified a person under subsection (2) of his decision that the person is an appropriate person to make a declaration under subsection (1) or (5) in respect of a film, the Commissioner, having regard to the role of the person in the production of the film, decides that, if the person were to make a declaration at the relevant time as to the matter specified in paragraph (1)(h), the person would not be an appropriate person to make such a declaration, the Commissioner shall notify the person in writing of his decision.

(5) Where:

- (aa) a film account has been opened in relation to a film;
- (a) a declaration in relation to the film is lodged under subsection (1) or under this subsection by a person who has been notified by the Commissioner under subsection (2) that the Commissioner considers the person to be an appropriate person to make the declaration; and
- (b) the person dies or the Commissioner notifies the person under subsection (4) of a decision of the Commissioner under that subsection;

a person may lodge with the Commissioner, before the expiration of 1 month after the death or the notification under subsection (4), as the case may be, or within such further time as the Commissioner allows, a declaration that all moneys withdrawn

from the film account after the time the declaration is made will, upon withdrawal, be dealt with in the prescribed manner or paid to persons as refunds of capital moneys expended by way of contribution to the cost of producing the film.

(8) For the purposes of this Division, but subject to subsection (9), a declaration made by a person under subsection (1) shall be taken to be in force at all times after it is lodged with the Commissioner.

(9) Where:

(aa) a film account has been opened in relation to a film;

(a) a declaration in relation to the film is lodged under subsection (1) or (5) by a person who has been notified by the Commissioner under subsection (2) that the Commissioner considers the person to be an appropriate person to make the declaration;

(b) the person dies or the Commissioner notifies the person under subsection (4) of a decision of the Commissioner under that subsection; and

(c) a further declaration is not lodged under subsection (5) in relation to the film by a person who is notified by the Commissioner under subsection (2) that the person is considered by the Commissioner to be an appropriate person to lodge the declaration;

the following provisions have effect:

(d) where the declaration referred to in paragraph (a) was lodged under subsection (1)—the declaration shall be taken, for the purposes of this Division, not to be, and never to have been, in force;

(e) where the declaration referred to in paragraph (a) was lodged under subsection (5)—any declaration lodged under subsection (1) in respect of the film that would, but for this subsection, be in force shall be taken, for the purposes of this Division, not to be, and never to have been, in force.

(10) A person who is notified of a decision of the Commissioner under subsection (2) or (4) and who is dissatisfied with the decision may object against it in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

124ZADB Notification regarding non-completion of film

- (1) Where:
- (a) a person has lodged a declaration under subsection 124ZADA(1) or (5) in respect of a film;
 - (b) the Commissioner has notified the person under subsection 124ZADA(2) that the Commissioner considers the person to be an appropriate person to make the declaration and the Commissioner has not notified the person of a decision under subsection 124ZADA(4) in relation to the declaration; and
 - (c) either of the following conditions is satisfied:
 - (i) at the time when the person was notified as mentioned in paragraph (b), the person was satisfied that the film would not be, or was unlikely to be, completed before the expiration of the relevant 24 month period; or
 - (ii) after the person was notified as mentioned in paragraph (b), the person becomes satisfied that the film will not be, or is unlikely to be, completed before the expiration of the relevant 24 month period;

the person shall, within 14 days after:

- (d) in a case to which subparagraph (c)(i) applies—the day on which the person was notified as mentioned in paragraph (b); or
- (e) in a case to which subparagraph (c)(ii) applies—the day on which the person becomes satisfied as mentioned in that subparagraph;

notify the Commissioner in writing that the person was so satisfied or became so satisfied, as the case may be.

Penalty: 2 penalty units.

- (2) An offence under subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

124ZAE Election that Division not apply

- (1) A taxpayer may elect that this Division shall not apply in relation to the taxpayer in relation to a film and, where such an election is made, this Division does not apply in relation to the taxpayer in relation to that film.

- (2) An election under subsection (1) in relation to a film must be made on or before the date of lodgment of the return of income of the taxpayer of the first year of income in respect of which a deduction would, but for this section, and the provisions of Subdivision B other than section 124ZAF A, be allowable to the taxpayer in relation to the film.

124ZAEA Transfer by way of security

For the purpose of this Division, disregard an acquisition or disposal of property by way of the transfer of the property for the provision or redemption of a security. Consequently this Division applies as if the person who was the owner of the property before the transfer continues to be the owner after the transfer.

Subdivision B—Deductions for capital expenditure

124ZAF A Subdivision subject to Division 245 of Schedule 2C

This Subdivision has effect subject to Division 245 of Schedule 2C.

124ZAF A Deductions for capital expenditure under post 12 January 1983 contracts

- (1) Subject to this Subdivision, where:
- (a) a taxpayer has, under a contract entered into on or after 13 January 1983, expended capital moneys in producing, or by way of contribution to the cost of producing, a film;
 - (b) at the time when the moneys were expended:
 - (i) the taxpayer was a resident; and
 - (ii) a provisional certificate or a final certificate was in force in relation to the film;
 - (c) the Commissioner is satisfied that, at the time when the moneys were expended:
 - (i) the taxpayer expected to become the first owner, or one of the first owners, of the copyright in the film when that copyright came into existence; and
 - (ii) the taxpayer intended to use that copyright, or the taxpayer's interest in that copyright, as the case may be, for the purpose of producing assessable income from the

Section 124ZAF A

exhibition of the film to the public in cinemas or by way of television broadcasting or from granting rights to exhibit the film to the public in cinemas or by way of television broadcasting; and

- (d) in a case where the moneys were expended by the taxpayer by way of contribution to the cost of producing the film:
 - (iii) there is in force a declaration lodged in respect of the film in accordance with subsection 124ZADA(1) by a person who has been notified by the Commissioner under subsection 124ZADA(2) that the person is considered by the Commissioner to be an appropriate person to lodge the declaration in respect of the film; and
 - (iv) before the end of the financial year in which capital moneys were first expended (whether by the taxpayer or by another person) in producing, or by way of contribution to the cost of producing, the film:
 - (A) a production contract was entered into (whether or not by the taxpayer) under which an amount of capital moneys specified in the production contract as the estimated cost of producing the film was to be expended in producing, or by way of contribution to the cost of producing, the film; or
 - (B) a production contract, and an underwriting contract or underwriting contracts, were entered into (whether or not by the taxpayer) under which an amount of capital moneys specified in the production contract as the estimated cost of producing the film was to be expended in producing, or by way of contribution to the cost of producing, the film;

an amount equal to:

- (e) where:
 - (i) the moneys were expended under a contract entered into on or before 23 August 1983; and
 - (ii) the moneys were expended by the taxpayer by way of contribution to the cost of producing the film; and
 - (iii) the moneys were contributed before 1 July 1983; and
 - (iv) the moneys were:

- (A) expended before 1 July 1983 in producing the film; or
 - (B) on or before 1 July 1983, paid into a film account opened in relation to the film;
- 150%; or
- (f) where:
- (i) the moneys were expended under a contract entered into on or before 23 August 1983; and
 - (ii) the moneys were expended by the taxpayer by way of contribution to the cost of producing the film; and
 - (iii) the moneys were contributed after 30 June 1983; and
 - (iv) the moneys were, upon contribution, deposited in a film account opened in relation to the film;
- 150%; or
- (g) where:
- (i) the moneys were expended under a contract entered into on or before 23 August 1983; and
 - (ii) the moneys were expended by the taxpayer in producing the film;
- 150%; or
- (h) where:
- (i) the moneys were expended under a contract entered into after 23 August 1983 and on or before 19 September 1985; and
 - (ii) the moneys were expended by the taxpayer by way of contribution to the cost of producing the film; and
 - (iii) the moneys were, upon contribution, deposited in a film account opened in relation to the film;
- 133%; or
- (j) where:
- (i) the moneys were expended under a contract entered into after 23 August 1983 and on or before 19 September 1985; and
 - (ii) the moneys were expended by the taxpayer in producing the film;
- 133%; or

Section 124ZAFA

(k) where:

- (i) the moneys were expended under a contract entered into after 19 September 1985 and before 25 May 1988; and
- (ii) the moneys were expended by the taxpayer by way of contribution to the cost of producing the film; and
- (iii) the moneys were, upon contribution, deposited in a film account opened in relation to the film;

120%; or

(m) where:

- (i) the moneys were expended under a contract entered into after 19 September 1985 and before 25 May 1988; and
- (ii) the moneys were expended by the taxpayer in producing the film;

120%; or

(n) where the moneys were expended under a contract entered into on or after 25 May 1988—100%;

of the amount of the moneys expended shall be allowed as a deduction in the assessment of the taxpayer in respect of income of the year of income in which the moneys were expended by the taxpayer.

(1A) A deduction under subsection (1) is not allowable in relation to the 2009-10 year of income or a later year of income.

(2) Subject to subsection (3), where a deduction has been allowed, or would, but for this subsection, be allowable, from the assessable income of a taxpayer of a year of income under subsection (1) in relation to capital moneys expended by the taxpayer in producing, or by way of contribution to the cost of producing, a film and the following conditions are not satisfied:

(a) before the expiration of the relevant 24 month period:

- (i) the taxpayer has used the copyright in the film or the taxpayer's interest in the copyright, as the case may be, for the purpose of producing assessable income from the exhibition of the film to the public in cinemas or by way of television broadcasting or from granting rights to exhibit the film to the public in cinemas or by way of television broadcasting; or
- (ii) the taxpayer has derived assessable income under an agreement entered into before the copyright in the film

came into existence under which the taxpayer agreed, upon the copyright coming into existence, to grant rights to another person to exhibit the film to the public in cinemas or by way of television broadcasting; and

- (b) the taxpayer has, by reason of the moneys being expended, become the first owner, or one of the first owners, of the copyright in the film before the expiration of the relevant 24 month period;

the deduction shall, for the purposes of this Act, be deemed not to have been, or not to be, allowable, as the case may be.

- (3) Subsection (2) does not apply in relation to a deduction that has been allowed, or is allowable, from the assessable income of a taxpayer of a year of income in relation to capital moneys expended by the taxpayer in producing, or by way of contribution to the cost of producing, a film where:

- (a) the taxpayer dies before the expiration of the relevant 24 month period; and
(b) the Commissioner is satisfied that subsection (2) would not have applied in relation to the deduction if the taxpayer had not died.

- (4) Where:

- (a) by reason that the Commissioner is satisfied in accordance with paragraph (3)(b) that subsection (2) would not have applied in relation to a deduction if a taxpayer had not died, subsection (2) would not, but for this subsection, apply in relation to the deduction; and
(b) the Commissioner later becomes satisfied that subsection (2) would have applied in relation to the deduction if the taxpayer had not died;

subsection (2) shall, notwithstanding subsection (3), apply in relation to the deduction.

- (5) In this section:

production contract, in relation to a film, means a contract under which a person has, or persons have, agreed to expend capital moneys in producing, or by way of contribution to the cost of producing, the film, but does not include an underwriting contract.

Section 124ZAG

underwriting contract, in relation to a film, means a contract:

- (a) under which a person has, or persons have, conditionally agreed to expend capital moneys by way of contribution to the cost of producing the film; and
 - (b) under which no person has agreed to expend capital moneys by way of contribution to the cost of producing the film otherwise than conditionally.
- (6) For the purposes of this section, a person shall be taken to have conditionally agreed under a contract to expend capital moneys by way of contribution to the cost of producing a film if, under the contract, the person has agreed to expend capital moneys by way of contribution to the cost of producing the film only in the event that the aggregate of the capital moneys expended, or agreed to be expended, in producing, or by way of contribution to the cost of producing, the film is less than an amount specified in, or ascertained in accordance with, the contract.

124ZAG Expenditure of contributions

(1) Where:

- (a) but for this section and sections 124ZAL and 124ZAM, an amount (in this subsection referred to as the ***relevant amount***) would be taken for the purposes of this Division to have been expended by a taxpayer by way of contribution to the cost of producing a film; and
- (b) the whole of the relevant amount is not expended in producing the film;

the following provisions have effect:

- (c) where no part of the relevant amount was expended in producing the film—no part of the relevant amount shall be taken for the purposes of this Division to have been expended by the taxpayer;
- (d) where part only of the relevant amount was not expended in producing the film—the relevant amount shall be reduced by that part of the relevant amount that was not expended in producing the film.

(2) Where:

- (a) but for this section and sections 124ZAL and 124ZAM, an amount (in this subsection referred to as the ***relevant***

amount) would be taken for the purposes of this Division to have been expended by a taxpayer by way of contribution to the cost of producing a film; and

- (b) the whole or a part of the relevant amount is included in an amount that was withdrawn from a film account opened in relation to the film and was not, upon withdrawal, dealt with in the prescribed manner;

the following provisions have effect:

- (c) where the whole of the relevant amount was included in the amount withdrawn from the film account—no part of the relevant amount shall be taken for the purposes of this Division to have been expended by the taxpayer;
- (d) where part only of the relevant amount was included in the amount withdrawn from the film account—the relevant amount shall be reduced by that part of the relevant amount that was so included.

124ZAGA Satisfaction of Commissioner as to the future application of certain provisions

(1) Where:

- (a) the Commissioner is at any time satisfied that:
 - (i) subsection 124ZAF(2) will, at a later time, apply to deem a deduction not to have been, or not to be, allowable to a taxpayer in relation to capital moneys expended in producing, or by way of contribution to the cost of producing, a film; or
 - (ii) section 124ZAG will, at a later time, apply in respect of an amount, or part of an amount, that, but for that section and sections 124ZAL and 124ZAM, would be taken for the purposes of this Division to have been expended by a taxpayer by way of contribution to the cost of producing a film; or
- (b) at a time after the Commissioner is satisfied in accordance with subparagraph (a)(i) or (ii), the Commissioner is satisfied that subsection 124ZAF(2) will not apply in relation to the deduction, or that section 124ZAG will not apply in relation to the amount or the part of the amount;

the following provisions have effect:

Section 124ZAH

- (c) in a case to which paragraph (a) applies—subsection 124ZAF(2) or section 124ZAG, as the case may be, shall, for the purposes of this Subdivision, be taken to apply, and always to have applied, in relation to the deduction or in relation to the amount or the part of the amount, as the case may be; and
 - (d) in a case to which paragraph (b) applies—subsection 124ZAF(2) or section 124ZAG, as the case may be, shall, for the purposes of this Subdivision, be taken not to apply, and never to have applied, in relation to the deduction, or in relation to the amount or the part of the amount, as the case may be.
- (2) Where, at any time after the making of an assessment in relation to a taxpayer, being an assessment in the making of which subsection 124ZAF(2) or section 124ZAG has been applied by reason that the Commissioner was satisfied in accordance with subparagraph (1)(a)(i) or (ii) of this section, the taxpayer considers that the Commissioner ought to be satisfied in accordance with paragraph (1)(b) of this section that subsection 124ZAF(2) or section 124ZAG, as the case may be, will not apply, the taxpayer may post to, or lodge with, the Commissioner a request in writing for an amendment of the assessment to give effect to subsection (1).
 - (3) The Commissioner shall consider the request and shall serve on the taxpayer, by post or otherwise, a written notice of his decision on the request.
 - (4) If the taxpayer is dissatisfied with the Commissioner's decision on the request, the taxpayer may object against the decision in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

124ZAH Allocation of contributions expended

- (1) Where:
 - (a) a taxpayer has expended capital moneys by way of contribution to the cost of producing a film; and
 - (b) an amount of moneys has been expended in producing the film out of moneys that include the moneys expended by the taxpayer;

then, for the purposes of this Division, so much of the moneys expended by the taxpayer as the Commissioner determines shall be taken to be included in the amount referred to in paragraph (b) that has been expended in producing the film.

(1A) Where:

- (a) a taxpayer has expended capital moneys by way of contribution to the cost of producing a film;
- (b) an amount of moneys is withdrawn from a film account opened in relation to the film, being a film account into which the moneys expended by the taxpayer have been paid; and
- (c) the amount withdrawn from the film account was not, upon withdrawal, dealt with in the prescribed manner;

then, for the purposes of this Division, so much (if any) of the moneys expended by the taxpayer as the Commissioner determines shall be taken to be included in the amount withdrawn from the film account.

- (2) Sections 124ZAJ and 124ZAK apply, for the purposes of this section, in determining whether, and the extent to which, moneys have been expended in producing a film.

124ZAJ Non-arm's length transactions

(1) Where:

- (a) but for this section and sections 124ZAK, 124ZAL and 124ZAM, an amount expended by a person (in this subsection referred to as the *producer*) for the supply of goods or the provision of services would be taken, for the purposes of this Division, to be an amount expended in producing a film;
- (b) the Commissioner is satisfied, having regard to any connection between the producer and the person who supplied those goods or provided those services, or to any other relevant circumstances, that the producer and that person were not dealing with each other at arm's length in relation to the transaction; and
- (c) the Commissioner is satisfied that the amount of moneys expended on the supply of those goods or the provision of those services exceeds the amount of moneys that would have been expended by the producer if the producer and the

Section 124ZAK

person supplying those goods or providing those services had dealt with each other at arm's length;

then such part only of the amount of the moneys expended on the supply of those goods or the provision of those services as, in the opinion of the Commissioner, is reasonable shall be taken for the purposes of this Division to have been expended in producing the film.

- (2) A reference in subsection (1) to an amount expended by a person, in producing a film, for the provision of services includes a reference to an amount paid by the person to another person as consideration for the other person producing, or agreeing to produce, a film or a part of a film.

124ZAK Amounts expended in acquiring assets

Where:

- (a) but for this section and sections 124ZAL and 124ZAM, an amount would be taken for the purposes of this Division to have been expended in producing a film;
- (b) that amount or part of that amount was expended in the acquisition of assets for use in producing the film; and
- (c) those assets are subsequently disposed of or are used otherwise than in producing the film;

the amount referred to in paragraph (a) shall be reduced by such amount as the Commissioner considers reasonable.

124ZAL Deduction reduced if future copyright assigned

(1) Where:

- (a) but for this section and section 124ZAM, an amount would be taken for the purposes of this Division to have been expended by a taxpayer in producing, or by way of contribution to the cost of producing, a film; and
- (b) at the time when that amount was expended, or before or after that time, the taxpayer partially assigned his future copyright in the film;

the amount referred to in paragraph (a) shall be reduced by such amount as the Commissioner considers reasonable.

- (2) A reference in subsection (1) to an assignment by a taxpayer of future copyright in a film includes a reference to the taxpayer entering into an agreement to transfer copyright in the film to another person upon the copyright coming into existence or at any time after the coming into existence of the copyright.

124ZAM No deduction unless expenditure at risk

- (1) Where:

- (a) but for this section and sections 124ZAG, 124ZAJ, 124ZAK and 124ZAL, a taxpayer or a partnership would be taken, for the purposes of this Division, to have expended capital moneys in producing, or by way of contribution to the cost of producing, a film; and
- (b) but for this section, a taxpayer (in this section referred to as the *relevant taxpayer*), being the taxpayer referred to in paragraph (a) or a partner in the partnership, would be taken for the purposes of this Division to have expended the whole or a part of the capital moneys referred to in paragraph (a) (which whole or part is in this subsection referred to as the *relevant amount*) in producing, or by way of contribution to the cost of producing, the film;

then, for the purposes of this Division, the amount of the capital moneys that, by virtue of the expenditure of the moneys referred to in paragraph (a), the relevant taxpayer is to be taken to have expended in producing, or by way of contribution to the cost of producing, the film is:

- (c) if the Commissioner is satisfied that, at the time when the moneys referred to in paragraph (a) were expended, the relevant taxpayer was not at risk in respect of any amount by virtue of the expenditure of the moneys referred to in paragraph (a)—nil;
- (d) if the Commissioner is satisfied that, at the time when the moneys referred to in paragraph (a) were expended, the relevant taxpayer was, by virtue of the expenditure of the moneys referred to in paragraph (a), at risk in respect of an amount less than the relevant amount—the amount in respect of which the taxpayer was at risk; or
- (e) if the Commissioner is satisfied that, at the time when the moneys referred to in paragraph (a) were expended, the taxpayer was, by virtue of the expenditure of those moneys,

Section 124ZAM

at risk with respect to an amount equal to or greater than the relevant amount—the relevant amount.

- (2) For the purposes of the application of subsection (1) in respect of the relevant taxpayer in relation to the moneys expended in relation to the film as mentioned in paragraph (1)(a), the taxpayer shall be taken to be at risk, by virtue of the expenditure of those moneys, in respect of an amount equal to the amount of the loss that, in the opinion of the Commissioner, would be suffered by the taxpayer by reason of the expenditure of the moneys referred to in paragraph (1)(a) if the relevant taxpayer were not to derive any income, other than excepted income, from the film or from the taxpayer's interest in the copyright of the film.
- (3) For the purposes of subsection (2), income derived by the relevant taxpayer from the film is excepted income if:
 - (a) the income is derived under an agreement under which moneys were to be paid to the taxpayer or another person; and
 - (b) the Commissioner is satisfied that the agreement was entered into for the purpose, or for purposes that included the purpose, of enabling the moneys referred to in paragraph (1)(a) to be expended as mentioned in that paragraph.
- (4) In forming an opinion for the purpose of subsection (2) as to the amount of a loss that would be suffered by the relevant taxpayer, by virtue of the expenditure of the moneys referred to in paragraph (1)(a), if the relevant taxpayer were not to derive any income, other than excepted income, from the film or from the taxpayer's interest in copyright in the film, the Commissioner may have regard to:
 - (a) any act that occurred, any transaction that was entered into or any circumstance that existed before, or at the time when, the moneys referred to in paragraph (1)(a) were expended; and
 - (b) any act that was likely to occur, any transaction that was likely to be entered into or any circumstance that was likely to exist after the time when the moneys referred to in paragraph (1)(a) were expended by reason of any act, transaction or circumstance mentioned in paragraph (a);being an act, transaction or circumstance that had, or was likely to have, the effect of reducing or eliminating the loss that would be

suffered by the relevant taxpayer, by virtue of the expenditure of the moneys referred to in paragraph (1)(a), if the relevant taxpayer were not to derive any income, other than excepted income, from the film or from the taxpayer's interest in copyright in the film.

(5) In this section:

- (a) a reference to an agreement is a reference to any agreement, arrangement, understanding or scheme, whether formal or informal, whether express or implied, and whether or not enforceable or intended to be enforceable by legal proceedings; and
- (b) a reference to income derived from a film is a reference to:
 - (i) any amount received or receivable as consideration for the use of, or the right to use, the film or any copyright or interest in copyright in the film;
 - (ii) any amount received or receivable as consideration for the granting of a licence in respect of future copyright in the film; and
 - (iii) any amount received or receivable as consideration in respect of the disposal of the whole or a part of any copyright or interest in copyright in the film or in respect of the assignment of any right to use the copyright or an interest in the copyright in the film or to derive income from the use of such a copyright or interest.

Subdivision C—Miscellaneous

124ZAO Limitation on deductibility of revenue expenses

- (1) This section applies, in relation to a taxpayer in relation to a film in relation to a year of income, to:
 - (a) any deduction that, but for this section, would be allowable to the taxpayer in the year of income in respect of expenditure (not being expenditure in respect of which a deduction is allowable under section 124ZAFB) to the extent that the expenditure is incurred by the taxpayer in relation to the film and in gaining or producing amounts to which section 26AG applies in relation to the taxpayer in relation to the film in relation to any year of income; and

Section 124ZAP

- (b) any deduction deemed by subsection (3) to be a deduction to which this section applies in relation to the taxpayer in relation to the film in relation to the year of income.
- (2) Where:
- (a) but for this subsection, a deduction or deductions to which this section applies in relation to a taxpayer in relation to a film in relation to a year of income would be allowable to the taxpayer in respect of the year of income; and
 - (b) the amount of that deduction or of the sum of those deductions exceeds the amount, or the sum of the amounts, that would be included in the assessable income of the taxpayer of the year of income under section 26AG in relation to the film;
- then, notwithstanding any other provision of this Act, the amount of that deduction shall be reduced by the amount of the excess or, as the case requires, the amount of each of those deductions shall be reduced by an amount that bears to the amount of the excess the same proportion as the amount of the deduction bears to the sum of the deductions.
- (3) Where, by virtue of subsection (2), a deduction is not allowable to a taxpayer in a year of income in relation to a film or the amount of a deduction allowable to a taxpayer in a year of income in relation to a film is reduced, the following provisions have effect:
- (a) a deduction equal to the amount of the deduction or the amount of the reduction, as the case may be, is, subject to this section, allowable to the taxpayer in respect of the next succeeding year of income; and
 - (b) the deduction that, by virtue of paragraph (a), is allowable to the taxpayer in respect of the next succeeding year of income shall be deemed to be a deduction to which this section applies in relation to the taxpayer in relation to the film in relation to the next succeeding year of income.

124ZAP Special provisions relating to partnerships

- (1) This Division does not apply in calculating the net income of a partnership, or a partnership loss, in accordance with section 90.
- (2) For the purposes of the application of Subdivision B in relation to a taxpayer being a partner in a partnership, where, under a contract

entered into on or after 1 October 1980, the partnership has expended capital moneys in producing, or by way of contribution to the cost of producing, a film, the taxpayer shall be deemed to have expended capital moneys in producing, or by way of contribution to the cost of producing, that film, of an amount equal to:

- (a) so much of the amount of the moneys expended as the partners have agreed is to be borne by the taxpayer; or
 - (b) if the partners have not agreed as to the part of the moneys expended that is to be borne by the taxpayer—so much of the amount of the moneys expended as bears to that amount the same proportion as the individual interest of the taxpayer in the net income of the partnership of the year of income in which the moneys were expended bears to that net income or, as the case requires, the individual interest of the taxpayer in the partnership loss for that year of income bears to that partnership loss.
- (3) Sections 124ZAG, 124ZAH, 124ZAJ and 124ZAK apply, for the purposes of subsection (2), in determining whether a partnership has expended capital moneys in producing, or by way of contribution to the cost of producing, a film and in determining the amount of any such moneys.
- (4) Where a partnership has incurred expenditure in a year of income in respect of which a deduction is not allowable to the partnership in calculating the net income of the partnership for the purposes of section 90 but would be allowable but for subsections 26AG(9) and (10), a taxpayer being a partner in the partnership shall be deemed, for the purposes of this Act, to have incurred, at the time when that expenditure was incurred by the partnership:
- (a) so much of the amount of that expenditure as the partners have agreed is to be borne by the taxpayer; or
 - (b) if the partners have not agreed as to the part of the expenditure that is to be borne by the taxpayer—so much of that amount of the expenditure as bears to that amount the same proportion as the individual interest of the taxpayer in the net income of the partnership of the year of income in which the expenditure was incurred bears to that net income or, as the case requires, the individual interest of the taxpayer in the partnership loss for that year of income bears to that partnership loss.

Division 10E—PDFs (pooled development funds)

Subdivision A—Shares in PDFs

124ZM Treatment distributions to shareholders in PDF

Unfranked part of distribution exempt from income tax

- (1) If a company makes a distribution to a shareholder at a time when the company is a PDF, the unfranked part of the distribution is exempt from income tax.

Rest of section deals with franked part

- (2) The rest of this section applies to the franked part of the distribution.

Usual case

- (3) Subsection (4) applies if the assessable income of a year of income of a taxpayer who or that is:
 - (a) a company or a natural person (other than a company or natural person in the capacity of a trustee); or
 - (b) a corporate unit trust in relation to that year of income; or
 - (c) a public trading trust in relation to that year of income; or
 - (d) a complying superannuation fund, a non-complying superannuation fund, a complying approved deposit fund, a non-complying approved deposit fund or a pooled superannuation trust in relation to that year of income;would (apart from subsection (4)) include:
 - (e) the franked part of the distribution; or
 - (f) any of the franked part of the distribution that flows indirectly to the taxpayer.

This subsection does not apply to cases dealt with in subsections (5) and (6).

- (4) Subject to subsection (7), the following is exempt income of the taxpayer:
 - (a) if paragraph (3)(e) applies—the franked part;

- (b) if paragraph (3)(f) applies—so much of the franked part of the distribution as flows indirectly to the taxpayer.

Taxpayers who qualify for venture capital franking tax offset

- (5) If a taxpayer (other than a life assurance company) is entitled to a tax offset in relation to the distribution under section 210-170 of the *Income Tax Assessment Act 1997*, then:
- (a) so much of the franked part of the distribution as equals the part of the distribution that is franked with a venture capital credit is exempt income of the taxpayer; and
 - (b) if the franked part exceeds the amount so exempt—the excess is, subject to subsection (7), exempt income of the taxpayer.
- (6) If a life assurance company is entitled to a tax offset in relation to the distribution under section 210-170 of the *Income Tax Assessment Act 1997*, then:
- (a) so much of the franked part of the distribution as equals the amount worked out using the following formula is exempt income of the life assurance company:

$$\text{Venture capital franked part} \times \frac{\text{Complying superannuation class of taxable income}}{\text{Total income}}$$

where:

complying superannuation class of taxable income is the life assurance company's complying superannuation class of taxable income, within the meaning of subsection 995-1(1) of the *Income Tax Assessment Act 1997*, for the year of income in which the distribution is made.

venture capital franked part is the part of the distribution that is franked with a venture capital credit.

total income is the life assurance company's assessable income for the year of income in which the distribution is made; and

- (b) if the franked part exceeds the amount so exempt—the excess is, subject to subsection (7), exempt income of the life assurance company.

Section 124ZM

No exemption if return prepared on basis that amount assessable

- (7) Subsection (4) and paragraphs (5)(b) and (6)(b) do not exempt, and are taken never to have exempted, an amount if the taxpayer's return of income of the year of income is prepared on the basis that the amount is included in the taxpayer's assessable income of that year.

Where partner entitled to deduction for amount flowing indirectly

- (8) If:
- (a) any of the franked part of the distribution flows indirectly to a taxpayer who is a partner in a partnership; and
 - (b) apart from this subsection, the amount that flows indirectly would be allowable as a deduction from the taxpayer's assessable income of a year of income; and
 - (c) the taxpayer is of a kind mentioned in any of paragraphs (3)(a) to (d);
- the amount that flows indirectly is not allowable as a deduction from that assessable income.
- (9) Subsection (8) does not prevent, and is taken never to have prevented, an amount from being allowable as a deduction if the taxpayer's return of income of the year of income is prepared on the basis that the amount is so allowable.

Where trustee assessed on amount flowing indirectly

- (10) If:
- (a) any of the franked part of the distribution flows indirectly to the trustee of a trust estate; and
 - (b) apart from this subsection, the trustee would be liable under section 98, 99 or 99A to be assessed and pay tax on the amount that flows indirectly;
- the trustee is not liable under that section to be assessed and to pay tax on the amount that flows indirectly.
- (11) Subsection (10) does not prevent, and is taken never to have prevented, the trustee from being liable under that section to be assessed and to pay tax on an amount if the trustee elects to be so liable.

- (12) An election must be made in the trustee's return of income of the trust estate for the year of income concerned.

Interpretation

- (13) In this section:

flows indirectly has the meaning given by subsection 995-1(1) of the *Income Tax Assessment Act 1997*.

part of a distribution that is franked with a venture capital credit has the meaning given by subsection 995-1(1) of the *Income Tax Assessment Act 1997*.

124ZN Exemption of income from sale of shares in a PDF

Income derived by a taxpayer from selling shares in a company is exempt from income tax if the company is a PDF at the time of the sale.

Note: Any capital gain or capital loss from a disposal of shares in a PDF is disregarded: see section 118-13 of the *Income Tax Assessment Act 1997*.

124ZO Shares in a PDF are not trading stock

Shares in a PDF are not trading stock for the purposes of this Act.

124ZQ Effect of company becoming a PDF

- (1) This section applies to shares in a company that a taxpayer holds when the company becomes a PDF.
- (2) In determining for the purposes of this Act whether an amount is or was allowable as a deduction to the taxpayer in respect of acquiring the shares, the shares are taken to have been shares in a PDF throughout the period beginning immediately before the taxpayer acquired them and ending when the company became a PDF.
- (3) For the purposes of this Act, the shares are taken to have been trading stock of the taxpayer at no time during that period.
- (4) Section 170 does not prevent an assessment from being amended to give effect to this section.

124ZR Effect of company ceasing to be a PDF

- (1) This section applies to shares in a company that a taxpayer holds when the company ceases to be a PDF.
- (2) For the purposes of this Act (except Parts 3-1 and 3-3 (about CGT) of the *Income Tax Assessment Act 1997*), the taxpayer is taken:
 - (a) to have sold the shares immediately before the company ceased to be a PDF; and
 - (b) to have rebought the shares immediately after the company so ceased;for a consideration equal to the market value of the shares immediately after the company so ceased.
- (3) Parts 3-1 and 3-3 (about CGT) of the *Income Tax Assessment Act 1997* apply as if the taxpayer:
 - (a) had disposed of the CGT assets constituted by the shares, and had done so immediately before the company ceased to be a PDF; and
 - (b) had re-acquired those assets immediately afterwards;for an amount equal to the shares' market value immediately after the company so ceased.

Subdivision B—The taxable income of PDFs

124ZS Definitions

In this Subdivision:

non-CGT assessable income means an amount included in assessable income otherwise than under Part 3-1 or 3-3 (about CGT) of the *Income Tax Assessment Act 1997* or Subdivision C of this Division.

SME investment means an investment other than an unregulated investment.

Note: *SME* stands for small and medium enterprises.

unregulated investment has the same meaning as in the *Pooled Development Funds Act 1992*.

124ZTA Taxable income in first year as PDF if PDF component is nil

- (1) This section applies if:
 - (a) a company becomes a PDF during a year of income and is still a PDF at the end of the year of income; and
 - (b) the PDF component for the year of income is a nil amount; and
 - (c) the year of income is the 1997-98 year of income or a later one.
- (2) The company's taxable income of the year of income is the amount that, if the period (the *notional year*) beginning at the start of the year of income and ending immediately before the company becomes a PDF were a year of income of the company, would be the company's taxable income of the notional year.

124ZT SME assessable income

SME assessable income

- (1) A company's *SME assessable income* of a year of income is the sum of:
 - (a) so much of the company's non-CGT assessable income of the year of income as was derived:
 - (i) from, or from the disposal of, an SME investment of the company; and
 - (ii) at a time when the company was a PDF; and
 - (b) any assessable income allocated to the company's SME assessable income under section 124ZZB.

Note: Section 124ZZB deals with capital gains etc.

When assessable income derived

- (2) For the purposes of paragraph (1)(a), if an amount is derived by a company during, but not at a particular time during, a year of income, the amount is taken to have been derived by the company on the last day of the year of income.

124ZU SME income component

Full-year PDFs

- (1) The SME income component of a year of income of a company that is a PDF throughout the year of income is so much of the company's taxable income of the year of income as does not exceed the amount (if any) remaining after deducting from the company's SME assessable income of the year of income any deductions allowable to the company in relation to the year of income.

Part-year PDFs

- (2) The **SME income component** of a year of income of a company that becomes a PDF during the year of income and is still a PDF at the end of the year of income is so much of the company's adjusted taxable income of the year of income as does not exceed the amount (if any) remaining after deducting from the company's SME assessable income of the year of income any deductions where both of the following conditions are satisfied:
 - (a) the deductions were allowable to the company in relation to the year of income;
 - (b) the deductions were taken into account in working out the company's PDF component of the year of income.

For this purpose, **adjusted taxable income** means so much of the company's taxable income of the year of income as does not exceed its PDF component of the year of income.

124ZV Unregulated investment component

Full-year PDFs

- (1) The **unregulated investment component** of a year of income of a company that is a PDF throughout the year of income is the amount (if any) remaining after deducting from the company's taxable income of the year of income the company's SME income component of the year of income.

Part-year PDFs

- (2) The **unregulated investment component** of a year of income of a company that becomes a PDF during the year of income and is still
-

a PDF at the end of the year of income is the amount (if any) remaining after deducting from the company's adjusted taxable income of the year of income the company's SME income component of the year of income. For this purpose, **adjusted taxable income** means so much of the company's taxable income of the year of income as does not exceed its PDF component of the year of income.

Subdivision C—Adjustments of the tax treatment of capital gains and capital losses of PDFs

124ZW Definitions

In this Subdivision:

accumulated net capital loss for a year of income (the *loss year*) means the amount (if any) by which the total of:

- (a) the total of the overall capital losses for all classes of assessable income for the loss year; and
- (b) any accumulated net capital loss for the last year of income *before* the loss year;

exceeds:

- (c) the total of the overall capital gains for all classes of assessable income for the loss year (before section 116GB is applied).

class, in relation to assessable income, means a class specified in section 124ZY.

company does not include a company in a capacity of trustee.

non-CGT assessable income means an amount included in assessable income otherwise than under Part 3-1 or 3-3 (about CGT) of the *Income Tax Assessment Act 1997* or this Subdivision.

ordinary capital gain for a CGT event means any capital gain that would (apart from this Subdivision) arise from the event.

ordinary capital loss for a CGT event means any capital loss that would (apart from this Subdivision) arise from the event.

overall capital gain for a class of assessable income means:

Section 124ZX

- (a) the amount by which the total ordinary capital gain for that class exceeds the total ordinary capital loss for that class; or
- (b) if an amount has been applied under subsection 124ZZB(2) to reduce an overall capital gain previously worked out under this definition—that gain as so reduced.

overall capital loss for a class of assessable income means the amount by which the total ordinary capital gain for that class is less than the total ordinary capital loss for that class.

residual overall capital gain means so much of an overall capital gain as remains after applying subsection 124ZZB(2).

SME assessable income has the meaning given by Subdivision B.

SME investment means an investment other than an unregulated investment.

total ordinary capital gain for a class means the total of so much of any ordinary capital gains as has been allocated to that class under section 124ZZA.

total ordinary capital loss for a class means the total of so much of any ordinary capital losses as has been allocated to that class under section 124ZZA.

unregulated investment has the same meaning as in the *Pooled Development Funds Act 1992*.

124ZX Companies to which this Subdivision applies

This Subdivision applies to a company in relation to a year of income if:

- (a) the company is a PDF throughout the year of income; or
- (b) the company becomes a PDF during the year of income and is still a PDF at the end of the year of income.

124ZY Classes of assessable income

Classes

- (1) The classes of assessable income of the company are as follows:
 - (a) SME assessable income (see section 124ZT);

- (b) other assessable income (see subsection(2)).

Other assessable income

- (2) The company's **other assessable income** of the year of income is the sum of:
- (a) so much of the company's non-CGT assessable income of the year of income as is not included in the company's SME assessable income of the year of income; and
 - (b) any assessable income allocated to the company's other assessable income under section 124ZZB.

124ZZ Treatment of capital gains

Nothing is to be included in the company's assessable income of the year of income under section 102-5 of the *Income Tax Assessment Act 1997* (about net capital gains).

124ZZA Allocation of gain amounts and loss amounts to classes of assessable income

Disposals of SME investments

- (1) If:
- (a) there is an ordinary capital gain amount, or an ordinary capital loss amount, in respect of a disposal of an SME investment of the company; and
 - (b) the company was a PDF at the time of the disposal;
- the ordinary capital gain amount or ordinary capital loss amount, as the case may be, is taken into account in determining the overall capital gain or overall capital loss for the class known as SME assessable income.

Disposals of assets other than SME investments

- (2) If:
- (a) there is an ordinary capital gain amount, or an ordinary capital loss amount, in respect of a disposal of an asset of the company; and
 - (b) subsection (1) does not apply to the disposal;
- the ordinary capital gain amount or the ordinary capital loss amount, as the case may be, is taken into account in determining

Section 124ZZB

the overall capital gain or overall capital loss for the class known as other assessable income.

124ZZB Assessable income etc. in relation to capital gains

- (1) The assessable income of each class includes the amount (if any) that is left over after the overall capital gain for that class has been reduced in accordance with this section.
- (2) If there is an overall capital loss for a particular class of assessable income, the loss is to be applied in reduction of overall capital gains for the remaining class.
- (3) Any accumulated net capital loss for the immediately preceding year of income is to be applied in reduction of residual overall capital gains for the classes of assessable income in the following order:
 - (a) SME assessable income;
 - (b) other assessable income.

124ZZD No net capital loss

The company does not make a net capital loss for the year of income, despite section 102-10 of the *Income Tax Assessment Act 1997*.

Division 11—Interest paid by companies on bearer debentures

126 Interest paid by a company on bearer debentures

- (1) If:
- (a) a company pays or credits an amount of interest in respect of a debenture payable to bearer; and
 - (b) the interest is not, to any extent, subject to withholding tax under Division 11A; and
 - (c) neither of sections 128F (to the extent it applies to non-residents who are not engaged in carrying on a business in Australia at or through a permanent establishment in Australia) and 128GB applies to the interest; and
 - (d) the interest is not interest that, because of section 159GZZZZE (which deals with infrastructure borrowings), is not included in assessable income; and
 - (e) the company does not give the Commissioner the name and address of the holder of the debenture;

the company is liable to pay income tax, as imposed by the *Income Tax (Bearer Debentures) Act 1971*, on the amount paid or credited, or, if the company makes a deduction under subsection (2), the amount that otherwise would have been paid or credited.

- (1A) Subsection (1) does not affect any other liability of the company to pay income tax.
- (2) The company may deduct and retain for its own use from an amount payable to a person in respect of which the company is liable to pay tax in accordance with subsection (1) an amount equal to that tax.
- (3) Where the Commissioner is satisfied that that person is not liable to furnish a return, he shall refund to him the amount of tax paid by the company in respect of his debentures.

127 Credit for tax paid by company

- (1) Where the company pays tax under this Division on any interest, and that interest is included in the assessment of the person to

Part III Liability to taxation

Division 11 Interest paid by companies on bearer debentures

Section 128

whom it was paid or credited, the proportionate amount of tax paid by the company in respect of the interest shall be deducted from the total tax payable by that person.

128 Assessments of tax

An assessment of tax payable in accordance with this Division by a company may be an assessment of the amount of tax so payable upon interest in respect of a number of debentures, whether held by the one holder or not.

Division 11A—Dividends, interest and royalties paid to non-residents and to certain other persons

Subdivision A—General

128AAA Application of Division to non-share dividends

- (1) This Division:
 - (a) applies to a non-share equity interest in the same way as it applies to a share; and
 - (b) applies to an equity holder in the same way as it applies to a shareholder; and
 - (c) applies to a non-share dividend in the same way as it applies to a dividend.
- (2) Subsection (1) does not apply to:
 - (a) section 128AE; and
 - (b) section 128F; and
 - (ba) section 128FA.

128A Interpretation

- (1) In this Division, unless the contrary intention appears:

ADI means a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*.

dividend:

 - (a) includes part of a dividend; and
 - (b) (except when used in paragraph (d) of the definition of *interest* in subsection (1AB)) does not include a dividend paid in respect of a non-equity share.

enterprise means a business or other industrial or commercial undertaking.

entity means:

 - (a) the Commonwealth, a State or an authority of the Commonwealth or of a State;

Part III Liability to taxation

Division 11A Dividends, interest and royalties paid to non-residents and to certain other persons

Section 128A

- (b) a natural person;
- (c) a company;
- (d) the partners in a partnership, in their capacity as partners;
- (e) the persons carrying on a joint venture, in their capacity as such persons; or
- (f) the trustees of a trust, in their capacity as such trustees.

foreign bank means a non-resident company that carries on a banking business.

joint venture means an enterprise carried on by 2 or more persons in common otherwise than as partners.

non-ADI financial institution means a corporation that:

- (a) is a registered entity within the meaning of the *Financial Sector (Collection of Data) Act 2001*; and
- (b) is included in Category D (Money Market Corporation) in a list kept under section 11 of that Act; and
- (c) carries on a general business of providing finance (within the meaning of that Act) on a commercial basis.

nostro account means an account that:

- (a) an ADI or non-ADI financial institution holds with a foreign bank and maintains for the sole purpose of settling international transactions; and
- (b) operates on the basis that:
 - (i) amounts deposited in the account are held in the account for no more than 10 days; and
 - (ii) amounts advanced by way of an overdraft on the account are repaid within 10 days.

(1AA) In this Division and in an Act imposing withholding tax:

income includes a royalty and a dividend.

(1AB) For the purposes of this Division:

interest includes an amount, other than an amount referred to in subsection 26C(1):

- (a) that is in the nature of interest; or

- (b) to the extent that it could reasonably be regarded as having been converted into a form that is in substitution for interest; or
- (c) to the extent that it could reasonably be regarded as having been received in exchange for interest in connection with a washing arrangement; or
- (d) that is a dividend paid in respect of a non-equity share; or
- (e) if regulations under the *Income Tax Assessment Act 1997* are made having the effect that instruments known as upper tier 2 capital instruments, or a class of instruments of that kind, are debt interests—that is paid on such a debt interest and is not a return of an investment;

but does not include an amount to the extent to which it is a return on an equity interest in a company.

washing arrangement means an arrangement under which the title to a security is transferred to a resident shortly before an interest payment is made where the sole or dominant purpose of the arrangement is to reduce the amount of withholding tax payable by a person.

- (1AC) An example of an amount in the nature of interest is an amount representing a discount on a security.
- (1AD) An example of an amount in substitution for interest is a lump sum payment made instead of payments of interest.
- (1AE) For the purposes of this Division, if a lender assigns a loan, or the right to interest under a loan, any payment from the borrower to the assignee that represents an amount that would have been interest if the assignment had not taken place is taken to be a payment of interest.
- (1AF) For the purposes of this Division, if a person acquires a security, or the right to interest under a security, any payment from the issuer of the security to that person that represents an amount that would have been interest if the acquisition had not taken place is taken to be a payment of interest.
- (1A) Subject to subsection (1B), for the purposes of this subsection and sections 128AA, 128AB, 128AD, 128C, 128NA and 128NBA:
 - (a) a reference to the reduced issue price of a security that has been partially redeemed on one or more occasions is a

Part III Liability to taxation

Division 11A Dividends, interest and royalties paid to non-residents and to certain other persons

Section 128A

reference to the issue price of the security reduced by the amount of the partial redemption or the sum of the amounts of the partial redemptions, as the case may be;

- (b) expressions used in this subsection or those sections that are also used in Division 16E have the same respective meanings as in that Division; and
 - (c) sections 159GV (other than subsection 159GV(2)) and 159GZ apply as if references in those sections to “this Division” were references to “subsection 128A(1A) and sections 128AA, 128AB, 128AD, 128C, 128NA and 128NBA”.
- (1B) Subsection (1A) applies as if:
- (a) paragraph (c) of the definition of *qualifying security* in subsection 159GP(1) were omitted; and
 - (b) paragraph (a) of the definition of *security* in that subsection included a reference to debt interests.
- (2) For the purposes of this Division, interest or a royalty shall be deemed to have been paid by a person to another person although it is not actually paid over to the other person but is reinvested, accumulated, capitalized, carried to any reserve, sinking fund or insurance fund however designated, or otherwise dealt with on behalf of the other person or as the other person directs.
- (3) For the purposes of this Division, a beneficiary who is presently entitled to a dividend, to interest or to a royalty included in the income of a trust estate shall be deemed to have derived income consisting of that dividend, interest or royalty at the time when he became so entitled.
- (4) In section 260, *income tax* or *tax* includes withholding tax.
- (5) For the purposes of this Division:
- (a) the borrowing of moneys by a company by means of the issue of a number of debentures or debt interests in one borrowing operation shall be deemed to be the raising of a loan;
 - (b) subject to paragraph (a), each receipt of moneys by a borrower under a contract under which moneys are to be, or may be, advanced by way of loan shall be deemed to be the raising of a loan; and

- (c) the moneys received by the raising of a loan, less the expenses of borrowing, shall be deemed to be the loan moneys in respect of the loan.
- (6) A reference in this Division to beneficial interests in relation to an entity shall be read:
- (a) in the case of an entity being a company or the partners in a partnership—as a reference to beneficial interests in respect of the capital of, and in respect of any profits or income of, the company or partnership;
 - (b) in the case of an entity being persons carrying on a joint venture—as a reference to beneficial interests in respect of the enterprise; and
 - (c) in the case of an entity being the trustees of a trust—as a reference to beneficial interests under the trust.
- (7) A reference in this Division to the use of moneys for the purposes of an enterprise shall be read as not including use of those moneys in the course of carrying on an enterprise:
- (a) by way of providing capital for another enterprise; or
 - (b) by way of the making of loans.
- (9) For the purposes of this Division:
- (a) a reference to particular loan moneys (including the reference in paragraph (b)) includes a reference to moneys that, in the opinion of the Commissioner, represent those loan moneys; and
 - (b) without limiting the generality of paragraph (a):
 - (i) moneys received by way of repayment of a loan made out of particular loan moneys; and
 - (ii) moneys received in respect of shares in the capital of a company, being shares purchased or subscribed for by the expenditure of particular loan moneys, upon a sale of the shares, a return of capital by the company or liquidation of the company;shall be deemed to represent those loan moneys.
- (10) For the purposes of this Division, the trustee of a provident, benefit, superannuation or retirement fund is a non-resident at a particular time if, and only if, the fund is a foreign superannuation fund at that time.
-

Part III Liability to taxation

Division 11A Dividends, interest and royalties paid to non-residents and to certain other persons

Section 128AA

- (11) If, apart from this subsection, there is, in relation to a fund, no person who is a trustee of the fund for the purposes of this Division, the person, or each of the persons, who manages the fund is taken, for the purposes of this Division, to be the trustee, or a trustee, as the case requires, of the fund.

128AA Deemed interest in respect of transfers of certain securities

- (1) Where:
- (a) a person transfers a qualifying security; and
 - (b) the transfer price of the security exceeds the issue price or, where the security has been partially redeemed, the reduced issue price of the security;
- so much of the transfer price as equals the excess referred to in paragraph (b) shall, for the purposes of this Division, be deemed to be income that consists of interest.
- (2) For the purposes of references to the transfer price, issue price or reduced issue price of a qualifying security in subsection (1), any application of subsection 159GP(2) shall be disregarded.

128AB Certificates relating to issue price of certain securities

- (1) Where:
- (a) a qualifying security is or was transferred either before or after the commencement of this section; and
 - (b) at the time of transfer either:
 - (i) the transferor is or was a resident; or
 - (ii) the transferor is or was a non-resident and the transfer price is or was derived from a source in Australia;
- the transferee may at any time after the transfer (including a time after the transferee ceases to be the holder of the security) apply to the Commissioner for the issue of a certificate under this section.
- (2) An application under subsection (1) shall be in accordance with the form required by the Commissioner, by notice in writing published in the *Gazette*, for the purposes of applications under that subsection.
- (3) Where the Commissioner is satisfied that the requirements of paragraph (1)(b) are satisfied in relation to the transfer of the qualifying security to which an application under subsection (1)
-

relates and that the security was transferred on a particular date and for a particular consideration to the applicant, the Commissioner shall issue to the applicant a certificate that:

- (a) is expressed to be issued under this section;
 - (b) identifies the security to which it relates;
 - (c) specifies that date as the date of transfer;
 - (d) specifies that consideration, or, where subsection 159GP(2) applies, the amount that is taken under that subsection to be the consideration for the transfer, as the transfer price; and
 - (e) specifies the name of the applicant as the transferee.
- (4) Where the Commissioner issues a certificate under this section in relation to a qualifying security that has been transferred to a person, the following provisions have effect:
- (a) for the purposes of the application of this Division in relation to the first subsequent transfer (if any) of the qualifying security by the person:
 - (i) the amount specified in the certificate shall be taken to be the issue price of the security; and
 - (ii) where the security was partially redeemed before the transfer to the person—any such partial redemption shall be taken not to have occurred;
 - (b) if the security is redeemed or partially redeemed without having been subsequently transferred by the person—in determining for the purposes of the application of this Division the extent (if any) to which the redemption payment comprises an amount that is interest by reason only of the definition of *interest* in subsection 128A(1AB):
 - (i) the amount specified in the certificate as the transfer price shall be taken to be the issue price of the security; and
 - (ii) where the security was partially redeemed before the transfer to the person—any such partial redemption shall be taken not to have occurred.
- (5) If the Commissioner refuses an application under subsection (1), the Commissioner shall serve on the applicant, by post or otherwise, notice in writing that the application has been refused.

Part III Liability to taxation

Division 11A Dividends, interest and royalties paid to non-residents and to certain other persons

Section 128AC

128AC Deemed interest in respect of hire-purchase and certain other agreements

(1) In this section:

agreement means any agreement, arrangement or understanding, whether formal or informal, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings.

attributable agreement payment, in relation to a relevant agreement, means so much of any payment made or liable to be made under the agreement as represents consideration for the use, sale or disposal of the relevant agreement property.

carry forward interest, in relation to an attributable agreement payment in relation to a relevant agreement, means so much (if any) of the notional interest in relation to the payment as exceeds the amount of the payment.

eligible value, in relation to the relevant agreement property in relation to a relevant agreement, means the market value of the property at the time at which the agreement commences or commenced to apply in relation to the property.

formula interest, in relation to an attributable agreement payment in relation to a relevant agreement, means the amount ascertained in accordance with the formula $\frac{2 AC}{B (B + 1)}$, where:

A is the total interest in relation to the relevant agreements.

B is the total number of attributable agreement payments liable to be made under the relevant agreements; and

C is the number that is **B**, reduced by the number of attributable agreement payments made under the relevant agreement before the attributable agreement payment concerned.

notional interest, in relation to an attributable agreement payment in relation to a relevant agreement, means the sum of the formula interest (if any) in relation to the payment and the carry forward interest (if any) in relation to the immediately preceding

attributable agreement payment in relation to the relevant agreement.

relevant agreement means an agreement entered into after 16 December 1984, being:

- (a) a hire-purchase agreement; or
- (b) a lease or any other agreement relating to the use by a person of property owned by another person, being a lease or agreement under which:
 - (i) the lessee or person using the property is entitled to purchase or require the transfer of the lease property or property subject to the agreement on the termination or expiration of the lease or agreement; or
 - (ii) the lease term or term of the agreement is for all, or substantially all, of the effective life of the lease property or property subject to the agreement.

relevant agreement property, in relation to a relevant agreement, means:

- (a) in the case of a hire-purchase agreement—the property that is the subject of the agreement; and
- (b) in any other case—the property in relation to which subparagraph (b)(i) or (ii) of the definition of **relevant agreement** applies.

total interest, in relation to a relevant agreement, means the sum of all of the attributable agreement payments liable to be made under the relevant agreement, reduced by the eligible value of the relevant agreement property.

- (2) Where an agreement (including a hire-purchase agreement and a lease) relates to the use by a person of 2 or more items of property owned by another person, this section applies as if, instead of the single agreement, there were separate agreements relating to the use of each of the items of property having such of the terms of the first-mentioned agreement as are relevant.
- (3) Where a variation is or was made in the terms of, or liability to make payments under, a relevant agreement, then, for the purposes of the application of this section:
 - (a) the relevant agreement shall be taken to be, or to have been, terminated at the time at which the variation has effect; and

Part III Liability to taxation

Division 11A Dividends, interest and royalties paid to non-residents and to certain other persons

Section 128AC

- (b) a new relevant agreement shall be taken to be, or to have been, entered into at the time at which the variation has effect and on the terms of the first-mentioned relevant agreement as so varied.
- (4) Where any right or option under an agreement to extend the term of, or otherwise vary the effect of, the agreement is or was exercised, then, for the purposes of this section, the exercise of that right or option shall be taken to be a variation of the terms of the agreement to provide for the extension or other effect.
- (5) Where an attributable agreement payment in relation to a relevant agreement is made, so much of the attributable agreement payment as does not exceed the notional interest in relation to the payment shall, for the purposes of this Division, be deemed to be income that consists of interest.
- (6) Where:
 - (a) a relevant agreement is entered into after the commencement of this section; and
 - (b) at the time at which the relevant agreement is entered into, the total interest in relation to the relevant agreement exceeds the sum of all amounts that, if all of the attributable agreement payments liable to be made under the relevant agreement were made, would, disregarding this subsection, be deemed to be income that consists of interest under subsection (5) in relation to the relevant agreement;the amount of the notional interest in relation to the first attributable agreement payment in relation to the relevant agreement shall, for the purposes of this section, be increased by an amount equal to the excess referred to in paragraph (b).
- (7) For the purposes of section 128D, where withholding tax is payable on a part of an attributable agreement payment that is taken under subsection (5) of this section to be an amount of interest, the withholding tax shall be taken to be payable on the whole of the attributable agreement payment.

128AD Indemnification etc. agreements in relation to bills of exchange and promissory notes

(1) Where:

- (a) the drawer of a bill of exchange issued after the day on which this section comes into operation pays an amount (in this subsection referred to as the *indemnification amount*) to the acceptor of the bill to indemnify, reimburse or otherwise compensate the acceptor in respect of the whole or a part of an amount (which whole or part is in this subsection referred to as the *eligible presentment amount*) that the acceptor has, or will, become liable to pay to the payee under the bill on presentment of the bill;
- (b) no part of the indemnification amount is, or will be, included in the assessable income of the acceptor of any year of income; and
- (c) the whole or a part (in this subsection referred to as the *eligible presentment interest*) of the eligible presentment amount consists or will consist of interest;

so much of the indemnification amount as indemnifies, reimburses or otherwise compensates the acceptor in respect of the eligible presentment interest shall, for the purposes of this Division, be deemed to be income that consists of interest.

(2) Where:

- (a) a person (in this subsection referred to as the *indemnifier*) pays an amount (in this subsection referred to as the *indemnification amount*) to the issuer of a promissory note issued after the day on which this section comes into operation to indemnify, reimburse or otherwise compensate the issuer in respect of the whole or a part of an amount (which whole or part is in this subsection referred to as the *eligible presentment amount*) that the issuer has, or will, become liable to pay to the payee under the note on presentment of the note;
- (b) no part of the indemnification amount is, or will be, included in the assessable income of the issuer of any year of income; and
- (c) the whole or a part (in this subsection referred to as the *eligible presentment interest*) of the eligible presentment amount consists or will consist of interest;

Part III Liability to taxation

Division 11A Dividends, interest and royalties paid to non-residents and to certain other persons

Section 128AE

so much of the indemnification amount as indemnifies, reimburses or otherwise compensates the issuer in respect of the eligible presentment interest shall, for the purposes of this Division, be deemed to be income that consists of interest.

128AE Interpretation provisions relating to offshore banking units

(1) In this Division, unless the contrary intention appears:

borrow includes raise finance by the issue of a security.

lend includes provide finance by the purchase of a security.

OB activity has the same meaning as in section 121D.

offshore banking unit has the meaning given by this section.

offshore borrowing means:

- (a) a borrowing in any currency, by a person who is or has been an offshore banking unit, from a non-resident who is not a related person (within the meaning of Division 9A); or
- (b) a borrowing in a currency other than Australian currency, by a person who is or has been an offshore banking unit, from a resident or a related person (within the meaning of Division 9A).

offshore gold borrowing means borrowing gold from an offshore person within the meaning of section 121E.

prevailing borrowing rate, in relation to a person who is or has been an offshore banking unit, in relation to a particular time, means the effective annual interest rate that the Commissioner considers was payable by the person on borrowings at or about that time or, where there were none, by offshore banking units generally at or about that time.

prevailing borrowing term, in relation to a person who is or has been an offshore banking unit, in relation to a particular time, means the period that the Commissioner considers was the usual term of borrowings by the person at or about that time or, where there were none, by offshore banking units generally at or about that time.

security means a bond, debenture, debt interest, bill of exchange, promissory note or other security or similar instrument.

tax exempt gold means gold that is tax exempt gold under this section.

tax exempt loan money means an amount that is tax exempt loan money under this section.

transfer to a person includes apply an amount for the benefit of a person.

- (2) The Treasurer may, by notice published in the *Gazette*, declare a person being:
- (a) a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*; or
 - (b) a public authority constituted by a law of a State, being a public authority that carries on the business of State banking; or
 - (ba) a company in which all of the equity interests are beneficially owned by an offshore banking unit (other than one to which paragraph (c) applies); or
 - (c) a person whom the Treasurer is satisfied is appropriately authorised to carry on business as a dealer in foreign exchange; or
 - (d) a life insurance company registered under the *Life Insurance Act 1995*; or
 - (e) a company incorporated under the *Corporations Act 2001* that provides funds management services on a commercial basis (other than solely to related persons):
 - (i) that is, under the *Financial Sector (Collection of Data) Act 2001*, a registered entity included in the category for money market corporations; or
 - (ii) all of the shares which are beneficially owned by a company covered by subparagraph (i); or
 - (iii) a financial services licensee (as defined by section 761A of the *Corporations Act 2001*) whose licence covers dealing in securities (as defined by subsection 92(3) of the *Corporations Act 2001*), providing financial advice in relation to such securities or operating a managed

Part III Liability to taxation

Division 11A Dividends, interest and royalties paid to non-residents and to certain other persons

Section 128AE

investment scheme (as defined by section 9 of the *Corporations Act 2001*); or

(f) a company that the Treasurer determines, in writing, to be an OBU under subsection (2AA);

to be an offshore banking unit for the purposes of this Division.

(2AA) The Treasurer may, on written application by a company, make a written determination that the company is an OBU.

(2AB) The determination must:

(a) specify the day when the company commences to be an OBU; and

(b) contain any other information the Treasurer considers appropriate.

(2AC) A determination of the Treasurer under subsection (2AA) must be made in accordance with guidelines determined by the Treasurer under subsection (2AD).

(2AD) The Treasurer must, by legislative instrument, determine guidelines for the making of determinations under subsection (2AA). The guidelines may require the Treasurer to take into account:

(a) specified criteria; or

(b) recommendations of particular bodies; or

(c) any other factors.

(2A) If a person who is an offshore banking unit for the purposes of this Division:

(a) is convicted of an offence against section 8L, 8N, 8Q, 8T or 8U of the *Taxation Administration Act 1953*, or against Division 136 or 137 of the *Criminal Code* in relation to a taxation law (within the meaning of the *Taxation Administration Act 1953*); or

(b) incurs a tax liability, within the meaning of that Act, by way of a penalty equal to 90% of an amount;

the Treasurer may declare, by notice published in the *Gazette*, that the person is no longer an offshore banking unit for the purposes of this Division.

(2B) If the Treasurer makes such a declaration in respect of a company that is an offshore banking unit only because of paragraph (2)(ba),

the offshore banking unit mentioned in that paragraph, and in any previous application of that paragraph that was necessary for it to apply to the company, is no longer an offshore banking unit from the time when the declaration comes into force.

- (2C) If a person who is an offshore banking unit ceases to be a person of a kind mentioned in any of paragraphs (2)(a), (b), (ba) and (c), the Treasurer must declare, by notice published in the *Gazette*, that the person is no longer an offshore banking unit for the purposes of this Division.
- (2D) Except as mentioned in subsection (2A), (2B) or (2C), a person does not cease to be an offshore banking unit for the purposes of this Division.
- (3) A declaration under subsection (2), (2A) or (2C) shall not come into force before the day on which the notice containing the declaration is published in the *Gazette*.
- (4) Where:
- (a) a person who is an offshore banking unit makes an offshore borrowing or offshore gold borrowing; and
 - (b) the lender would, but for section 128GB, be liable to pay withholding tax on income consisting of interest on the offshore borrowing or offshore gold borrowing;
- then, for the purposes of this Division, the amount borrowed is tax exempt loan money or tax exempt gold of the person.
- (5) Where:
- (a) a person who is or has been an offshore banking unit makes a loan of tax exempt loan money or tax exempt gold where the loan is an OB activity or would be if the person were an OBU; and
 - (b) the loan is repaid;
- the amount repaid is, for the purposes of this Division, deemed to be tax exempt loan money or tax exempt gold of the person.
- (7) Where a person who is or has been an offshore banking unit transfers an amount of tax exempt loan money or tax exempt gold to another person, the following provisions have effect for the purposes of this Division:

Part III Liability to taxation

Division 11A Dividends, interest and royalties paid to non-residents and to certain other persons

Section 128AE

- (a) subject to subsections (10) and (11), the amount transferred ceases to be tax exempt loan money or tax exempt gold of the person; and
 - (b) the amount transferred does not become tax exempt loan money or tax exempt gold of the other person.
- (8) Where a person who is or has been an offshore banking unit transfers to another person an amount of money or gold that, in the opinion of the Commissioner, includes tax exempt loan money or tax exempt gold, so much of the amount transferred as the Commissioner considers was tax exempt loan money or tax exempt gold is deemed, for the purposes of this Division, to have been tax exempt loan money or tax exempt gold of the person.
- (9) Where a person who is or has been an offshore banking unit deals with an amount of tax exempt loan money or tax exempt gold of the person under the person's internal accounting arrangements in such a way that the amount becomes available for possible transfer to other persons (other than by way of payment in carrying on an OB activity, or what would be an OB activity if the person were an OBU, or repayment of an offshore borrowing or an offshore gold borrowing), the following provisions have effect for the purposes of this Division:
 - (a) the person is, when the amount so becomes available, deemed to make a transfer of the amount to another person, other than by way of payment in carrying on an OB activity (or what would be an OB activity if the person were an OBU) or repayment of an offshore borrowing or an offshore gold borrowing;
 - (b) any actual transfer of the amount by the person to another person shall be disregarded.
- (10) For the purposes of this Division, where a person who is or has been an offshore banking unit transfers tax exempt loan money to another person in exchange for an equivalent amount in a different currency:
 - (a) the amount received in exchange shall be taken to be the same money as was transferred; and
 - (b) the transfer shall be taken not to have occurred.
- (11) For the purposes of this Division, where a person who is or has been an offshore banking unit transfers tax exempt loan money or

tax exempt gold to another person by way of a deposit for the purposes of temporary safe-keeping pending the making of an offshore loan or repayment of an offshore borrowing or an offshore gold borrowing:

- (a) the amount held on deposit and upon being repaid shall be taken to be the same money as was transferred; and
 - (b) the transfer shall be taken not to have occurred.
- (12) For the purposes of this section, an amount:
- (a) deposited in an account with a bank or other financial institution; or
 - (b) paid by way of consideration for the issue of a security;
- shall be taken to have been lent to, and borrowed by, the bank, financial institution or issuer of the security.
- (13) If an offshore banking unit consists of:
- (a) one or more permanent establishments in Australia at or through which the offshore banking unit carries on what are OB activities within the meaning of Division 9A; and
 - (b) one or more other permanent establishments either in Australia or outside Australia;
- then this section and section 128NB apply as if:
- (c) the offshore banking unit consisted only of the permanent establishments referred to in paragraph (a); and
 - (d) the permanent establishments referred to in paragraph (b) were separate persons.

128AF Payments through interposed entities

- (1) This section applies if:
- (a) a payment received by a non-resident through one or more interposed companies, partnerships, trusts or other persons is attributable to an amount of dividends, interest or royalties paid by a resident; and
 - (b) one or more of the interposed companies, partnerships, trusts or other persons is exempt from tax.
- (2) If this section applies, the amount of dividends, interest or royalties paid by a resident is taken, for the purposes of this Division, to have been paid by the resident directly to the non-resident.

Part III Liability to taxation

Division 11A Dividends, interest and royalties paid to non-residents and to certain other persons

Section 128B

- (3) For the purposes of this section, a person is exempt from tax if, at the time at which the payment was received by the non-resident, all income of the person was exempt from tax.

128B Liability to withholding tax

- (1A) In this section, a reference to a person to whom this section applies is a reference to the Commonwealth, a State, an authority of the Commonwealth or of a State or a person who is, or persons at least 1 of whom is, a resident.

- (1) Subject to subsections (3), (3A), (3D) and (3E), this section applies to income that:
- (a) is derived, on or after 1 January 1968, by a non-resident; and
 - (b) consists of a dividend paid by a company that is a resident.

Note: An amount declared to be conduit foreign income is an amount to which this section does not apply: see sections 802-15 and 802-17 of the *Income Tax Assessment Act 1997*.

- (2) Subject to subsection (3), this section also applies to income that:
- (a) is derived, on or after 1 January 1968, by a non-resident; and
 - (b) consists of interest that:
 - (i) is paid to the non-resident by a person to whom this section applies and is not an outgoing wholly incurred by that person in carrying on business in a country outside Australia at or through a permanent establishment of that person in that country; or
 - (ii) is paid to the non-resident by a person who, or by persons each of whom, is not a resident and is, or is in part, an outgoing incurred by that person or those persons in carrying on business in Australia at or through a permanent establishment of that person or those persons in Australia.

Note: An amount of interest paid to a person by a temporary resident is an amount to which this section does not apply: see section 768-980 of the *Income Tax Assessment Act 1997*.

- (2A) Subject to subsection (3), where income:
- (a) is, or has, after 2 July 1973, been, derived, or derived in part, by a person to whom this section applies in carrying on business in a country outside Australia at or through a permanent establishment of the person in that country; and

- (b) consists of interest that:
- (i) is or has been paid to the person by another person to whom this section applies and is not an outgoing wholly incurred by that other person in carrying on business in a country outside Australia at or through a permanent establishment of that other person in that country; or
 - (ii) is or has been paid to the first-mentioned person by a person who is, or by persons each of whom is, not a resident and is, or is in part, an outgoing incurred by that last-mentioned person or those last-mentioned persons in carrying on business in Australia at or through a permanent establishment of that last-mentioned person or those last-mentioned persons in Australia;

this section also applies to that income or to the part of that income so derived, as the case may be.

Note: An amount of interest paid to a person by a temporary resident is an amount to which this section does not apply: see section 768-980 of the *Income Tax Assessment Act 1997*.

- (2B) Subject to subsection (3), this section also applies to income that:
- (a) is derived by a non-resident:
 - (i) during the 1993-94 year of income of the non-resident; or
 - (ii) during a later year of income of the non-resident; and
 - (b) consists of a royalty that:
 - (i) is paid to the non-resident by a person to whom this section applies and is not an outgoing wholly incurred by that person in carrying on business in a foreign country at or through a permanent establishment of that person in that country; or
 - (ii) is paid to the non-resident by a person who, or by persons each of whom, is not a resident and is, or is in part, an outgoing incurred by that person or those persons in carrying on business in Australia at or through a permanent establishment of that person or those persons in Australia.
- (2C) Subject to subsection (3), where income:
- (a) is derived, or derived in part, by a person (the *recipient*) to whom this section applies in carrying on business in a

Part III Liability to taxation

Division 11A Dividends, interest and royalties paid to non-residents and to certain other persons

Section 128B

country outside Australia at or through a permanent establishment of the person in that country; and

(b) consists of a royalty that:

(i) is paid to the recipient by another person (the *payer*) to whom this section applies and is not an outgoing wholly incurred by the payer in carrying on business in a country outside Australia at or through a permanent establishment of the payer in that country; or

(ii) is paid to the recipient by one or more persons (the *non-resident payers*), each of whom is not a resident, and is, or is in part, an outgoing incurred by the non-resident payers in carrying on business in Australia at or through a permanent establishment of the non-resident payers in Australia;

this section also applies to that income or to the part of that income mentioned in paragraph (a).

(2D) Subsections (2B) and (2C) do not apply to income to the extent to which it is a return on an equity interest in a company.

(3) This section does not apply to:

(aaa) income that consists of a non-share dividend that is unfrankable under section 215-10 of the *Income Tax Assessment Act 1997*; or

(a) income derived by a non-resident that is:

(i) exempt from income tax because of section 50-5 (other than because of item 1.5A, 1.5B or 1.6 in the table in that section) or 50-10, item 6.1 or 6.2 of the table in section 50-30, section 50-40 or item 9.1 or 9.2 of the table in section 50-45 of the *Income Tax Assessment Act 1997*; and

(ii) exempt from income tax in the country in which the non-resident resides; or

(aa) income derived by a non-resident that is an overseas charitable institution (within the meaning of section 121C) where the income is exempt under subsection 121ELA(1); or

(ab) income that is exempt from income tax because of item 9.4 of the table in section 50-45 of the *Income Tax Assessment Act 1997* (which exempts income derived by the Commonwealth Games Federation); or

- (b) income that is exempt from income tax by virtue of subsection 23C(2); or
- (ba) income that is exempt from income tax because of section 124ZM (which exempts dividends paid by PDFs); or
- (bb) income that is not included in assessable income because of section 159GZZZZE; or
- (d) income in respect of which a trustee is liable to be assessed under section 99 or section 99A; or
- (e) income that is derived by a trustee, being a trustee in relation to a trust created by a person who, at the time the income is derived, is a resident and in respect of which the Commissioner is empowered, under section 102, to assess the trustee to pay income tax; or
- (ga) income that consists of:
 - (i) the franked part of a dividend; or
 - (ii) in relation to a dividend that is paid by a former exempting entity (within the meaning of the *Income Tax Assessment Act 1997*) on a share acquired under an employee share scheme (within the meaning of that Act)—the part of the dividend that is franked with an exempting credit; or
 - (iii) in relation to a dividend that is paid by a former exempting entity (within the meaning of the *Income Tax Assessment Act 1997*) to an eligible continuing substantial member (within the meaning of that Act)—the part of the dividend that is franked with an exempting credit;
other than a dividend in respect of which a determination is made under paragraph 204-30(3)(c) of the *Income Tax Assessment Act 1997* or a dividend or a part of a dividend in respect of which a determination is made under paragraph 177EA(5)(b) of this Act; or
- (gb) income that consists of a dividend derived from assets included in the insurance funds of a life assurance company that carries on business in Australia at or through a permanent establishment of the life assurance company in Australia; or
- (gc) income that consists of interest derived on a nostro account by a non-resident that is a foreign bank; or

Part III Liability to taxation

Division 11A Dividends, interest and royalties paid to non-residents and to certain other persons

Section 128B

- (h) income that consists of:
 - (ii) interest derived by a non-resident in carrying on business in Australia at or through a permanent establishment of the non-resident in Australia (except interest derived by a limited partner in a VCLP, ESVCLP or AFOF as such a partner);
 - (iv) interest to which section 128F, 128FA or 128GB applies; or
 - (j) income in respect of which a taxpayer is liable to be assessed under Division 9C; or
 - (jb) income that:
 - (i) is derived by a non-resident that is a superannuation fund for foreign residents; and
 - (ii) consists of interest, or consists of dividends or non-share dividends paid by a company that is a resident; and
 - (iii) is exempt from income tax in the country in which the non-resident resides; or
 - (k) income that is not included in assessable income because of subsection 271-105(1); or
 - (l) income derived by a trustee that, because of paragraph 102UK(2)(b) or 102UM(2)(b), is not included in the assessable income of a trustee beneficiary of the trust estate.
- (3A) Paragraph (3)(ga) does not apply to income consisting of a dividend, or a part of a dividend, that is derived by the trustee of a trust, or a partnership, to the extent (if any) to which any amount paid to, or applied for the benefit of, a taxpayer (being a beneficiary in the trust or a partner in the partnership) that:
- (a) was attributable to the dividend; and
 - (b) was paid or applied:
 - (i) in respect of an interest in the trust or partnership that was acquired, or was acquired for a period that was extended, at or after the commencing time; or
 - (ii) under a financing arrangement (including an arrangement extending an earlier arrangement) entered into at or after the commencing time;
- may reasonably be regarded as equivalent to the payment of interest on a loan.

(3B) In subsection (3A):

commencing time means 7.30 pm by legal time in the Australian Capital Territory on 13 May 1997.

financing arrangement has the meaning given by subsection 995-1(1) of the *Income Tax Assessment Act 1997*.

(3C) In determining for the purposes of subsection (3A) the extent (if any) to which an amount may reasonably be regarded as equivalent to the payment of interest on a loan, regard is to be had to:

- (a) the way in which the amount was calculated; and
- (b) the conditions applying to the payment or application of the amount; and
- (c) any other relevant matters.

(3D) This section does not apply to a demerger dividend to which section 45B does not apply.

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

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

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

(3F) In subsection (3E):

permanent establishment of a person:

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

(4) A person who derives income to which this section applies that consists of a dividend is liable to pay income tax upon that income

Part III Liability to taxation

Division 11A Dividends, interest and royalties paid to non-residents and to certain other persons

Section 128B

at the rate declared by the Parliament in respect of income to which this subsection applies.

- (5) A person who derives income to which this section applies that consists of interest is, subject to subsections (6) and (7), liable to pay income tax upon that income at the rate declared by the Parliament in respect of income to which this subsection applies.
- (5A) A person who derives income to which this section applies that consists of a royalty is liable to pay income tax upon that income at the rate declared by the Parliament in respect of income to which this subsection applies.
- (6) Where:
- (a) income to which this section applies consists of interest and is paid to the person by whom it is derived by a person to whom this section applies; and
 - (b) the interest is, in part only, an outgoing incurred by that person to whom this section applies in carrying on business in a country outside Australia at or through a permanent establishment of that person to whom this section applies in that country;
- income tax is payable under subsection (5) upon so much only of the income as is attributable to so much of the interest as is not an outgoing so incurred.
- (7) Where:
- (a) income to which this section applies consists of interest and is paid to the person by whom it is derived by a person who, or by persons each of whom, is not a resident; and
 - (b) the interest is, in part only, an outgoing incurred by the person or persons by whom it is paid in carrying on business in Australia at or through a permanent establishment of that person or those persons in Australia;
- income tax is payable under subsection (5) upon so much only of the income as is attributable to so much of the interest as is an outgoing so incurred.
- (8) For the purposes of subparagraphs (2)(b)(i) and (2A)(b)(i) and paragraph (6)(b), where:
- (a) interest is paid, or has, after 2 July 1973, been paid, to a person by another person, being a person to whom this

section applies, carrying on business in a country outside Australia; and

- (b) the interest or a part of the interest:
 - (i) is interest incurred by the other person in gaining or producing income that is derived by the other person otherwise than in carrying on business in a country outside Australia at or through a permanent establishment of the other person in that country or is interest incurred by the other person for the purpose of gaining or producing income to be so derived; or
 - (ii) is interest incurred by the other person in carrying on business for the purpose of gaining or producing income and is reasonably attributable to income that is derived, or may be derived, by the other person otherwise than in so carrying on business at or through a permanent establishment of the other person in a country outside Australia;

the interest or the part of the interest, as the case may be, is not an outgoing incurred by the other person in carrying on business in a country outside Australia at or through a permanent establishment of the other person in that country.

- (9) For the purposes of subparagraphs (2)(b)(ii) and (2A)(b)(ii) and paragraph (7)(b), where:
 - (a) interest is paid, or has, after 2 July 1973, been paid, to a person by another person or other persons (in this subsection referred to as *the borrower*), being:
 - (i) another person who is or was carrying on business in Australia and is not or was not a resident; or
 - (ii) other persons who are or were carrying on business in Australia and each of whom is not or was not a resident; and
 - (b) the interest or a part of the interest:
 - (i) is interest incurred by the borrower in gaining or producing income that is derived by the borrower in carrying on business in Australia at or through a permanent establishment of the borrower in Australia or is interest incurred by the borrower for the purpose of gaining or producing income to be so derived; or

Part III Liability to taxation

Division 11A Dividends, interest and royalties paid to non-residents and to certain other persons

Section 128B

- (ii) is interest incurred by the borrower in carrying on a business for the purpose of gaining or producing income and is reasonably attributable to income that is derived, or may be derived, by the borrower in so carrying on business at or through a permanent establishment of the borrower in Australia;

the interest or the part of the interest, as the case may be, is an outgoing incurred by the borrower in carrying on business in Australia at or through a permanent establishment of the borrower in Australia.

- (9A) For the purposes of subparagraphs (2B)(b)(i) and (2C)(b)(i), where:

- (a) a royalty is paid, to a person by another person, being a person to whom this section applies, carrying on business in a country outside Australia; and
- (b) the royalty, or a part of the royalty:
 - (i) is a royalty incurred by the other person in gaining or producing income that is derived by the other person otherwise than in carrying on business in a country outside Australia at or through a permanent establishment of the other person in that country or is a royalty incurred by the other person for the purpose of gaining or producing income to be so derived; or
 - (ii) is a royalty incurred by the other person in carrying on business for the purpose of gaining or producing income and is reasonably attributable to income that is derived, or may be derived, by the other person otherwise than in so carrying on business at or through a permanent establishment of the other person in a country outside Australia;

the royalty or the part of the royalty, as the case may be, is not an outgoing incurred by the other person in carrying on business in a country outside Australia at or through a permanent establishment of the other person in that country.

- (9B) For the purposes of subparagraphs (2B)(b)(ii) and (2C)(b)(ii), where:

- (a) a royalty is paid to a person by another person or other persons (the *licensee*), being:

- (i) another person who is or was carrying on business in Australia and is not or was not a resident; or
 - (ii) other persons who are or were carrying on business in Australia and each of whom is not or was not a resident; and
- (b) the royalty or a part of the royalty:
- (i) is a royalty incurred by the licensee in gaining or producing income that is derived by the licensee in carrying on business in Australia at or through a permanent establishment of the licensee in Australia or is a royalty incurred by the licensee for the purpose of gaining or producing income to be so derived; or
 - (ii) is a royalty incurred by the licensee in carrying on a business for the purpose of gaining or producing income and is reasonably attributable to income that is derived, or may be derived, by the licensee in so carrying on business at or through a permanent establishment of the licensee in Australia;

the royalty or the part of the royalty, as the case may be, is an outgoing incurred by the licensee in carrying on business in Australia at or through a permanent establishment of the licensee in Australia.

(9C) If:

- (a) apart from this subsection, tax would be payable under subsection 126(1) on an amount of interest paid to a person; and
- (b) section 128F would apply to the interest, assuming that paragraph (1)(e) of that section had not been enacted;

then:

- (c) despite anything else in this section, the interest is taken, for the purposes of this Division, to be income derived by the person and to be income to which this section applies; and

Note: As a result of this paragraph, the interest will not be subject to tax under subsection 126(1): see paragraph 126(1)(b).

- (d) in addition to the effect of any credit arising under section 18-30 in Schedule 1 to the *Taxation Administration Act 1953* in respect of the interest, the total tax payable by the person, other than under this section, is reduced by the

Part III Liability to taxation

Division 11A Dividends, interest and royalties paid to non-residents and to certain other persons

Section 128C

amount of any tax payable under this section on the interest;
and

- (e) tax paid under this section on the interest is not an allowable deduction.
- (10) Income tax payable by a person in accordance with this section is in addition to any other income tax payable by him upon income to which this section does not apply.
- (11) Income tax payable by a person in accordance with this section upon income to which this section applies by virtue of subsection (2A) or (2C) is in addition to, and shall not be taken into account in arriving at the amount of, any other income tax payable by him in respect of that income.

128C Payment of withholding tax

- (1) Withholding tax is due and payable by the person liable to pay the tax at the expiration of 21 days after the end of the month in which the income to which the tax relates was derived by the person.
- (3) If any of the withholding tax which a person is liable to pay remains unpaid after the time by which it is due to be paid, the person is liable to pay the general interest charge on the unpaid amount for each day in the period that:
 - (a) started at the beginning of the day by which the withholding tax was due to be paid; and
 - (b) finishes at the end of the last day on which, at the end of the day, any of the following remains unpaid:
 - (i) the withholding tax;
 - (ii) general interest charge on any of the withholding tax.

Note: The general interest charge is worked out under Part IIA of the *Taxation Administration Act 1953*.

- (4AA) If:
 - (a) a person is liable to pay the general interest charge on an amount of withholding tax which is payable on an amount that, by virtue of the application of section 128AA, is taken to consist of interest paid in relation to the transfer of a qualifying security;

- (b) the Commissioner is satisfied that:
 - (i) before the security was transferred, a notice expressed to be issued under subsection 265B(4) identifying the security was given by the person, in connection with the transfer, to the transferee;
 - (ii) one or more of the statements made in the notice is incorrect; and
 - (iii) the person did not know of the circumstance referred to in subparagraph (ii) at the time of transfer of the security; and
- (c) the proper amount of the withholding tax liability of the person exceeds the amount that would have been the amount of the withholding tax liability if it were determined on the basis that the statements made in the notice were correct;
the Commissioner shall remit so much of the amount of the general interest charge as bears to that amount the same proportion as the amount of the excess referred to in paragraph (c) bears to the amount of withholding tax.
- (6) The ascertainment of the amount of any withholding tax shall not be deemed to be an assessment within the meaning of any of the provisions of this Act.
- (7) The Commissioner may serve on a person, by post or otherwise, a notice in which is specified:
 - (a) the amount of any withholding tax that the Commissioner has ascertained is payable by that person; and
 - (b) the date on which that tax became due and payable.
- (8) The production of a notice served under subsection (7), or of a document under the hand of the Commissioner, a Second Commissioner or a Deputy Commissioner purporting to be a copy of such a notice, is evidence that the amount of withholding tax specified in the notice became due and payable by the person on whom the notice was served on the date so specified.

128D Certain income not assessable

Income other than income to which section 128B applies by virtue of subsection (2A), (2C) or (9C) of that section upon which withholding tax is payable, or upon which withholding tax would, but for paragraph 128B(3)(ga) or (jb), section 128F, section 128FA

Part III Liability to taxation

Division 11A Dividends, interest and royalties paid to non-residents and to certain other persons

Section 128F

or section 128GB, be payable, is not assessable income and is not exempt income of a person.

Note: An amount of interest paid to a person by a temporary resident is non-assessable non-exempt income: see section 768-980 of the *Income Tax Assessment Act 1997*.

128F Division does not apply to interest on certain publicly offered company debentures or debt interests

Interest to which this section applies

- (1) This section applies to interest paid by a company in respect of a debenture or debt interest in the company if:
 - (a) the company was a resident of Australia when it issued the debenture or debt interest; and
 - (b) the company is a resident of Australia when the interest is paid; and
 - (c) for a debt interest other than a debenture—the debt interest:
 - (i) is a non-equity share; or
 - (ii) consists of 2 or more related schemes (within the meaning of the *Income Tax Assessment Act 1997*) where one or more of them is a non-equity share; or
 - (iii) is a syndicated loan; or
 - (iv) is prescribed by the regulations for the purposes of this section; and
 - (d) either:
 - (i) the issue of the debenture or debt interest satisfies the public offer test set out in subsection (3) or (4); or
 - (ii) for a syndicated loan—the invitation to become a lender under the relevant syndicated loan facility satisfies the public offer test set out in subsection (3A).
- (1A) This section also applies to interest paid by a company in respect of a debenture or debt interest in the company if:
 - (a) the company was a non-resident when it issued the debenture or debt interest; and
 - (b) the company is a non-resident when the interest is paid; and
 - (c) the debenture or debt interest was issued, and the interest is paid, by the company in carrying on business at or through a permanent establishment in Australia; and

- (d) for a debt interest other than a debenture—the debt interest:
 - (i) is a non-equity share; or
 - (ii) consists of 2 or more related schemes (within the meaning of the *Income Tax Assessment Act 1997*) where one or more of them is a non-equity share; or
 - (iii) is a syndicated loan; or
 - (iv) is prescribed by the regulations for the purposes of this section; and
- (e) either:
 - (i) the issue of the debenture or debt interest satisfies the public offer test set out in subsection (3) or (4); or
 - (ii) for a syndicated loan—the invitation to become a lender under the relevant syndicated loan facility satisfies the public offer test set out in subsection (3A).

(1B) If:

- (a) some or all of the transfer price (within the meaning of section 128AA) of a debenture or debt interest is taken under that section to be income that consists of interest; and
- (b) for a debt interest other than a debenture—the debt interest:
 - (i) is a non-equity share; or
 - (ii) consists of 2 or more related schemes (within the meaning of the *Income Tax Assessment Act 1997*) where one or more of them is a non-equity share; or
 - (iii) is a syndicated loan; or
 - (iv) is prescribed by the regulations for the purposes of this section; and
- (c) either:
 - (i) the issue of the debenture or debt interest satisfies the public offer test set out in subsection (3) or (4); or
 - (ii) for a syndicated loan—the invitation to become a lender under the relevant syndicated loan facility satisfies the public offer test set out in subsection (3A);

this section applies to the interest.

Note: Subsection (6) does not apply to the interest because that subsection deals only with interest paid on a debenture or debt interest by the issuing company.

Part III Liability to taxation

Division 11A Dividends, interest and royalties paid to non-residents and to certain other persons

Section 128F

Tax not payable

- (2) Tax is not payable under this Division in respect of interest to which this section applies.

Public offer test

- (3) The issue of a debenture or debt interest by a company *satisfies the public offer test* if the issue resulted from the debenture or debt interest being offered for issue:
- (a) to at least 10 persons each of whom:
 - (i) was carrying on a business of providing finance, or investing or dealing in securities, in the course of operating in financial markets; and
 - (ii) was not known, or suspected, by the company to be an associate (see subsection (9)) of any of the other persons covered by this paragraph; or
 - (b) to at least 100 persons whom it was reasonable for the company to have regarded as either:
 - (i) having acquired debentures or debt interests in the past; or
 - (ii) being likely to be interested in acquiring debentures or debt interests; or
 - (c) as a result of being accepted for listing on a stock exchange, where the company had previously entered into an agreement with a dealer, manager or underwriter, in relation to the placement of debentures or debt interests, requiring the company to seek such listing; or
 - (d) as a result of negotiations being initiated publicly in electronic form, or in another form, that was used by financial markets for dealing in debentures or debt interests; or
 - (e) to a dealer, manager or underwriter, in relation to the placement of debentures or debt interests, who, under an agreement with the company, offered the debenture or debt interest for sale within 30 days in a way covered by any of paragraphs (a) to (d).
- (3A) An invitation to become a lender under a syndicated loan facility by a company *satisfies the public offer test* if the invitation was made:

- (a) to at least 10 persons each of whom:
 - (i) was carrying on a business of providing finance, or investing or dealing in securities, in the course of operating in financial markets; and
 - (ii) was not known, or suspected, by the company to be an associate (see subsection (9)) of any of the other persons covered by this paragraph; or
- (b) publicly in electronic form, or in another form, that was used by financial markets for dealing in debentures or debt interests; or
- (c) to a dealer, manager or underwriter, in relation to the placement of debentures or debt interests, who, under an agreement with the company, made the invitation to become a lender under the facility within 30 days in a way covered by paragraph (a) or (b).

Global bonds

- (4) The issue of a debenture or debt interest by a company also **satisfies the public offer test** if the debenture or debt interest is a global bond (see subsection (10)).

Issues and invitations that always fail the public offer test

- (5) The issue of a debenture or debt interest by a company does not **satisfy the public offer test** if, at the time of the issue, the company knew, or had reasonable grounds to suspect, that:
 - (a) the debenture, an interest in the debenture or the debt interest was being, or would be, acquired either directly or indirectly by an associate of the company; and
 - (b) either:
 - (i) the associate is a non-resident and the debenture or interest, or the debt interest, was not being, or would not be, acquired by the associate in carrying on a business in Australia at or through a permanent establishment of the associate in Australia; or
 - (ii) the associate is a resident of Australia and the debenture or interest, or the debt interest, was being, or would be, acquired by the associate in carrying on a business in a country outside Australia at or through a permanent establishment of the associate in that country; and

Part III Liability to taxation

Division 11A Dividends, interest and royalties paid to non-residents and to certain other persons

Section 128F

- (c) the debenture or interest, or the debt interest, was not being, or would not be, acquired by the associate in the capacity of:
 - (i) a dealer, manager or underwriter in relation to the placement of the debenture or debt interest; or
 - (ii) a clearing house, custodian, funds manager or responsible entity of a registered scheme.

- (5AA) An invitation to become a lender under a syndicated loan facility is taken never to have *satisfied the public offer test* if, at the time the invitation is made, the company knew, or had reasonable grounds to suspect, that:
 - (a) an associate of the company is or will become a lender under the facility; and
 - (b) either:
 - (i) the associate is a non-resident and the associate is not or would not become a lender under the facility in carrying on a business in Australia at or through a permanent establishment of the associate in Australia; or
 - (ii) the associate is a resident of Australia and the associate is or would become a lender under the facility in carrying on a business in a country outside Australia at or through a permanent establishment of the associate in that country; and
 - (c) the associate is not or would not become a lender under the facility in the capacity of:
 - (i) a dealer, manager or underwriter in relation to the invitation; or
 - (ii) a clearing house, custodian, funds manager or responsible entity of a registered scheme.

No exemption for central borrowing authorities

- (5A) This section does not apply in relation to a debenture or debt interest issued in Australia by a company that is covered by subsection (7) or is a central borrowing authority of a State or Territory. A central borrowing authority is a body established for the purpose of raising finance for the State or Territory. The following are examples of central borrowing authorities:
 - (a) the Tasmanian Public Finance Corporation;
 - (b) the Queensland Treasury Corporation;

- (c) the South Australian Government Financing Authority;
- (d) the Western Australian Treasury Corporation;
- (e) the New South Wales Treasury Corporation;
- (f) the Treasury Corporation of Victoria;
- (g) the Northern Territory Treasury Corporation.

No exemption for interest paid to certain associates of the issuing company

- (6) This section does not apply to interest paid by the company to a person in respect of the debenture or debt interest if, at the time of the payment, the company knows, or has reasonable grounds to suspect, that:
 - (a) the person is an associate of the company; and
 - (b) either:
 - (i) the associate is a non-resident and the payment is not received by the associate in respect of a debenture or debt interest that the associate acquired in carrying on a business in Australia at or through a permanent establishment of the associate in Australia; or
 - (ii) the associate is a resident of Australia and the payment is received by the associate in respect of a debenture or debt interest that the associate acquired in carrying on a business in a country outside Australia at or through a permanent establishment of the associate in that country; and
 - (c) the associate does not receive the payment in the capacity of a clearing house, paying agent, custodian, funds manager or responsible entity of a registered scheme.

Australian public bodies are treated as Australian resident companies

- (7) This section applies in relation to a debenture or debt interest issued by:
 - (a) an authority of the Commonwealth; or
 - (b) a State or an authority of a State;as if the authority or State were a company and a resident of Australia.

Part III Liability to taxation

Division 11A Dividends, interest and royalties paid to non-residents and to certain other persons

Section 128F

Debentures or debt interests issued through certain non-resident subsidiaries can also get the exemption

- (8) If:
- (a) a company (the **parent company**) beneficially owns all of the issued equity interests in the capital of a company (the **subsidiary**) that is not a resident of Australia; and
 - (b) the subsidiary's only business is raising finance for the purposes of the parent company; and
 - (c) the subsidiary raises finance in a country specified in the regulations (but not Australia) by issuing a debenture or debt interest in that country; and
 - (d) when the debenture or debt interest is issued, the subsidiary is treated as a resident of that country for the purposes of the tax law (see subsection (9)) of the country;

then this section has effect as if the parent company had raised the finance and issued the debenture or debt interest.

Definitions

- (9) In this section:

associate has the meaning given by section 318, except that paragraphs (1)(b), (2)(a) and (4)(a) of that section must be disregarded.

clearing house means a person who operates a facility that is used by financial markets for investing in or dealing in securities.

company includes a company in the capacity of trustee of a resident trust estate if:

- (a) the trust is not established by a will, or instrument of trust, for public charitable purposes; and
- (b) the only person who is capable (whether by the exercise of a power of appointment or otherwise) of benefiting under the trust is a company other than a company in the capacity of trustee.

debenture, without affecting its meaning elsewhere in this Act, includes a promissory note or a bill of exchange (in addition to the things mentioned in the definition of **debenture** in subsection 6(1)).

global bond has the meaning given by subsection (10).

registered scheme has the same meaning as in the *Corporations Act 2001*.

responsible entity, of a registered scheme, has the same meaning as in the *Corporations Act 2001*.

syndicated loan means a loan or other form of financial accommodation that is provided under a syndicated loan facility, being a facility that has 2 or more lenders.

syndicated loan facility has the meaning given by subsections (11), (12) and (13).

tax law, in relation to a country other than Australia, means:

- (a) if the country has federal foreign tax—the law of the country that imposes the federal foreign tax; or
- (b) in any other case—the law of the country that imposes foreign tax.

Global bond

- (10) A debenture or debt interest issued by a company is a **global bond** if:
- (a) it describes itself as a global bond or a global note; and
 - (b) it is issued to a clearing house (see subsection (9)) or to a person as trustee or agent for, or otherwise on behalf of, one or more clearing houses; and
 - (c) in connection with the issue, the clearing house or houses:
 - (i) confer rights in relation to the debenture or debt interest on other persons; and
 - (ii) record the existence of the rights; and
 - (d) before the issue:
 - (i) the company; or
 - (ii) a dealer, manager or underwriter, in relation to the placement of debentures or debt interests, on behalf of the company;
announces that, as a result of the issue, such rights will be able to be created; and
 - (e) the announcement is made in a way or ways covered by any of paragraphs (3)(a) to (e) (reading a reference in those paragraphs to “debentures or debt interests” as if it were a

Part III Liability to taxation

Division 11A Dividends, interest and royalties paid to non-residents and to certain other persons

Section 128F

reference to such a right, and a reference to the “company” as if it included a reference to the dealer, manager or underwriter); and

- (f) under the terms of the debenture or debt interest, interests in the debenture or debt interest are able to be surrendered, whether or not in particular circumstances, in exchange for other debentures or debt interests issued by the company that are not themselves global bonds.
- (11) A written agreement is a *syndicated loan facility* if:
- (a) the agreement describes itself as a syndicated loan facility or syndicated facility agreement; and
 - (b) the agreement is between one or more borrowers and at least 2 lenders; and
 - (c) under the agreement each lender severally, but not jointly, agrees to lend money to, or otherwise provide financial accommodation to, the borrower or borrowers; and
 - (d) the amount to which the borrower or borrowers will have access at the time the first loan or other form of financial accommodation is to be provided under the agreement is at least \$100,000,000 (or a prescribed amount).
- (12) A written agreement is also a *syndicated loan facility* if:
- (a) the agreement describes itself as a syndicated loan facility or syndicated facility agreement; and
 - (b) the agreement is between one or more borrowers and one lender where the agreement provides for the addition of other lenders; and
 - (c) the agreement provides that, when other lenders are added, each lender severally, but not jointly, agrees to lend money to, or otherwise provide financial accommodation to, the borrower or borrowers; and
 - (d) the amount to which the borrower or borrowers will have access at the time the first loan or other form of financial accommodation is to be provided under the agreement is at least \$100,000,000 (or a prescribed amount).
- (13) However, an agreement under which there are 2 or more borrowers is a *syndicated loan facility* only if all of them are:
- (a) members of the same wholly-owned group (within the meaning of the *Income Tax Assessment Act 1997*); or
-

- (b) parties to the same joint venture; or
 - (c) associates of each other.
- (14) For the purposes of this section, a change (including by novation) to the lenders under a syndicated loan facility does not result in a different agreement.
- (15) For a debt interest that consists of 2 or more related schemes (within the meaning of the *Income Tax Assessment Act 1997*) where one or more of them is a non-equity share, this section applies only to interest paid in respect of the non-equity share.
- Note: Subsection 128A(1AB) defines *interest* for the purposes of this Division. Under that subsection, dividends paid in respect of a non-equity share are treated as being interest.
- (16) The rule in subsection (15) does not apply to the extent that interest in respect of the other related scheme or schemes would be interest to which this section applies in respect of a debenture or debt interest.

128FA Division does not apply to interest on certain publicly offered unit trust debentures or debt interests

Interest to which this section applies

- (1) This section applies to interest paid by the trustee of an eligible unit trust in respect of a debenture or debt interest issued by the trustee if:
- (a) for a debt interest other than a debenture—the debt interest:
 - (i) is a syndicated loan; or
 - (ii) is prescribed by the regulations for the purposes of this section; and
 - (b) either:
 - (i) the issue of the debenture or debt interest satisfies the public offer test set (see subsection (6)); or
 - (ii) for a syndicated loan—the invitation to become a lender under the relevant syndicated loan facility satisfies the public offer test (see subsection (6A)).
- (2) If:
- (a) some or all of the transfer price (within the meaning of section 128AA) of a debenture or debt interest issued by the

Part III Liability to taxation

Division 11A Dividends, interest and royalties paid to non-residents and to certain other persons

Section 128FA

trustee of an eligible unit trust is taken under that section to be income that consists of interest; and

- (b) for a debt interest other than a debenture—the debt interest:
 - (i) is a syndicated loan; or
 - (ii) is prescribed by the regulations for the purposes of this section; and
- (c) either:
 - (i) the issue of the debenture or debt interest satisfies the public offer test set (see subsection (6)); or
 - (ii) for a syndicated loan—the invitation to become a lender under the relevant syndicated loan facility satisfies the public offer test (see subsection (6A));

this section applies to the interest.

Note: Subsection (4) does not apply to the interest because that subsection deals only with interest paid on a debenture or debt interest by the issuing eligible unit trust.

Tax not payable

- (3) Tax is not payable under this Division in respect of interest to which this section applies.

No exemption for interest paid to certain associates of the issuing trustee

- (4) This section does not apply to interest paid by the trustee of an eligible unit trust to a person in respect of the debenture or debt interest if, at the time of the payment, the trustee knows, or has reasonable grounds to suspect, that:
 - (a) the person is an associate of the trustee; and
 - (b) either:
 - (i) the associate is a non-resident and the payment is not received by the associate in respect of a debenture or debt interest that the associate acquired in carrying on a business in Australia at or through a permanent establishment of the associate in Australia; or
 - (ii) the associate is a resident of Australia and the payment is received by the associate in respect of a debenture or debt interest that the associate acquired in carrying on a business in a country outside Australia at or through a

permanent establishment of the associate in that country; and

- (c) the associate does not receive the payment in the capacity of a clearing house, paying agent, custodian, funds manager or responsible entity of a registered scheme.

Debentures or debt interests issued through certain non-resident subsidiaries can also get the exemption

- (5) If:
- (a) the trustee of an eligible unit trust holds all of the issued equity interests in the capital of a company that is not a resident of Australia; and
 - (b) the company's only business is raising finance for the purposes of the eligible unit trust; and
 - (c) the company raises finance in a country specified in the regulations (but not Australia) by issuing a debenture or debt interest in that country; and
 - (d) when the debenture or debt interest is issued, the company is treated as a resident of that country for the purposes of the tax law (see subsection (8)) of the country;

then this section has effect as if the trustee had raised the finance and issued the debenture or debt interest.

Public offer test

- (6) For the purposes of working out under this section whether the issue of a debenture or debt interest by the trustee of an eligible unit trust **satisfies the public offer test**, subsections 128F(3) to (5) apply to the trustee of the eligible unit trust in a corresponding way to the way in which those subsections apply to a company, subject to subsection (7) of this section.
- (6A) For the purposes of working out under this section whether an invitation to become a lender under a syndicated loan facility satisfies the public offer test, subsections 128F(3A) and (5AA) apply to the trustee of the eligible unit trust in a corresponding way to the way in which those subsections apply to a company, subject to subsection (7) of this section.
- (7) For the purposes of applying subsection 128F(3), (3A), (4), (5) or (5AA) as mentioned in subsection (6) or (6A) of this section:

Part III Liability to taxation

Division 11A Dividends, interest and royalties paid to non-residents and to certain other persons

Section 128FA

- (a) a reference in any of those subsections to a company knowing, suspecting or having reasonable grounds to suspect something, or it being reasonable for a company to have regarded something, is taken to be a reference to the trustee of the eligible unit trust knowing, suspecting or having reasonable grounds to suspect that thing, or it being reasonable for the trustee of the eligible unit trust to have regarded that thing; and
 - (b) a reference in any of those subsections to an associate is taken to be a reference to an associate within the meaning of this section; and
 - (c) a reference in any of those subsections to a global bond is taken to be a reference to a global bond within the meaning of subsection 128F(10).
- (7A) For the purposes of this section, a change (including by novation) to the lenders under a syndicated loan facility does not result in a different agreement.

Definitions

- (8) In this section:

associate has the meaning given by section 318, except that:

- (a) paragraphs (1)(b), (2)(a) and (4)(a) of that section must be disregarded; and
- (b) subsection (5) of that section applies to a unit trust mentioned in paragraph (b) of the definition of **eligible unit trust** in this subsection in the same way as that subsection applies in relation to a public unit trust.

clearing house has the same meaning as in section 128F.

company has the same meaning as in section 128F.

debenture:

- (a) in relation to the trustee of an eligible unit trust, includes debenture stock, bonds, promissory and other notes, bills of exchange and any other securities issued by the trustee, whether constituting a charge on the assets of the eligible unit trust or not; and
- (b) in relation to a company, has the same meaning as in section 128F.

eligible unit holder means:

- (a) the trustee of a public unit trust; or
- (b) the trustee (within the meaning of the *Income Tax Assessment Act 1997*) of a complying superannuation fund that has 50 or more members; or
- (c) the trustee of a pooled superannuation trust within the meaning of the *Income Tax Assessment Act 1997*; or
- (d) the trustee (within the meaning of the *Income Tax Assessment Act 1997*) of a complying approved deposit fund; or
- (e) a life insurance company within the meaning of the *Income Tax Assessment Act 1997*; or
- (f) a public company within the meaning of section 103A; or
- (g) the trustee of a unit trust in which all of the issued units are held by 2 or more entities that are eligible unit holders because of:
 - (i) the application of another paragraph of this definition (whether or not the same paragraph); or
 - (ii) a previous application of this paragraph; or
 - (iii) any combination of subparagraphs (i) and (ii).

eligible unit trust means:

- (a) a public unit trust; or
- (b) a unit trust in which all of the issued units are held by 2 or more eligible unit holders.

public unit trust has the same meaning as in section 102G.

registered scheme has the same meaning as in section 128F.

responsible entity has the same meaning as in section 128F.

syndicated loan has the same meaning as in section 128F.

syndicated loan facility has the same meaning as in section 128F.

tax law has the same meaning as in section 128F.

- (9) For the purposes of this section, a trust or fund of a kind mentioned in any of paragraphs (a) to (d) of the definition of ***eligible unit holder*** in subsection (8) in relation to a year of income is taken to

Part III Liability to taxation

Division 11A Dividends, interest and royalties paid to non-residents and to certain other persons

Section 128GB

be a trust or fund of that kind at all times during the year of income.

128GB Division not to apply to interest payments on offshore borrowings by offshore banking units

- (1) This section applies to:
 - (a) interest paid by a person in respect of an offshore borrowing of the person; or
 - (b) interest consisting of gold paid by a person in respect of an offshore gold borrowing of the person;if, when the borrowing took place, the person was an offshore banking unit (whether or not the person is still an offshore banking unit when the interest is paid).
- (2) Tax is not payable in accordance with this Division in respect of interest to which this section applies.

128NA Special tax payable in respect of certain securities and agreements

- (1) Where, but for subsection 128AA(2):
 - (a) the transferor of a qualifying security who is not liable to pay withholding tax in relation to the transfer of the qualifying security would be liable to pay withholding tax in relation to the transfer; or
 - (b) the transferor of a qualifying security who is liable to pay withholding tax in relation to the transfer of the qualifying security would be liable to pay additional withholding tax in relation to the transfer;then, for the purposes of this section, there shall be taken to be an avoided withholding tax amount in relation to the person who is the transferee of the qualifying security of an amount equal to the withholding tax or the additional withholding tax, as the case may be, that the person would be so liable to pay.
- (2) Where:
 - (a) an attributable agreement payment or attributable agreement payments were made by a person under a relevant agreement before the commencement of section 128AC; and

(b) the Commissioner is of the opinion that the payment or payments were made before the commencement of that section, or that the payment or payments were of a greater amount than they would otherwise have been, for the sole or dominant purpose of securing the result that the total amount (in this subsection referred to as the *actual withholding tax*) of withholding tax payable under that section in relation to all attributable agreement payments made under the relevant agreement after the commencement of that section would be less than the amount (in this subsection referred to as the *notional withholding tax*) that would otherwise have been payable;

then, for the purposes of this section, there shall be taken to be an avoided withholding tax amount in relation to the person of an amount equal to the amount by which the notional withholding tax exceeds the actual withholding tax.

- (3) For the purposes of subsection (2), expressions used in that subsection that are also used in section 128AC have the same respective meanings in that subsection as in that section.
- (4) Where there is an avoided withholding tax amount in relation to a person under this section, the person is liable to pay income tax, as imposed by the *Income Tax (Securities and Agreements) (Withholding Tax Recoupment) Act 1986*, in respect of the avoided withholding tax amount.

128NB Special tax payable in respect of certain dealings by current and former offshore banking units

- (1) Where a person who is or has been an offshore banking unit transfers to another person an amount of tax exempt loan money or tax exempt gold, other than by way of:
- (a) payment in carrying on an OB activity or what would be an OB activity if the person were an OBU; or
 - (b) repayment of an offshore borrowing or offshore gold borrowing;

the person is liable to pay income tax, as imposed by the *Income Tax (Offshore Banking Units) (Withholding Tax Recoupment) Act 1988*, on the lost withholding tax amount in respect of the transfer.

Part III Liability to taxation

Division 11A Dividends, interest and royalties paid to non-residents and to certain other persons

Section 128NB

- (2) For the purposes of subsection (1), the lost withholding tax amount in respect of the transfer is an amount ascertained in accordance with the formula:

$$\text{IWT rate} \times \text{PB rate} \times \text{PB term} \times \text{TA}$$

where:

IWT rate is the rate declared by the Parliament in respect of income to which subsection 128B(5) applies.

PB rate is the prevailing borrowing rate in relation to the person at the time of the transfer.

PB term is the number of years in the prevailing borrowing term in relation to the person at the time of the transfer; and

TA is the amount of tax exempt loan money or tax exempt gold transferred.

- (3) Tax under this section is due and payable by the person liable to pay the tax at the end of:
- (a) 21 days after the end of the month in which the transfer to which it relates takes place; or
 - (b) such further period as the Commissioner, in special circumstances, allows.

Application

- (3A) The Commissioner must not exercise his or her power under paragraph (3)(b) on or after 1 July 2000.

Note: For provisions about collection and recovery of tax on or after 1 July 2000, see Part 4-15 in Schedule 1 to the *Taxation Administration Act 1953*.

- (4) Section 128C (other than subsections (1) and (4AA)) applies, in addition to its application apart from this subsection, as if references in that section to withholding tax were references to tax payable under this section.
- (5) The Commissioner may remit the whole or part of an amount of tax payable under this section in relation to the transfer of an amount of tax exempt loan money or tax exempt gold to another person if:
- (a) the Commissioner is satisfied that:

- (i) the liability to pay the amount of tax arose because the person mistakenly believed, on reasonable grounds, that the other person was a non-resident or an offshore banking unit, that interest payable to the person in respect of the amount transferred would be an outgoing of a particular kind or that the amount transferred was not tax exempt loan money or tax exempt gold; and
 - (ii) the person had taken reasonable steps to ascertain the matter to which the mistaken belief related; or
- (b) the Commissioner is satisfied that there are special circumstances justifying the remission of the whole or part of the amount of tax.

128NBA Credits in respect of amounts assessed under Division 16E of Part III

When section applies

- (1) This section applies if:
- (a) the amount of any withholding tax that has become payable by a taxpayer on a payment of interest under, or in relation to the transfer of, a qualifying security has been paid; and
 - (b) there is a net Division 16E amount (see subsection (5)) in relation to the taxpayer in relation to:
 - (i) if the payment of interest is a payment in relation to the transfer of the qualifying security—the security; or
 - (ii) if the payment of interest is such a payment by virtue of the application of section 128AC in relation to an attributable agreement payment within the meaning of that section—the attributable agreement payment; or
 - (iii) in any other case—the payment of interest; and
 - (c) the amount of the withholding tax payable on the interest exceeds the amount that would have been payable on the interest if the interest were reduced by the net Division 16E amount.

Entitlement to apply for credit

- (2) The taxpayer may apply to the Commissioner for a credit of an amount equal to the excess.

Part III Liability to taxation

Division 11A Dividends, interest and royalties paid to non-residents and to certain other persons

Section 128P

Requirements for application

- (3) The application must be in the approved form.

Entitlement to credit

- (4) If the Commissioner is satisfied as to the matters mentioned in paragraphs (1)(a), (b) and (c), the applicant is entitled to a credit of an amount equal to the excess.

Net Division 16E amount

- (5) For the purposes of this section, if:
- (a) the sum of all amounts (if any) included in the assessable income of the taxpayer of any years of income in relation to the qualifying security, attributable agreement payment or payment of interest under section 159GQ;
exceeds:
 - (b) the sum of all amounts (if any) allowable as deductions from the assessable income of the taxpayer of any years of income in relation to the security or the payment, as the case may be, under that section;
- there is a net Division 16E amount equal to the excess.

128P Objections

If an applicant for a certificate under this Division is dissatisfied with a decision of the Commissioner:

- (a) in any case—to refuse to issue the certificate; or
- (b) in the case of a certificate under section 128AB—to specify a particular amount in the certificate;

the applicant may object against the decision in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

128Q Power of Commissioner to obtain information

Section 264 applies, for the purposes of this Division, as if the reference in paragraph (1)(b) of that section to a person's income or assessment were a reference to a matter relevant to the administration or operation of this Division.

128R Informal arrangements

For the purposes of this Division, the Commissioner may have regard to arrangements, understandings and practices not having legal force in the same manner as if they had legal force.

Division 11B—Equity investments in small-medium enterprises

128TG Summary of this Division

- (1) The following is a summary of this Division.
- (2) If, in connection with a money-lending business, a taxpayer is issued shares in a small-medium enterprise, any profit or loss the taxpayer makes when it disposes of certain shares that would be dealt with under section 6-5 or 8-1 of the *Income Tax Assessment Act 1997* is, to the extent that it relates to the period after the issue, instead dealt with under Parts 3-1 and 3-3 (about CGT) of the *Income Tax Assessment Act 1997*.
- (3) For this to apply, the taxpayer must, after the issue, hold shares representing at least 10% of the value of the small-medium enterprise.

128TH When Division applies

This Division applies if:

- (a) a taxpayer acquires a threshold interest in an SME (see section 128TJ); and
- (b) afterwards, the taxpayer disposes of ordinary shares, or an interest in ordinary shares, in the SME that were issued to the taxpayer (whether before, at the time of, or after acquiring the threshold interest); and
- (ba) the disposal takes place:
 - (i) in any case—in the course of the taxpayer carrying on a business of lending money or otherwise in connection with such a business of the taxpayer; or
 - (ii) if the taxpayer is a company that is a subsidiary of another company—while the one or more members of the direct ownership group of the taxpayer (see subsection 128TL(3)) are each carrying on a business of lending money; and
- (c) the shares are not trading stock of the taxpayer; and

- (d) apart from this section:
 - (i) any profit on the disposal would be included in the taxpayer's assessable income of a year of income under section 6-5 of the *Income Tax Assessment Act 1997*; and
 - (ii) any loss on the disposal would be allowable as a deduction from the taxpayer's assessable income of a year of income under section 8-1 of that Act.

128TI Consequences of Division applying

If this Division applies:

- (a) no profit on the disposal is included in the taxpayer's assessable income of any year of income under section 6-5 of the *Income Tax Assessment Act 1997*; and
- (b) no loss on the disposal is allowable as a deduction from the taxpayer's assessable income of any year of income under section 8-1 of that Act; and
- (c) the taxpayer is taken:
 - (i) to have disposed of the shares, at the time of acquiring the threshold interest in the SME, for a consideration equal to their market value at the time; and
 - (ii) to have re-acquired the shares immediately afterwards (for the purposes of this section, as if they had been issued to the taxpayer) for an amount equal to that consideration; and
- (d) any profit or loss on the disposal that is taken to have happened by subparagraph (c)(i) is included in the taxpayer's assessable income under section 6-5 of that Act, or is an allowable deduction under section 8-1 of that Act, in the year of income in which the shares are actually (disregarding that subparagraph) disposed of, and not in any other year of income.

Note: As a result of this section, the tax consequences of the actual disposal will be dealt with under section 6-5 or 8-1 of that Act in respect of any period of holding before the acquisition of the threshold interest and under Parts 3-1 and 3-3 (about CGT) of the *Income Tax Assessment Act 1997* in respect of any period after the acquisition of that interest.

128TJ Acquiring a threshold interest in an SME

A taxpayer *acquires a threshold interest in an SME* if:

- (a) ordinary shares in an SME (see section 128TK) are issued to the taxpayer; and
- (b) the shares are issued:
 - (i) in any case—in the course of the taxpayer carrying on a business of lending money or otherwise in connection with such a business of the taxpayer; or
 - (ii) if the taxpayer is a company that is a subsidiary of another company—while the one or more members of the direct ownership group of the taxpayer (see subsection 128TL(3)) are each carrying on a business of lending money; and
- (c) immediately after the shares, and any other ordinary shares forming part of the same issue, are issued to the taxpayer and any other persons, the percentage of the value of the SME represented by ordinary shares issued to the taxpayer (whether before or as part of the threshold share issue) is at least 10%; and
- (d) no previous issue of shares to the taxpayer had resulted in the taxpayer acquiring a threshold interest in the SME.

128TK SME or small-medium enterprise

- (1) An *SME* or *small-medium enterprise* is a company the total value of whose assets, as determined under this section, is no more than \$50 million.
- (2) The total value of the company's assets is the total value of its assets (both current and non-current) as shown in the last audited accounts prepared in relation to the company for the purposes of Division 4 of Part 3.6 of the *Corporations Act 2001* before the investment is made.
- (3) If:
 - (a) no such audited accounts have been prepared within the 12 months ending when the shares are issued; or
 - (b) the last such audited accounts prepared relate to a period that ended more than 18 months before the shares are issued;

then the company is not an **SME** unless:

- (c) before the shares are issued, the taxpayer gets an audited statement (see subsection (4)) showing the total value of the company's assets as at a time no more than 12 months before the shares are issued; and
 - (d) that value is no more than \$50 million.
- (4) In subsection (3), an **audited statement** is a statement audited by a person or firm:
- (a) who is appointed as the company's auditor in accordance with the *Corporations Act 2001*; or
 - (b) who is eligible to consent to being so appointed.

128TL Subsidiary and direct ownership group

- (1) A company (the **first company**) is a **subsidiary** of another company (the **second company**) if all the shares in the first company are beneficially owned by:
- (a) the second company; or
 - (b) a company that is, or 2 or more companies each of which is, a subsidiary of the second company; or
 - (c) the second company and a company that is, or 2 or more companies each of which is, a subsidiary of the second company.
- (2) For the purposes of subsection (1), if a company is a subsidiary of another company (including a company that is such a subsidiary because of a previous application or applications of this subsection), every company that is a subsidiary of the first-mentioned company is taken to be a subsidiary of that other company.
- (3) The one or more companies in whichever of paragraph (1)(a), (b) or (c) applies are the **direct ownership group** of the first company.

Division 11C—Payments in respect of mining operations on Aboriginal land

128U Interpretation

- (1) In this Division, unless the contrary intention appears:

Aboriginal means a person who is:

- (a) a member of the Aboriginal race of Australia; or
- (b) a member of the race to which Torres Strait Islanders belong.

Aboriginal land means any estate or interest in land that, under provisions of a law of the Commonwealth or of a State or Territory that relate to Aboriginals, is held for the use or benefit of Aboriginals.

Aboriginals Benefit Account means the Aboriginals Benefit Account continued in existence by section 62 of the *Aboriginal Land Rights (Northern Territory) Act 1976*.

distributing body means:

- (a) an Aboriginal Land Council established by or under the *Aboriginal Land Rights (Northern Territory) Act 1976*;
- (b) a corporation registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*; or
- (d) any other incorporated body that:
 - (i) is established by or under provisions of a law of the Commonwealth or of a State or Territory that relate to Aboriginals; and
 - (ii) is empowered or required (whether under that law or otherwise) to pay moneys received by the body to Aboriginals or to apply such moneys for the benefit of Aboriginals, either directly or indirectly.

mineral royalties means royalties payable in respect of the mining of minerals.

minerals means:

- (a) gold, silver, copper, tin and other metals;

- (b) coal, shale, petroleum (within the meaning of the *Income Tax Assessment Act 1997*) and valuable earths and substances;
 - (c) mineral substances;
 - (d) gems and precious stones; and
 - (e) ores and other substances containing minerals;
- whether suspended in water or not, and includes water.

miner's right means a miner's right or other authority issued or granted under a law of the Commonwealth or of a State or Territory relating to mining of minerals, being a right or authority that empowers the holders to take possession of, mine or occupy land or take any other action in relation to land for any purpose in connection with mining.

mining includes the obtaining of minerals from alluvial or surface deposits.

mining interests, in relation to any land, means any lease or other interest in the land (including a right to prospect or explore for minerals in or on the land) issued or granted under a law of the Commonwealth or of a State or Territory relating to mining of minerals.

mining payment means a payment made to a distributing body or made to, or applied for the benefit of, an Aboriginal or Aborigines, being:

- (a) a payment made on or after 1 July 1979 and before the day that the *Financial Management Legislation Amendment Act 1999* commenced, out of the Aborigines Benefit Reserve to the extent that the payment represents money paid into the Aborigines Benefit Reserve on or after 1 July 1979 in pursuance of subsection 63(2) or (4) of the *Aboriginal Land Rights (Northern Territory) Act 1976*; and
- (aa) a payment made on or after the day that the *Financial Management Legislation Amendment Act 1999* commenced by the Commonwealth in respect of a debit from the Aborigines Benefit Account to the extent that the payment represents an amount credited to the Aborigines Benefit Account in pursuance of subsection 63(1) or (4) of the *Aboriginal Land Rights (Northern Territory) Act 1976*; and

Section 128U

- (b) any payment made on or after 1 July 1979 that is of the kind referred to in subsection 44 (1) or (2) of the *Aboriginal Land Rights (Northern Territory) Act 1976*; and
 - (c) any other payment made on or after 1 July 1979 under provisions of a law of the Commonwealth or of a State or Territory that relate to Aboriginals or under an agreement made in accordance with such provisions, being a payment made:
 - (i) in consideration of the issuing, granting or renewal of a miner's right or mining interest in respect of Aboriginal land;
 - (ii) in consideration of the granting of permission to a person to enter or remain on Aboriginal land or to do any act on Aboriginal land in relation to prospecting or exploring for, or mining of, minerals; or
 - (iii) by way of payment of mineral royalties payable in respect of the mining of minerals on Aboriginal land or by way of payment of an amount determined by reference to an amount of mineral royalties received by the Commonwealth, a State or the Northern Territory in respect of the mining of minerals on Aboriginal land;but does not include a payment made by a distributing body.
- (2) In section 260, *income tax* or *tax* includes mining withholding tax.
- (3) For the purposes of this Division, a mining payment is taken to include any amount that has been, or purports to have been, withheld from the mining payment for the purposes of section 12-320 in Schedule 1 to the *Taxation Administration Act 1953*.
- (4) For the purposes of the succeeding provisions of this Division, where a mining payment (in this subsection referred to as the *relevant mining payment*) is made to, or applied for the benefit of, 2 or more persons, there shall be deemed to have been made to, or applied for the benefit of, each of those persons, a mining payment of an amount equal to so much of the relevant mining payment as bears to the relevant mining payment the same proportion as 1 bears to the number of persons to whom the relevant mining payment was made or for whose benefit the relevant mining payment was applied, as the case may be.

128V Liability to mining withholding tax

- (1) Where a mining payment is made to, or applied for the benefit of, a person, that person is liable to pay income tax on the amount of the mining payment at the rate declared by the Parliament for the purposes of this section.
- (2) Income tax payable by a person in accordance with this section is in addition to other income tax payable by that person upon amounts that are not mining payments.

128W Payment of mining withholding tax

- (1) Mining withholding tax is due and payable by a person liable to pay the tax at the expiration of 21 days after the end of the month in which the payment of the amount to which the tax relates was made, or of such further period as the Commissioner, in special circumstances, allows.
- (2) Mining withholding tax, when it becomes due and payable, is a debt due to the Queen on behalf of the Commonwealth and payable to the Commissioner.
- (3) Any unpaid mining withholding tax may be sued for and recovered in a court of competent jurisdiction by the Commissioner or a Deputy Commissioner suing in his official name.
- (4) The ascertainment of the amount of any mining withholding tax shall not be deemed to be an assessment within the meaning of any of the provisions of this Act.
- (5) The Commissioner may serve on a person liable to pay mining withholding tax, by post or otherwise, a notice in which is specified:
 - (a) the amount of any mining withholding tax that the Commissioner has ascertained is payable by that person; and
 - (b) the date on which that tax became due and payable.
- (6) The production of a notice served under subsection (5), or of a document under the hand of the Commissioner, a Second Commissioner or a Deputy Commissioner purporting to be a copy of such a notice, is evidence that the amount of mining withholding tax specified in the notice became due and payable by the person

Part III Liability to taxation

Division 11C Payments in respect of mining operations on Aboriginal land

Section 128X

on whom the notice was served on the date specified in the notice as the date on which that tax became due and payable.

Application

- (7) Subsections (2) and (3) do not apply in relation to any mining withholding tax that becomes due and payable on or after 1 July 2000.

Note: For provisions about collection and recovery of mining withholding tax and other amounts on or after 1 July 2000, see Part 4-15 in Schedule 1 to the *Taxation Administration Act 1953*.

128X Power of Commissioner to obtain information

Section 264 applies, for the purposes of this Division, as if the reference in paragraph (1)(b) of that section to a person's income or assessment were a reference to a matter relevant to the administration or operation of this Division.

Division 12—Oversea ships

129 Taxable income of ship-owner or charterer

Where a ship belonging to or chartered by a person whose principal place of business is out of Australia carries passengers, live-stock, mails or goods shipped in Australia, 5% of the amount paid or payable to him in respect of such carriage, whether that amount is payable in or out of Australia, shall be deemed to be taxable income derived by him in Australia.

130 Master or agent to make return

The master of the ship, or the agent or other representative in Australia of the owner or charterer, shall, when called upon by the Commissioner by notice in the *Gazette* or by any other notice to him, make a return of the amounts so paid or payable.

131 Determination by Commissioner

If such return is not made, or if the Commissioner is not satisfied with the return, he may determine the amount so paid or payable.

132 Assessment of tax

The master, agent or representative, as agent for the owner or charterer, may be assessed upon the taxable income and shall be liable to pay the tax assessed.

133 Master liable to pay

- (1) Where the assessment is made on the agent or representative, and the tax is not paid forthwith upon receipt of notice of the assessment, the master shall be liable to pay the tax.
- (2) This section shall not, so long as any tax for which the master becomes liable under this section remains unpaid, relieve any other person to whom the notice of assessment has been given in respect of that tax, from liability to pay the tax remaining unpaid.

134 Notice of assessment

Where any person is liable to pay tax under this Division, the Commissioner shall give notice to him of the assessment, and he shall forthwith pay the tax.

135 Clearance of ship

A collector or officer of customs for any State or Territory shall not grant a clearance to the ship until he is satisfied that any tax which has been or may be assessed under this Division has been paid, or that arrangements for its payment have been made to the satisfaction of the Commissioner.

135A Freights payable under certain agreements

Where goods are shipped in pursuance of an agreement of the kind specified in section 7C of the *Australian Industries Preservation Act 1906-1937*, the amount paid or payable to the owner or charterer of the ship in respect of the carriage of those goods shall, for the purposes of this Division, be deemed to be the amount remaining after deducting from the amount which would be payable according to the gross rate of freight specified in the agreement the amount of any rebate allowed in pursuance of the agreement or any payment, whenever made, by the owner or charterer, or out of funds provided by the owner or charterer, to any person or persons being the owner or shipper of the goods or the agent of either of them in respect of the shipment.

Division 13—International agreements and determination of source of certain income

136AA Interpretation

- (1) In this Division, unless the contrary intention appears:

acquire includes:

- (a) acquire by way of purchase, exchange, lease, hire or hire-purchase; and
- (b) obtain, gain or receive.

agreement means any agreement, arrangement, transaction, understanding or scheme, whether formal or informal, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings.

area covered by an international tax sharing treaty has the meaning given by subsection (4).

derive includes gain or produce.

expenditure includes loss or outgoing.

income includes any amount that is, or may be, included in assessable income or taken into account in calculating an amount that is, or may be, included in assessable income.

permanent establishment, in relation to a taxpayer, means:

- (a) a place that is a permanent establishment of the taxpayer by virtue of the definition of *permanent establishment* in section 6; or
- (b) a place at which any property of the taxpayer is manufactured or processed for the taxpayer, whether by the taxpayer or another person.

property includes:

- (a) a chose in action;
- (b) any estate, interest, right or power, whether at law or in equity, in or over property;
- (c) any right to receive income; and

Section 136AA

(d) services.

right to receive income means a right of a person to have income that will or may be derived (whether from property or otherwise) paid to, or applied or accumulated for the benefit of, the person.

services includes any rights, benefits, privileges or facilities and, without limiting the generality of the foregoing, includes the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under:

- (a) an agreement for or in relation to:
 - (i) the performance of work (including work of a professional nature);
 - (ii) the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction;
 - (iii) the conferring of rights, benefits or privileges for which consideration is payable in the form of a royalty, tribute, levy or similar exaction; or
 - (iv) the carriage, storage or packaging of any property or the doing of any other act in relation to property;
- (b) an agreement of insurance;
- (c) an agreement between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking; or
- (d) an agreement for or in relation to the lending of moneys.

supply includes:

- (a) supply by way of sale, exchange, lease, hire or hire-purchase; and
- (b) provide, grant or confer.

taxpayer includes a partnership and a taxpayer in the capacity of a trustee.

- (2) The definition of **taxpayer** in subsection (1) shall not be taken to affect in any way the interpretation of that expression where it is used in this Act other than this Division.
- (3) In this Division, unless the contrary intention appears:
 - (a) a reference to the supply or acquisition of property includes a reference to agreeing to supply or acquire property;

- (b) a reference to consideration includes a reference to property supplied or acquired as consideration and a reference to the amount of any such consideration is a reference to the value of the property;
 - (c) a reference to the arm's length consideration in respect of the supply of property is a reference to the consideration that might reasonably be expected to have been received or receivable as consideration in respect of the supply if the property had been supplied under an agreement between independent parties dealing at arm's length with each other in relation to the supply;
 - (d) a reference to the arm's length consideration in respect of the acquisition of property is a reference to the consideration that might reasonably be expected to have been given or agreed to be given in respect of the acquisition if the property had been acquired under an agreement between independent parties dealing at arm's length with each other in relation to the acquisition; and
 - (e) a reference to the supply or acquisition of property under an agreement includes a reference to the supply or acquisition of property in connection with an agreement.
- (4) If, under an international tax sharing treaty, Australia and another country share tax revenues from activities undertaken in an area identified by or under the agreement, that area is referred to in this Division as the *area covered by the international tax sharing treaty*.

136AB Operation of Division

- (1) Nothing in the provisions of this Act other than this Division shall be taken to limit the operation of this Division.
- (2) In the application of this Division, the operation of section 70-20 of the *Income Tax Assessment Act 1997* shall be disregarded.

136AC International agreements

For the purposes of this Division, an agreement is an international agreement if:

- (a) a non-resident supplied or acquired property under the agreement otherwise than in connection with a business

Section 136AD

- carried on in Australia by the non-resident at or through a permanent establishment of the non-resident in Australia; or
- (b) a resident carrying on a business outside Australia supplied or acquired property under the agreement, being property supplied or acquired in connection with that business; or
 - (c) a taxpayer:
 - (i) supplied or acquired property under the agreement in connection with a business; and
 - (ii) carries on that business in an area covered by an international tax sharing treaty.

136AD Arm's length consideration deemed to be received or given

(1) Where:

- (a) a taxpayer has supplied property under an international agreement;
- (b) the Commissioner, having regard to any connection between any 2 or more of the parties to the agreement or to any other relevant circumstances, is satisfied that the parties to the agreement, or any 2 or more of those parties, were not dealing at arm's length with each other in relation to the supply;
- (c) consideration was received or receivable by the taxpayer in respect of the supply but the amount of that consideration was less than the arm's length consideration in respect of the supply; and
- (d) the Commissioner determines that this subsection should apply in relation to the taxpayer in relation to the supply;

then, for all purposes of the application of this Act in relation to the taxpayer, consideration equal to the arm's length consideration in respect of the supply shall be deemed to be the consideration received or receivable by the taxpayer in respect of the supply.

(2) Where:

- (a) a taxpayer has supplied property under an international agreement;
- (b) the Commissioner, having regard to any connection between any 2 or more of the parties to the agreement or to any other relevant circumstances, is satisfied that the parties to the agreement, or any 2 or more of those parties, were not

dealing at arm's length with each other in relation to the supply;

(c) no consideration was received or receivable by the taxpayer in respect of the supply; and

(d) the Commissioner determines that this subsection should apply in relation to the taxpayer in relation to the supply;

then, for all purposes of the application of this Act in relation to the taxpayer, consideration equal to the arm's length consideration in respect of the supply shall be deemed to have been received and receivable by the taxpayer in respect of the supply at the time when the property was supplied or, as the case requires, any of the property was first supplied, or at such later time or times as the Commissioner considers appropriate.

(3) Where:

(a) a taxpayer has acquired property under an international agreement;

(b) the Commissioner, having regard to any connection between any 2 or more of the parties to the agreement or to any other relevant circumstances, is satisfied that the parties to the agreement, or any 2 or more of those parties, were not dealing at arm's length with each other in relation to the acquisition;

(c) the taxpayer gave or agreed to give consideration in respect of the acquisition and the amount of that consideration exceeded the arm's length consideration in respect of the acquisition; and

(d) the Commissioner determines that this subsection should apply in relation to the taxpayer in relation to the acquisition;

then, for all purposes of the application of this Act in relation to the taxpayer, consideration equal to the arm's length consideration in respect of the acquisition shall be deemed to be the consideration given or agreed to be given by the taxpayer in respect of the acquisition.

(4) For the purposes of this section, where, for any reason (including an insufficiency of information available to the Commissioner), it is not possible or not practicable for the Commissioner to ascertain the arm's length consideration in respect of the supply or acquisition of property, the arm's length consideration in respect of

Section 136AE

the supply or acquisition shall be deemed to be such amount as the Commissioner determines.

136AE Determination of source of income etc.

(1) Where:

- (a) by the application of section 136AD in relation to a taxpayer other than a partnership or trustee, the arm's length consideration in respect of the supply or acquisition of property by the taxpayer is deemed to have been received or receivable or received and receivable, or to have been given or agreed to be given, as the case may be; and
- (b) a question arises whether, and if so, as to the extent to which:
 - (i) any income, being that consideration, is derived by the taxpayer from sources in Australia or sources out of Australia;
 - (ii) any income in the calculation of which that consideration is taken into account is derived by the taxpayer from sources in Australia or sources out of Australia; or
 - (iii) that consideration is expenditure incurred by the taxpayer in deriving income from sources in Australia or sources out of Australia;

the income or expenditure shall be deemed, for all purposes of this Act, to have been derived or to have been incurred in deriving income, as the case may be, from such source, or from such sources and in such proportions, as the Commissioner determines.

(2) Where:

- (a) by the application of section 136AD in relation to a taxpayer being a partnership, the arm's length consideration in respect of the supply or acquisition of property by the taxpayer is deemed to have been received or receivable or received and receivable, or to have been given or agreed to be given, as the case may be; and
- (b) in determining the net income, exempt income or partnership loss of the taxpayer or the extent to which the individual interest of a partner in the net income, exempt income or partnership loss of the taxpayer is attributable to sources in Australia, a question arises whether, and if so, as to the extent to which:

- (i) any income, being that consideration, is derived by the taxpayer from sources in Australia or sources out of Australia;
- (ii) any income in the calculation of which that consideration is taken into account is derived by the taxpayer from sources in Australia or sources out of Australia; or
- (iii) that consideration is expenditure incurred by the taxpayer in deriving income from sources in Australia or sources out of Australia;

the income or expenditure shall be deemed, for all purposes of this Act, to have been derived or to have been incurred in deriving income, as the case may be, from such source, or from such sources and in such proportions, as the Commissioner determines.

(3) Where:

- (a) by the application of section 136AD in relation to a taxpayer being the trustee of a trust estate, the arm's length consideration in respect of the supply or acquisition of property by the taxpayer is deemed to have been received or receivable or received and receivable, or to have been given or agreed to be given, as the case may be; and
- (b) in determining the net income or exempt income of the trust estate or the extent to which the share of a beneficiary of the net income or exempt income of the trust estate is attributable to sources in Australia, a question arises whether, and if so, as to the extent to which:
 - (i) any income, being that consideration, is derived by the taxpayer from sources in Australia or sources out of Australia;
 - (ii) any income in the calculation of which that consideration is taken into account is derived by the taxpayer from sources in Australia or sources out of Australia; or
 - (iii) that consideration is expenditure incurred by the taxpayer in deriving income from sources in Australia or sources out of Australia;

the income or expenditure shall be deemed, for all purposes of this Act, to have been derived or to have been incurred in deriving income, as the case may be, from such source, or from such sources and in such proportions, as the Commissioner determines.

Section 136AE

- (4) Where:
- (a) a taxpayer (other than a partnership or trustee):
 - (i) is a resident and carries on a business in a country other than Australia at or through a permanent establishment of the taxpayer in that other country; or
 - (ii) is a resident and carries on a business in an area covered by an international tax sharing treaty; or
 - (iii) is a non-resident and carries on a business in Australia at or through a permanent establishment of the taxpayer in Australia; or
 - (iv) is a non-resident and carries on a business in an area covered by an international tax sharing treaty and also carries on a business somewhere else in Australia at or through a permanent establishment of the taxpayer in Australia; and
 - (b) a question arises whether, and if so, as to the extent to which:
 - (i) any income derived by the taxpayer is derived from sources in Australia or sources out of Australia; or
 - (ii) any expenditure incurred by the taxpayer is incurred in deriving income from sources in Australia or sources out of Australia;
 - (c) none of the preceding provisions of this section applies in relation to the determination of that question;
 - (d) that question, if determined on the basis of the return furnished by the taxpayer, would have a tax result more favourable to the taxpayer than the result that would occur if that question were determined in accordance with this subsection; and
 - (e) in the Commissioner's opinion, the derivation of the income or the incurring of the expenditure is attributable, in whole or in part, to activities carried on by the taxpayer:
 - (i) at or through the permanent establishment that is referred to in subparagraph (a)(i) or (iii); or
 - (ii) in the area covered by the international tax sharing treaty that is referred to in paragraph (a)(ii) or (iv);
- the income or expenditure shall be deemed, for all purposes of this Act, to have been derived or to have been incurred in deriving income, as the case may be, from such source, or from such sources and in such proportions, as the Commissioner determines.

- (5) Where:
- (a) a taxpayer:
 - (i) is a partnership and carries on a business in a country other than Australia at or through a permanent establishment of the taxpayer in that other country; or
 - (ii) is a partnership and carries on a business in an area covered by an international tax sharing treaty; or
 - (iii) carries on a business in Australia at or through a permanent establishment of the taxpayer in Australia and is a partnership in which any of the partners is a non-resident; or
 - (iv) carries on a business in an area covered by an international tax sharing treaty and also carries on a business somewhere else in Australia at or through a permanent establishment of the taxpayer in Australia and is a partnership in which any of the partners is a non-resident; and
 - (b) in determining the net income, exempt income or partnership loss of the taxpayer or the extent to which the individual interest of a partner in the net income, exempt income or partnership loss of the taxpayer is attributable to sources in Australia, a question arises whether, and if so, as to the extent to which:
 - (i) any income derived by the taxpayer is derived from sources in Australia or sources out of Australia; or
 - (ii) any expenditure incurred by the taxpayer is incurred in deriving income from sources in Australia or sources out of Australia;
 - (c) none of the preceding provisions of this section applies in relation to the determination of that question;
 - (d) that question, if determined on the basis of the return furnished by the taxpayer, would have a tax result more favourable to a taxpayer than the result that would occur if that question were determined in accordance with this subsection; and
 - (e) in the Commissioner's opinion, the derivation of the income or the incurring of the expenditure is attributable, in whole or in part, to activities carried on by the taxpayer:
 - (i) at or through the permanent establishment that is referred to in subparagraph (a)(i) or (iii); or
-

Section 136AE

- (ii) in the area covered by the international tax sharing treaty that is referred to in paragraph (a)(ii) or (iv); the income or expenditure shall be deemed, for all purposes of this Act, to have been derived or to have been incurred in deriving income, as the case may be, from such source, or from such sources and in such proportions, as the Commissioner determines.
- (6) Where:
- (a) a taxpayer:
- (i) is the trustee of a trust estate and carries on a business in a country other than Australia at or through a permanent establishment of the taxpayer in that other country; or
 - (ii) is the trustee of a trust estate and carries on a business in an area covered by an international tax sharing treaty; or
 - (iii) carries on a business in Australia at or through a permanent establishment of the taxpayer in Australia and is the trustee of a trust estate of which any of the beneficiaries is a non-resident; or
 - (iv) carries on a business in an area covered by an international tax sharing treaty and also carries on a business somewhere else in Australia at or through a permanent establishment of the taxpayer in Australia and is the trustee of a trust estate of which any of the beneficiaries is a non-resident; and
- (b) in determining the net income or exempt income of the trust estate or the extent to which the share of a beneficiary of the net income or exempt income of the trust estate is attributable to sources in Australia, a question arises whether, and if so, as to the extent to which:
- (i) any income derived by the taxpayer is derived from sources in Australia or sources out of Australia; or
 - (ii) any expenditure incurred by the taxpayer is incurred in deriving income from sources in Australia or sources out of Australia;
- (c) none of the preceding provisions of this section applies in relation to the determination of that question;
- (d) that question, if determined on the basis of the return furnished by the taxpayer, would have a tax result more favourable to a taxpayer than the result that would occur if that question were determined in accordance with this subsection; and
-

- (e) in the Commissioner's opinion, the derivation of the income or the incurring of the expenditure is attributable, in whole or in part, to activities carried on by the taxpayer:
- (i) at or through the permanent establishment that is referred to in subparagraph (a)(i) or (iii); or
 - (ii) in the area covered by the international tax sharing treaty that is referred to in paragraph (a)(ii) or (iv);
- the income or expenditure shall be deemed, for all purposes of this Act, to have been derived or to have been incurred in deriving income, as the case may be, from such source, or such sources and in such proportions, as the Commissioner determines.
- (7) In the application of the preceding provisions of this section in determining the source or sources of any income derived by a taxpayer or the extent to which expenditure incurred by the taxpayer was incurred in deriving income from a particular source or sources, the Commissioner shall have regard to:
- (a) the nature and extent of any relevant business carried on by the taxpayer and the place or places at which the business is carried on;
 - (b) if any relevant business carried on by the taxpayer is carried on at or through a permanent establishment—the circumstances that would have, or might reasonably be expected to have, existed if the permanent establishment were a distinct and separate entity dealing at arm's length with the taxpayer and other persons; and
 - (c) such other matters as the Commissioner considers relevant.
- (8) A reference in this section to expenditure incurred by a taxpayer in deriving income includes a reference to expenditure incurred by the taxpayer in carrying on a business for the purpose of deriving income.
- (8A) In this section:
- (a) a reference to income being derived from a source in Australia is to be read as including a separate reference to income being derived from a source in an area in Australia that is covered by an international tax sharing treaty; and
 - (b) a reference to expenditure being incurred in deriving income from a source in Australia is to be read as including a separate reference to expenditure being incurred in deriving

Section 136AF

income from a source in an area in Australia that is covered by an international tax sharing treaty.

Note: This means that the following are the 3 different kinds of sources referred to in this section:

- (a) a source in Australia (but not in an area covered by an international tax sharing treaty);
- (b) a source in an area in Australia that is covered by an international tax sharing treaty;
- (c) a source out of Australia.

136AF Consequential adjustments to assessable income and allowable deductions

(1) Where, by reason of the application of section 136AD in relation to the supply or acquisition of property by a taxpayer, an amount is included in the assessable income of the taxpayer of a year of income or a deduction is not allowable or is not, in part, allowable, to the taxpayer in respect of a year of income, the Commissioner may, in relation to any taxpayer (in this subsection referred to as the *relevant taxpayer*):

(a) if, in the opinion of the Commissioner:

- (i) there has been included, or would but for this subsection be included, in the assessable income of the relevant taxpayer of a year of income an amount that would not have been included or would not be included, as the case may be, in the assessable income of the relevant taxpayer of that year of income if the property had been supplied or acquired, as the case may be, under an agreement between independent parties dealing at arm's length with each other in relation to the supply or acquisition; and
- (ii) it is fair and reasonable that that amount or a part of that amount should not be included in the assessable income of the relevant taxpayer of that year of income;

determine that that amount or that part of that amount, as the case may be, should not have been included or shall not be included, as the case may be, in the assessable income of the relevant taxpayer of that year of income; and

(b) if, in the opinion of the Commissioner:

- (i) an amount would have been allowed or would be allowable to the relevant taxpayer as a deduction in

relation to a year of income if the property had been supplied or acquired, as the case may be, under an agreement between independent parties dealing at arm's length with each other in relation to the supply or acquisition, being an amount that was not allowed or would not, but for this subsection, be allowable, as the case may be, as a deduction to the relevant taxpayer in relation to that year of income; and

- (ii) it is fair and reasonable that that amount or a part of that amount should be allowable as a deduction to the relevant taxpayer in relation to that year of income;

determine that that amount or that part of that amount, as the case may be, should have been allowed or shall be allowable, as the case may be, as a deduction to the relevant taxpayer in relation to that year of income;

and the Commissioner shall take such action as he considers necessary to give effect to any such determination.

- (1A) Subsection (1) also has the effect that it would have if the reference in that subsection to the application of section 136AD in relation to a taxpayer included references to:

- (a) the application of section 136AD in accordance with section 102AAZA for the purpose of calculating the attributable income of a trust estate; and
(b) the application of section 136AD in accordance with section 400 for the purpose of calculating the attributable income of a CFC.

- (2) Where the Commissioner makes a determination under subsection (1) by virtue of which an amount is allowed as a deduction to a taxpayer in relation to a year of income, that amount shall be deemed to be so allowed as a deduction by virtue of such provision of this Act as the Commissioner determines.

- (3) Where:

- (a) by reason of the application of section 136AD in relation to the supply or acquisition of property by a taxpayer, an amount is included in the assessable income of the taxpayer of a year of income or a deduction is not allowable or is not, in part, allowable, to the taxpayer in respect of a year of income;

Section 136AF

- (b) in the opinion of the Commissioner, an amount of withholding tax has become payable and has been paid in respect of interest or royalties paid to a taxpayer (in this subsection referred to as the *relevant taxpayer*), being withholding tax that would not have become payable if the property had been supplied or acquired by the first-mentioned taxpayer under an agreement between independent parties dealing at arm's length with each other in relation to the supply or acquisition; and
 - (c) in the opinion of the Commissioner, it is fair and reasonable that that amount of withholding tax or part of that amount of withholding tax should not have become payable by the relevant taxpayer;
the Commissioner may determine that that amount of withholding tax or that part of that amount of withholding tax, as the case may be, should not have become payable by the relevant taxpayer and the Commissioner shall take such action as he considers necessary to give effect to any such determination.
- (4) Where, at any time, a taxpayer considers that the Commissioner ought to make a determination under subsection (1) or (3) in relation to the taxpayer, the taxpayer may post to or lodge with the Commissioner a request in writing for the making by the Commissioner of a determination under the subsection concerned.
 - (5) The Commissioner shall consider the request and serve on the taxpayer, by post or otherwise, a written notice of his decision on the request.
 - (6) If the taxpayer is dissatisfied with the Commissioner's decision on the request, the taxpayer may object against it in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

Division 13A—Employee share schemes

Subdivision A—Key principle and overview of Division

139 The key principle

This Division provides for the taxation treatment of shares and rights acquired under employee share schemes.

Any discount from the market price of the shares or rights is assessable. However, 2 alternative concessions are available for shares or rights provided under schemes that satisfy certain requirements.

The first concession is that the discount will not be included in the employee's assessable income until a later year of income.

The second concession is that the employee may make an election that reduces the amount assessed. Additional requirements must be satisfied to obtain this concession.

139A Overview of Division

The following table summarises the contents of this Division:

OVERVIEW	
Subdivision	Coverage
A	Key principle and overview
B	The basic requirement that the discount be included in assessable income
C	Key concepts: <i>employee share scheme, discount, cessation time, qualifying shares, qualifying rights and exemption conditions</i>
D	Special provisions
DA	Takeovers and restructures
DB	Stapled securities
E	Elections

Section 139B

OVERVIEW

Subdivision	Coverage
F	Special provisions about the market value of a share or right
G	Definitions (including a list of all terms defined in the Division)

Subdivision B—Inclusion of discount in assessable income

139B Discount to be included in assessable income

- (1) If a taxpayer has acquired a share or right under an employee share scheme, the assessable income of the taxpayer includes the discount given in relation to the share or right.

Note: *Employee share scheme* is defined in section 139C.

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

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

When the discount is to be included

- (2) Unless subsection (2A) or (3) applies, the discount is included in the taxpayer's assessable income of the year of income in which the share or right is acquired.
- (2A) Unless subsection (3) applies, if the taxpayer:
- (a) acquired the share or right while the taxpayer was not an employee; and
 - (b) subsequently became an employee while holding the share or right;

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

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

- (3) If the share or right is a qualifying share or right and the taxpayer has not made an election under section 139E covering the share or right, the discount is included in the taxpayer's assessable income of the year of income in which the cessation time (see sections 139CA and 139CB) occurs.

139BA Reduction of amounts included—elections

- (1) This section applies if a taxpayer has made an election under section 139E for a year of income and the exemption conditions (see section 139CE) are satisfied in relation to shares or rights covered by the election. It applies to the total amount otherwise included in a taxpayer's assessable income for the year of income under section 139B in respect of those shares or rights.
- (2) The total amount is only included in the assessable income to the extent that it is greater than \$1,000.

Subdivision C—Key concepts: employee share scheme, discount, cessation time, qualifying shares and rights and exemption conditions

139C Employee share schemes

- (1) A taxpayer acquires a share or right under an *employee share scheme* if the share or right is acquired by the taxpayer in respect of, or for or in relation directly or indirectly to, any employment of the taxpayer or an associate of the taxpayer.
- (2) A taxpayer acquires a share or right under an employee share scheme if the share or right is acquired by the taxpayer in respect of, or for or in relation directly or indirectly to, any services provided by the taxpayer or an associate of the taxpayer.
- (3) The taxpayer does not acquire a share or right under an employee share scheme if the consideration for the acquisition is equal to, or more than, the market value of the share or right at the time that it is acquired.

Section 139CA

- (4) The taxpayer does not (except for the purposes of Subdivision DA) acquire a share under an employee share scheme if the taxpayer acquires the share as the result of exercising a right that the taxpayer acquired under an employee share scheme.
- (5) The taxpayer does not acquire a share or right under an employee share scheme if the taxpayer is the trustee of a trust whose sole activities are obtaining shares, or rights to acquire shares, and providing those shares or rights to employees of a company or to associates of those employees.

139CA Cessation time—shares

- (1) The *cessation time* for a share is the time when the taxpayer acquires the share if:
 - (a) there is no restriction preventing the taxpayer from disposing of the share before a particular time; and
 - (b) the scheme under which the share was acquired did not have any conditions that could result in the taxpayer forfeiting ownership of the share.
- (2) If subsection (1) does not apply, the *cessation time* for a share is the earliest of the following:
 - (a) the time when the taxpayer disposes of the share;
 - (b) subject to subsection (4), the later of:
 - (i) the time when any restriction preventing the taxpayer from disposing of the share ceases to have effect; and
 - (ii) the time when any condition that could result in the taxpayer forfeiting ownership of shares ceases to have effect;
 - (c) the time when the employment in respect of which the share was acquired ceases;
 - (d) the end of the 10 year period starting when the taxpayer acquired the share.
- (3) For the purposes of subsection (2), a taxpayer only ceases the employment in respect of which the share was acquired when the taxpayer is no longer employed by any of the following:
 - (a) the employer of the taxpayer in that employment;
 - (b) a holding company of the employer;

- (c) a subsidiary of the employer or of a holding company of the employer.
- (4) Paragraph (2)(b) does not apply in relation to a share that, because of section 139DQ, is treated, for the purposes of this Division, as if it were a continuation of a share acquired under an employee share scheme.

Note: Subdivision DA can affect whether the taxpayer is treated as having disposed of a share or ceased employment.

139CB Cessation time—rights

- (1) The *cessation time* for a right is the earliest of the following:
 - (a) the time when the taxpayer disposes of the right (other than by exercising it);
 - (b) the time when the employment in respect of which the right was acquired ceases;
 - (c) subject to subsection (3), if the right is exercised and there is a restriction preventing the taxpayer from disposing of the share acquired as a result of the exercise of the right or a condition that could result in the taxpayer forfeiting ownership of the share—the time when the last such restriction or condition ceases to have effect;
 - (d) subject to subsection (3), if the right is exercised and there is no such restriction or condition—the time when the right is exercised;
 - (da) if subsection (3) applies—the time when the taxpayer disposes of the share referred to in paragraph (3)(b);
 - (e) the end of the 10 year period starting when the taxpayer acquired the right.
- (2) For the purposes of subsection (1), a taxpayer only ceases the employment in respect of which the right was acquired when the taxpayer is no longer employed by any of the following:
 - (a) the employer of the taxpayer in that employment;
 - (b) a holding company of the employer;
 - (c) a subsidiary of the employer or of a holding company of the employer.

Note: Subdivision DA can affect whether the taxpayer is treated as having disposed of a right or ceased employment.

Section 139CC

- (3) Paragraphs (1)(c) and (d) do not apply in relation to a right if:
- (a) a share has been or is acquired as a result of the exercise of the right; and
 - (b) because of section 139DQ, another share is treated, for the purposes of this Division, as if it were a continuation of that share.

139CC Calculation of discount

- (1) This section sets out how to calculate the *discount* given in relation to a share or right.

Case 1—discount covered by subsection 139B(2) or (2A)

- (2) If subsection 139B(2) or (2A) applies to the discount, the discount is the market value of the share or right at the time when it was acquired by the taxpayer less any consideration paid or given by the taxpayer as consideration for the acquisition of the share or right.

Case 2—discount covered by subsection 139B(3)—share or right disposed of at arm's length within 30 days

- (3) If subsection 139B(3) applies to the discount, and the share or right (or any share acquired as a result of the exercise of the right) is disposed of by the taxpayer in an arm's length transaction at the cessation time or within 30 days after the cessation time, the discount is:
- (a) the amount or value of any consideration received by the taxpayer for the disposal;
- reduced by:
- (b) the amount or value of any consideration paid or given by the taxpayer as consideration for the acquisition of the share or right; and
 - (c) for a right that has been exercised—the amount or value of any consideration paid or given to exercise the right.

Case 3—discount covered by subsection 139B(3)—share or right not disposed of at arm's length within 30 days

- (4) If subsection 139B(3) applies to the discount, and the share or right (or any share acquired as a result of the exercise of the right) is not

disposed of by the taxpayer in an arm's length transaction at the cessation time or within 30 days after the cessation time, the discount is:

- (a) the market value of the share or right (or the share acquired as a result of the exercise of the right) at the cessation time; reduced by:
- (b) the amount of any consideration paid or given by the taxpayer as consideration for the acquisition of the share or right; and
- (c) for a right that has been exercised—the amount of any consideration paid or given by the taxpayer to exercise the right.

Note: Section 139DS can affect the amount of consideration that the taxpayer is treated as having paid or given.

139CD Meaning of *qualifying shares* and *qualifying rights*

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

Note 1: Section 139DF excludes certain shares from being qualifying shares.

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

- (2) The first condition is that the share or right is acquired by a taxpayer under an employee share scheme.
- (3) The second condition is that the company is the employer of the taxpayer or a holding company of the employer of the taxpayer.
- (4) The third condition is that all the shares available for acquisition under the scheme are ordinary shares and all the rights available

Section 139CDA

for acquisition under the scheme are rights to acquire ordinary shares.

- (5) The fourth condition is that, at the time the share was acquired, at least 75% of the permanent employees of the employer were, or at some earlier time had been, entitled to acquire:
 - (a) shares or rights under the scheme; or
 - (b) shares or rights in the employer, or a holding company of the employer, under another employee share scheme.
- (6) The fifth condition is that, immediately after the acquisition of the share or right, the taxpayer does not hold a legal or beneficial interest in more than 5% of the shares in the company.
- (7) The sixth condition is that, immediately after the acquisition of the share or right, the taxpayer is not in a position to cast, or control the casting of, more than 5% of the maximum number of votes that might be cast at a general meeting of the company.
- (8) The Commissioner may determine that the fourth condition (see subsection (5)) is taken to have been satisfied in relation to a share if the Commissioner considers that the employer has done everything reasonably practicable to ensure that the condition was satisfied.

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

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

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

139CE Exemption conditions

- (1) This section sets out the 3 exemption conditions that, subject to subsection (3A), must be satisfied for section 139BA to apply to a share or right acquired under an employee share scheme.

- (2) The first condition is that the scheme did not have any conditions that could result in any recipient forfeiting ownership of shares or rights acquired under it.
- (3) The second condition is that the scheme was operated so that no recipient would be permitted to dispose of a share or right (the *scheme share* or *scheme right*) acquired under it, or of a share acquired as a result of a scheme right, before the earlier of the following times:
 - (a) the end of the period of 3 years after the time of the acquisition of the scheme share or scheme right;
 - (b) the time when the taxpayer ceased, or first ceased, to be employed by the employer.
- (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.
- (4) The third condition is that both the employee share scheme and any scheme for the provision of financial assistance in respect of acquisitions of shares or rights under the employee share scheme are operated on a non-discriminatory basis (see section 139GF).
- (5) For the purposes of subsection (3), a taxpayer only ceases the employment in respect of which the share or right was acquired when the taxpayer is no longer employed by any of the following:
 - (a) the employer of the taxpayer in that employment;
 - (b) a holding company of the employer;
 - (c) a subsidiary of the employer or of a holding company of the employer.

Subdivision D—Special provisions

139D Discount assessable to associate if share acquired by taxpayer in respect of associate's employment

- (1) This section applies if:
 - (a) a taxpayer has acquired a share or right under an employee share scheme; and

Section 139DA

- (b) the share or right was acquired by the taxpayer in respect of, or for or in relation directly or indirectly to, any employment of, or services rendered by, an associate of the taxpayer; and
 - (c) apart from this section, an amount:
 - (i) would be included in respect of the acquisition in the assessable income of the taxpayer of a year of income under this Division; or
 - (ii) would have been so included if the taxpayer had been a resident at the time of the acquisition.
- (2) Subject to subsection (3), if this section applies, the amount is included in the associate's assessable income of the year of income instead of in the taxpayer's assessable income.
- (3) If:
- (a) this section applies; and
 - (b) the taxpayer acquired the share or right while the associate was not an employee; and
 - (c) the associate subsequently became an employee while the taxpayer was holding the share or right;
- the amount is included in the associate's assessable income in the year of income in which, after the acquisition, the associate first becomes an employee in respect of employment or services that affect the acquisition or holding of the share or right.

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

139DA Acquisition of legal interest in shares or rights—certain discounts not assessable

- If:
- (a) a taxpayer has acquired the legal interest in a share or right; and
 - (b) the taxpayer, or an associate of the taxpayer, is required to include an amount under section 139B in the taxpayer's or the associate's assessable income as a result of the acquisition; and
 - (c) the taxpayer, or the associate, is, or would apart from section 139BA be, required to include an amount under

section 139B in his or her assessable income as a result of the acquisition of the beneficial interest in the share or right; the taxpayer, or the associate, is not required to include the amount mentioned in paragraph (b).

139DB No deduction until share or right acquired

If, at a particular time, a person (the *provider*) provides another person with money or other property:

- (a) under an arrangement; and
- (b) for the purpose of enabling another person (the *ultimate beneficiary*) to acquire, directly or indirectly, a share or right, under an employee share scheme;

then, for the purpose of determining when any deduction is allowable to the provider in respect of provision of the money or other property, the provider is taken to have provided it not before the time when the ultimate beneficiary acquires the share or right.

Note: The amount included in assessable income for the acquisition of an interest in a share is the same as for the acquisition of the share—see Subdivision F and section 139G.

139DC Deduction for provider of certain qualifying shares or rights

- (1) A taxpayer is entitled to an allowable deduction in the taxpayer's assessment in respect of income of a year of income (the *benefit year*) if the taxpayer provides one or more qualifying shares or qualifying rights to another person in the benefit year that satisfy the following conditions:
 - (a) the exemption conditions (see section 139CE);
 - (b) the condition that no amount has been allowed, is allowable, or will be allowable, as a deduction in the assessment of the taxpayer in respect of income of any year of income in respect of expenditure incurred in providing the share or right.
- (2) The amount of the deduction in respect of the shares or rights provided by the taxpayer to the person in the benefit year is the lesser of:
 - (a) \$1,000; and
 - (b) the sum of the market values, at the time that the share or right is provided, of each qualifying share or qualifying right

Section 139DD

that satisfies the conditions in subsection (1) reduced by the sum of any amounts paid by the person as consideration for those shares or rights.

Note: Only one deduction is allowable under this section in respect of each person to whom the taxpayer provided shares or rights in a year.

139DD No benefit where rights lost

- (1) For the purposes of this Division, a right to acquire a share in a company is never acquired by a taxpayer if the following 2 requirements are satisfied.
- (2) The first requirement is that the taxpayer loses the right without having exercised it.
- (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.
- (3) The second requirement is that the company was, at the time the right was acquired, the employer of the taxpayer or a holding company of the employer of the taxpayer.
- (3A) To avoid doubt, the company does not cease to be the employer of the taxpayer or a holding company of the employer of the taxpayer if, because of section 139DQ, the taxpayer's employment by another company is treated, for the purposes of this Division, as if it were a continuation of that employment.
- (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.
- (4) Section 170 does not prevent the amendment of an assessment at any time for the purpose of giving effect to this section.

139DE Amount not assessable under other provisions

Section 21A of this Act and section 15-2 of the *Income Tax Assessment Act 1997* do not apply to:

- (a) a share or right that a taxpayer acquires under an employee share scheme; or
- (b) any share acquired by a taxpayer as a result of a right covered by paragraph (a).

139DF Anti-avoidance—certain shares and rights not qualifying shares and qualifying rights

- (1) Despite any other provision of this Part, a share in a company, or a right to acquire a share in a company, acquired by a taxpayer is not a qualifying share or right if:
 - (a) the predominant business of the company (whether or not stated in its constituent documents) is the acquisition, sale or holding of shares, securities or other investments (whether directly or indirectly through one or more companies, partnerships or trusts); and
 - (b) the taxpayer is employed by the company and is also employed by another company; and
 - (c) the company and the other company are members of the same company group.
- (2) A company is a *member of the same company group* as another company if one of the companies is a holding company of the other or if another company is a holding company of both companies.

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

- (1) If:
 - (a) an amount has been included in a taxpayer's assessable income of a particular year of income; and
 - (b) that amount is reduced or increased because of a change in the extent (if any) of the application of section 23AF or 23AG or subsection 139B(1A) in relation to the amount during a subsequent year of income;section 170 does not prevent the amendment of an assessment, for the purpose of giving effect to the reduction or increase, at any

Section 139DP

time during the period of 4 years starting immediately after the income year during which the period of employment or service relating to the acquisition of the share or right in question ends.

- (2) In paragraph (1)(b):
- (a) the reference to an amount being reduced includes a reference to the amount being reduced to a nil amount; and
 - (b) the reference to an amount being increased includes a reference to the amount being increased from a nil amount.

Subdivision DA—Takeovers and restructures

139DP Object of this Subdivision

The object of this Subdivision is to allow this Division to continue to apply, in appropriate circumstances, to 100% takeovers or restructures of companies that have employee share schemes.

139DQ The effect of 100% takeovers and restructures on employee share schemes

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 an employee share scheme; or
 - (ii) rights 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 an employee share scheme; 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 section 139DR are met, the matching shares or rights are treated, for the purposes of this Division and Subdivision 768-R of the *Income Tax Assessment Act 1997*, 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 shares or rights in the old company that the taxpayer had acquired under an employee share scheme; but
 - (b) is not a matching share or right to which subsection (1) applies;

the taxpayer is treated, for the purposes of this Division and Subdivision 768-R of the *Income Tax Assessment Act 1997*, as having disposed of shares, or disposed of rights (other than by exercising them), that the taxpayer held, under an employee share scheme, in the old company immediately before the takeover or restructure.

Treating new employment as continuation of existing employment

- (3) If subsection (1) applies, any employment of the taxpayer in:
- (a) the new company; or
 - (b) a holding company of the new company; or
 - (c) a subsidiary of the new company or of a holding company of the new company;

is treated, for the purposes of this Division and Subdivision 768-R of the *Income Tax Assessment Act 1997*, as a continuation of the employment in respect of which he or she acquired the shares or rights in the old company or in a subsidiary of the old company.

139DR Conditions for the continuation of shares or rights

- (1) The first condition is that, immediately before the takeover or restructure, the taxpayer held shares or rights in the old company under an employee share scheme.
- (2) The second condition is that, 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, an employee of:

Section 139DS

- (a) the new company; or
 - (b) a holding company of the new company; or
 - (c) a subsidiary of the new company or of a holding company of the new company.
- (3) The third 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 fourth condition is that, at the time the taxpayer acquires the matching shares or rights, the taxpayer does not hold a legal or beneficial interest in more than 5% of the shares of the new company.
- (6) The fifth condition is that, at that time, the taxpayer is not in a position to cast, or control the casting of, more than 5% of the maximum number of votes that may be cast at a general meeting of the new company.

139DS Apportionment rules

- (1) If:
- (a) subsection 139DQ(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 an employee share scheme, 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.
- Note: Subsection 139FA(4) alters the meaning of market value of a share or right for the purposes of this section.
- (2) 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 Division 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.

Subdivision DB—Stapled securities

139DSA Object of this Subdivision

The object of this Subdivision is to allow this Division to apply to stapled securities that include an ordinary share and are listed for quotation on the Australian Stock Exchange, and to rights to acquire such stapled securities.

139DSB Application of Division to stapled securities

- (1) This Division (except this Subdivision) applies, with the modifications set out in this Subdivision, in relation to a stapled security in the same way as it applies in relation to a share (including an ordinary share) in a company.
 - Note 1: For the definition of *stapled security*, see subsection 139GCD(1).
 - Note 2: This means the Division also applies to rights to acquire a stapled security in the same way it applies to rights to acquire a share.
 - Example: Subsection 139CD(4) will be satisfied if all the securities available for acquisition under the scheme are stapled securities, and all the rights available for acquisition are rights to acquire stapled securities.
- (2) For the purposes of the application of this Division (except this Subdivision) in relation to a stapled security or right to acquire a stapled security, a company, the shares in which are the subject of this Division, is taken to include (as part of the company) each stapled entity for the stapled security.
 - Note 1: For the definition of *stapled entity*, see subsection 139GCD(2).
 - Note 2: There are some modifications to this rule in this Subdivision.
 - Note 3: This rule has the effect that the company is treated as having all the interests in another entity that stapled entities for the stapled security have.

Section 139DSC

Example: The condition in subsection 139CD(3) will be satisfied if the company would be a holding company of the employer if all those stapled entities' interests in the employer were counted together.

139DSC Discount not to be included in assessable income unless stapled security or right is qualifying

Section 139B includes a discount given in relation to a stapled security or right to acquire a stapled security in the assessable income of the taxpayer only if the stapled security or right to acquire a stapled security is treated as a qualifying share or qualifying right because of this Subdivision.

139DSD Division does not also apply to share part of stapled security

- (1) If a stapled security or right to acquire a stapled security is treated as a qualifying share or qualifying right because of this Subdivision, this Division does not also apply separately in relation to a share that is a part of the stapled security.
- (2) However, if a stapled security is not treated as a qualifying share because of this Subdivision, the rest of this Division applies separately in relation to each share that is a part of the stapled security. To avoid doubt, section 139DSC does not prevent a discount given in relation to such a share from being included in the assessable income of a taxpayer.

139DSE Modifications relating to employment

Proportion of permanent employees of employer

- (1) Subsection 139DSB(2) does not affect a provision setting out a condition relating to a specified proportion of the permanent employees of a stapled entity that is the employer.

Example: In applying subsection 139CD(5), the employer of the taxpayer is not taken to include any other stapled entities. The condition in that subsection will be satisfied if it is satisfied for the employing entity alone.

- (2) The reference in paragraph 139CD(5)(b) to a holding company of an employer includes a reference to the stapled entities for the stapled security if:

- (a) the employer is not a stapled entity for the stapled security;
and
- (b) a company that included the stapled entities as parts of the company would be a holding company of the employer.

Cessation of employment

- (3) For the purposes of working out the time when a taxpayer ceases to be employed by the employer of the taxpayer, that employer is taken to include (as part of it) each other stapled entity for the stapled security.

Note: This rule affects the operation of subsections 139CA(2), 139CB(1) and 139CE(3).

139DSF Modification relating to legal or beneficial interest

A taxpayer is taken to satisfy a condition that the taxpayer not hold a legal or beneficial interest in more than 5% of the shares in a company at a time only if the taxpayer does not hold a legal or beneficial interest in more than 5% of any of the following at that time:

- (a) the shares in any company that is a stapled entity for the stapled security;
- (b) the units in any unit trust that is a stapled entity for the stapled security.

Note: This rule affects the operation of subsections 139CD(6) and 139DR(5).

139DSG Modification relating to voting rights

A taxpayer is taken to satisfy a condition that the taxpayer not be in a position to cast, or control the casting of, more than 5% of the maximum number of votes that might be cast at a general meeting of a company only if the taxpayer is not in a position to control the casting of more than 5% of the maximum number of votes that might be cast at a general meeting of:

- (a) a company that is a stapled entity for the stapled security because an ordinary share in the company is part of the stapled security; or
- (b) if more than one company is a stapled entity for the stapled security because an ordinary share in the company is part of the stapled security—each of those companies.

Section 139DSH

Note: This rule affects the operation of subsections 139CD(7) and 139DR(6).

139DSH Cessation time when stapling arrangement ceases

The cessation time for a stapled security or right to acquire a stapled security is the earlier of:

- (a) the time when any of the interests forming the stapled security cease to be stapled together; and
- (b) the time when the stapled security ceases to be listed for quotation in the official list of the ASX Limited;

if that time is earlier than:

- (c) in the case of a stapled security where subsection 139CA(1) does not apply—the earliest time when an event described in any of paragraphs 139CA(2)(a) to (d) happens; and
- (d) in the case of a right to acquire a stapled security—the earliest time when an event described in any of paragraphs 139CB(1)(a) to (e) happens.

Note: The times mentioned in paragraphs (a) and (b) are additional to the times mentioned in subsections 139CA(2) and 139CB(1). The actual cessation time is the time that is the earliest, unless subsection 139CA(1) applies (when the cessation time is the time of acquisition).

139DSI Deduction to be apportioned

- (1) If a stapled security is jointly provided by 2 or more taxpayers to another person in a year of income, each of those taxpayers is entitled to an allowable deduction in respect of income of the year of income under section 139DC if, because of this Subdivision:
 - (a) the stapled security is treated as a qualifying share; and
 - (b) the conditions in subsection 139DC(1) are satisfied for the stapled security.
- (2) The amount of the deduction worked out under subsection 139DC(2) in respect of the stapled security must be apportioned between each of the taxpayers on a reasonable basis.

Subdivision E—Elections

139E Taxpayer may make election

- (1) A taxpayer may make an election under this section that subsection 139B(2) applies for a year of income. The election covers each qualifying share or qualifying right acquired in that year by the taxpayer.

How and when election must be made

- (2) An election under subsection (1) must be in writing in the approved form and be made before the taxpayer lodges his or her return of income for the year of income, or within such further time as the Commissioner allows.
- (3) If:
- (a) a taxpayer becomes an employee during a year of income (the *employment year*); and
 - (b) before the employment year, the taxpayer had acquired a qualifying share or qualifying right, being an acquisition that occurred:
 - (i) while the taxpayer was not an employee; and
 - (ii) after the year of income (if any) in which the taxpayer last became an employee;

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

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

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

Subdivision F—Special provisions about the market value of a share or right

139F Meaning of *market value* of a share or right

This Subdivision sets out how to determine the *market value* of a share or right to acquire a share on a particular day.

139FA Listed shares or rights—market value

- (1) If the share or right is quoted on a stock market of an approved stock exchange on that day, the market value is:
 - (a) if there was at least one transaction on that stock market in shares or rights of that class during the one week period up to and including that day—the weighted average of the prices at which those shares or rights were traded on that stock market during the one week period up to and including that day; or
 - (b) if there were no transactions on that stock market in that one week period in such shares and rights:
 - (i) the last price at which an offer was made on that stock market in that period to buy such a share or right; or
 - (ii) if, in the case of a share, no such offer has been made—the value of the share that would have been determined under section 139FB if that section applied to the share; or
 - (iii) if, in the case of a right, no such offer has been made—the value of the right that would have been determined under section 139FC if that section applied to the right.
- (2) If a share or right is quoted on 2 or more approved stock markets on that day, the market value is the value determined under subsection (1) in respect of whichever of those the taxpayer chooses.
- (3) This section does not apply to a share if section 139FAA applies to the share.
- (4) This section applies for the purposes of section 139DS as if references in this section to the one week period up to and including that day were references to the period consisting of that day.

139FAA Listed shares—market value where public offer

- (1) This section applies to a share in a company if:
- (a) the share is acquired within the period starting 7 days before and ending 7 days after the day on which shares are first acquired under a public offer of shares in the company; and
 - (b) the following rights attached to the share are the same as those attached to the shares acquired under the public offer:
 - (i) rights in respect of voting;
 - (ii) rights in respect of dividends;
 - (iii) rights in respect of distribution of share capital in consequence of a reduction of share capital;
 - (iv) rights in respect of distribution of the property of the company in the event of the winding up of the company; and
 - (c) there is at least one price at which shares were sold under the public offer that satisfies the following requirements:
 - (i) 1,000 Australian residents (other than residents who are employees of the company or who held shares in the company immediately before the offer was made) acquired shares at the price;
 - (ii) the total cost of shares acquired by such Australian residents at the price was at least \$1,000,000; and
 - (d) the company has been a listed public company for at least 6 months immediately before the share is acquired.

However, this section does not apply if subsection 139CC(4) applies to the share.

- (2) The market value of a share is the lowest price that satisfies the requirements of subparagraphs (1)(c)(i) and (ii) at which shares were sold under the public offer.

What is a public offer?

- (3) A public offer of shares is an offer of shares in a company where:
- (a) the offer is by the company or by a person who, immediately before the offer is made, owns at least 20% of the shares with rights in respect of voting in the company; and
 - (b) the offer is made to at least 10,000 Australian residents (other than residents who are employees of the company or who

Section 139FB

held shares in the company immediately before the offer was made).

139FB Unlisted shares—market value

- (1) If the share is not quoted on an approved stock exchange on that day, the market value is the arm's length value of the share:
 - (a) as specified in a written report, in a form approved by the Commissioner, given to the person from whom the taxpayer acquires the share by a person who is a qualified person in relation to valuing the share (see section 139FG); or
 - (b) as calculated in accordance with any other method approved in writing by the Commissioner as a reasonable method of calculating the arm's length value of unlisted shares.

Partly paid unlisted shares

- (2) Without limiting the factors that must be taken into account in valuing, under paragraph (1)(a), a share that is partly paid, the qualified person must take into account:
 - (a) the amount unpaid on the share; and
 - (b) the amount and timing of future calls; and
 - (c) rights to dividends that arise from holding the share.

139FC Unlisted rights—market value

- (1) If the right is not quoted on an approved stock exchange on that day, the market value is the greater of:
 - (a) the market value, on the particular day, of the share that may be acquired by exercising the right, less the lowest amount that must be paid to exercise the right to acquire the share; andwhichever of the following applies:
 - (b) if the right can not be exercised more than 10 years after the day when the right was acquired—subject to section 139FE, the value determined in accordance with regulations for the purpose of this paragraph or, if no such regulations are in force, the value determined in accordance with sections 139FJ to 139FN;
 - (c) if the right can be exercised more than 10 years after the day when the right was acquired—the greater of:

- (i) the arm's length value of the right as specified in a written report, in a form approved by the Commissioner, given to the person from whom the taxpayer acquires the right by a suitably qualified valuer; and
 - (ii) the value that would have been determined under paragraph (b) if the right could be exercised 10 years after the particular day.
- (2) In calculating, for the purpose of subsection (1), the market value of the share that may be acquired by exercising the right, subsection 139FAA(1) applies as if the share were acquired on the particular day.

139FD Conditions and restrictions to be disregarded

In determining the market value of a share or right under section 139FB or 139FC, the share or right, and any share that may be acquired as a consequence of the exercise or operation of the right, is taken not to be subject to any conditions or restrictions.

139FE Value of right nil or can not be determined

- (1) If the lowest amount that must be paid to exercise a right to acquire a share is nil or can not be determined, the market value of the right on a particular day is the same as the market value of the share on that day.
- (2) In calculating, for the purpose of subsection (1), the market value of the share that may be acquired by exercising the right, subsection 139FAA(1) applies as if the share were acquired on the particular day.

139FF Value of legal and beneficial interests

To avoid doubt, if a person acquires either the beneficial interest or the legal interest in a share or right, the value that is applicable for the purposes of this Division is the value of the share or right, not the value of the interest in the share or right.

- Notes:
1. It is the value of the share or right that is relevant because the taxpayer is taken to have acquired the share or right—see section 139G.
 2. Double taxation is avoided by section 139DA.

139FG Meaning of *qualified person*

A person is a *qualified person* in relation to valuing a share in a company if the person is registered as a company auditor under a law in force in a State or a Territory, and is not:

- (a) a director, secretary or employee of the company; or
- (b) a partner, employer or employee of a person referred to in paragraph (a); or
- (c) a partner or employee of an employee of a person so referred to.

139FI Provision of information about market value

If a taxpayer requests the person from whom he or she acquired a share or right to provide information necessary for the taxpayer to calculate the market value of the share or right at a particular time, the person must take all reasonable steps to provide that information within 60 days after the request.

139FJ Outline of remainder of Subdivision

The remainder of this Subdivision sets out the method of calculating, for the purposes of paragraph 139FC(b), the market value, on a particular day, of a right to acquire a share.

139FK Step 1—calculate the calculation percentage

- (1) Apply the following formula. The result is the *calculation percentage*.

$$\frac{\text{Market value, on the particular day, of the share that is the subject of the right}}{\text{Amount, or lowest amount, that must be paid to exercise the right}} \times 100\%$$

- (2) In calculating, for the purpose of subsection (1), the market value of the share that is the subject of the right, subsection 139FAA(1) applies as if the share were acquired on the particular day.

139FL Step 2—how to use calculation percentage

If calculation percentage is less than 50%

- (1) If the calculation percentage is less than 50%, the **market value of the right** is nil.

If calculation percentage is equal to or greater than 50% but less than 110%

- (2) If the calculation percentage is equal to, or greater than, 50% but less than 110%, go to the instructions for using Table 1 in section 139FM that are set out below that Table.

If calculation percentage is equal to or greater than 110%

- (3) If the calculation percentage is equal to, or greater than, 110%, go to the instructions for using Table 2 in section 139FN that are set out below that Table.

139FM Table 1 and instructions

Table 1

- (1) The following is Table 1:

Calculation percentage								
Exercise period (months)	50% to 60%	60% to 70%	70% to 75%	75% to 80%	80% to 85%	85% to 90%	90% to 92.5%	92.5% to 95%
108 to 120	0.6%	2.1%	4.8%	6.7%	8.9%	11.4%	14.1%	15.5%
96 to 108	0.4%	1.5%	4.0%	5.8%	7.9%	10.3%	13.0%	14.5%
84 to 96	0.2%	1.1%	3.2%	4.8%	6.8%	9.2%	11.8%	13.3%
72 to 84	0.1%	0.7%	2.4%	3.8%	5.6%	7.9%	10.5%	11.9%
60 to 72	0.0%	0.4%	1.6%	2.8%	4.4%	6.5%	9.0%	10.4%
48 to 60	0.0%	0.1%	0.9%	1.8%	3.1%	4.9%	7.3%	8.6%
36 to 48	0.0%	0.0%	0.4%	0.9%	1.9%	3.3%	5.4%	6.6%
24 to 36	0.0%	0.0%	0.1%	0.3%	0.8%	1.8%	3.4%	4.4%
18 to 24	0.0%	0.0%	0.0%	0.1%	0.4%	1.0%	2.3%	3.2%

Part III Liability to taxation
Division 13A Employee share schemes

Section 139FM

Calculation percentage

Exercise period (months)	50% to 60%	60% to 70%	70% to 75%	75% to 80%	80% to 85%	85% to 90%	90% to 92.5%	92.5% to 95%
12 to 18	0.0%	0.0%	0.0%	0.0%	0.1%	0.4%	1.3%	2.0%
9 to 12	0.0%	0.0%	0.0%	0.0%	0.0%	0.2%	0.8%	1.3%
6 to 9	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.3%	0.7%
3 to 6	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.2%
0 to 3	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%

Calculation percentage

Exercise period (months)	95% to 97.5%	97.5% to 100%	100% to 102.5%	102.5% to 105%	105% to 107.5%	107.5% to 110%
108 to 120	16.9%	18.4%	20.0%	21.5%	23.1%	24.7%
96 to 108	15.9%	17.5%	19.0%	20.6%	22.2%	23.9%
84 to 96	14.8%	16.3%	17.9%	19.5%	21.2%	22.9%
72 to 84	13.4%	15.0%	16.6%	18.2%	19.9%	21.7%
60 to 72	11.8%	13.4%	15.0%	16.7%	18.5%	20.3%
48 to 60	10.1%	11.6%	13.2%	14.9%	16.7%	18.6%
36 to 48	8.0%	9.5%	11.1%	12.9%	14.7%	16.5%
24 to 36	5.7%	7.1%	8.7%	10.4%	12.2%	14.1%
18 to 24	4.4%	5.7%	7.2%	8.9%	10.8%	12.7%
12 to 18	2.9%	4.1%	5.6%	7.3%	9.1%	11.2%
9 to 12	2.2%	3.3%	4.7%	6.3%	8.2%	10.3%
6 to 9	1.4%	2.3%	3.6%	5.3%	7.2%	9.4%
3 to 6	0.5%	1.2%	2.4%	4.1%	6.1%	8.4%
0 to 3	0.1%	0.4%	1.3%	3.0%	5.3%	7.8%

Instructions for using Table 1

- (2) From Table 1, select the percentage (the *Table 1 percentage*) that corresponds to:

- (a) the period, in months, from the particular day until the last day on which the right may be exercised (the *exercise period*); and
- (b) the calculation percentage;
- and then multiply the amount, or lowest amount, that must be paid to exercise the right by the Table 1 percentage. The result is the *market value of the right*.

139FN Table 2 and instructions

Table 2

- (1) The following is Table 2:

Exercise period (months)	Column 1	Column 2
108 to 120	24.7%	0.6%
96 to 108	23.9%	0.6%
84 to 96	22.9%	0.7%
72 to 84	21.7%	0.7%
60 to 72	20.3%	0.7%
48 to 60	18.6%	0.7%
36 to 48	16.5%	0.8%
24 to 36	14.1%	0.8%
18 to 24	12.7%	0.8%
12 to 18	11.2%	0.9%
9 to 12	10.3%	0.9%
6 to 9	9.4%	0.9%
3 to 6	8.4%	0.9%
0 to 3	7.8%	1.0%

Instructions for using Table 2—calculating the base percentage

- (2) From column 1 of Table 2, select the percentage that corresponds to the period, in months, from the particular day until the last day on which the right may be exercised (the *exercise period*). This percentage is called the *base percentage*.

Section 139G

Instructions for using Table 2—calculating the additional percentage

- (3) From column 2 of Table 2, select the percentage that corresponds to the exercise period. This percentage is called the **additional percentage**.

Instructions for using Table 2—calculating the excess

- (4) Work out the result of the following formula. Disregard any fraction. The result is called the **excess**.

$$100 \times \left[\frac{\text{Calculation percentage}}{\text{percentage}} - 110\% \right]$$

Instructions for using Table 2—calculating the market value

- (5) The *market value of the right* is the amount worked out using the following formula:

$$\text{Amount or lowest amount that must be paid to exercise the right} \times \left[\frac{\text{Base percentage}}{\text{percentage}} + \left(\text{Excess} \times \frac{\text{Additional percentage}}{\text{percentage}} \right) \right]$$

Note: If:

- (a) the exercise period; or
- (b) the calculation percentage in relation to a particular right;

is the top of one range in Table 1 or 2 and is also the bottom of another range in that Table, it is taken to be in the lower range and not in the higher range.

Subdivision G—Definitions

139G Meaning of *acquiring or providing a share or right*

A person **acquires** a share or right if:

- (a) another person transfers the share or right to that person (other than, in the case of a share, by issuing the share to that person); or
- (b) in the case of a share—another person allots the share to that person; or
- (c) in the case of a right—another person creates the right in that person; or

- (d) the person otherwise acquires a legal interest in the share or right from another person; or
- (e) the person acquires a beneficial interest in the share or right from another person.

In those circumstances, the other person *provides* the share or right.

139GA Meaning of *employee* and *employer*

- (1) The expression *employee* means:
 - (a) a person who receives, or is entitled to receive, work and income support related withholding payments and benefits; or
 - (b) a person who is engaged in foreign service.
- (2) However:
 - (a) subsection (1) does not apply in relation to section 139GBA; and
 - (b) paragraph (1)(b) does not apply in relation to subsection 139B(2A), section 139CDA or subsection 139D(3), 139E(3) or 139GB(1).
- (3) The expression *employer* means:
 - (a) a person who pays, or is liable to pay, work and income support related withholding payments and benefits; or
 - (b) a person who engages another person in foreign service.

139GB Meaning of *permanent employee*

- (1) Subject to subsections (2) and (3), *permanent employee* of an employer is:
 - (a) a full-time employee of the employer; or
 - (b) a permanent part-time employee of the employer;with at least 36 months service (whether continuous or non-continuous).

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

- (2) A person is not a permanent employee of an employer that is a company at any time when the person is a director of the company.

Section 139GBA

- (3) A person is not a permanent employee at any time when the person:
 - (a) is a temporary resident within the meaning of the *Income Tax Assessment Act 1997*; or
 - (b) is not a resident; or
 - (c) is not physically present in Australia.
- (4) For the purposes of subsection (1), the length of a person's service includes any period when the person is, in accordance with the terms and conditions of that service:
 - (a) absent on recreation leave; or
 - (b) absent from work because of accident or illness.
- (5) In paragraph (4)(a), *recreation leave* does not include:
 - (a) long service leave, furlough, extended leave or leave of a similar kind (however described); or
 - (b) leave without pay or on reduced pay.

139GBA Meaning of *foreign service*

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

139GC Meaning of *holding company*

The expression "holding company" has the same meaning as in the *Corporations Act 2001*.

139GCA Meaning of *subsidiary*

The expression *subsidiary* has the same meaning as in the *Corporations Act 2001*.

139GCB Meaning of *100% takeover*

A *100% takeover* of a company by another company is an arrangement that is intended to result in the company becoming a 100% subsidiary of the other company, or of a holding company or subsidiary of the other company.

139GCC Meaning of *restructure*

A *restructure* of a company is a change in the ownership, or the structure of the ownership, of the company as a result of which some or all shares or rights held in the company under an employee share scheme immediately before the change:

- (a) are replaced; or
- (b) could reasonably be regarded as having been replaced; wholly or partly by shares or rights in one or more other companies.

139GCD Meaning of *stapled security* and *stapled entity*

- (1) A security consisting of 2 or more interests is a *stapled security* if:
 - (a) each interest is either a share in a company or a unit in a unit trust; and
 - (b) at least one of the interests is an ordinary share; and
 - (c) all the interests are stapled together; and
 - (d) the security is listed for quotation in the official list of the ASX Limited.
- (2) A *stapled entity* for a stapled security is a company or a unit trust covered by subsection (1) for the stapled security.

139GD Meaning of *approved stock exchange*

A stock exchange is an *approved stock exchange* if:

- (a) the stock exchange is named in regulations made for the purposes of this section; or
- (b) if no such regulations are in force—the stock exchange is an approved stock exchange within the meaning of Part XI.

139GE Meaning of *associate*

The expression *associate* has the same meaning as it would have in section 318 if references in that section to subsection (1) included a reference to subsection (1A) and the following subsection were inserted before subsection (1):

- (1A) For the purposes of this Part, if an entity holds (whether directly or indirectly through one or more interposed companies, partnerships

or trusts) a share in a company, or a right to acquire a share in a company, the company is an associate of the entity.

139GF Meaning of conducting a scheme on a *non-discriminatory basis*

- (1) This section sets out the conditions that must be satisfied for the employee share scheme mentioned in subsection 139CE(4) or a scheme for the provision of financial assistance in respect of acquisitions of shares or rights under the employee share scheme to be operated on a ***non-discriminatory basis***.

Non-discriminatory employee share scheme

- (2) The employee share scheme is operated on a ***non-discriminatory basis*** if, and only if, the following conditions are satisfied in relation to all offers to acquire shares or rights under the scheme:
- (a) participation in the scheme is open to at least 75% of permanent employees of the employer;
 - (b) the time for acceptance of each offer is reasonable;
 - (c) the essential features of each offer are the same for at least 75% of permanent employees of the employer.

Essential features of offer

- (3) The essential features of an offer for an employee share scheme are:
- (a) the consideration for the acquisition of the share or right concerned (whether that consideration is determined by reference to the value of the share or right or otherwise); and
 - (b) the number of shares or rights, the minimum number of shares or rights or the maximum number of shares or rights, offered to each employee, as the case may be; and
 - (c) the time for acceptance of the offer; and
 - (d) the steps taken for the circulation of information about the offer.

Non-discriminatory financial assistance schemes

- (4) The scheme for the provision of financial assistance in respect of acquisitions of shares or rights under the employee share scheme is operated on a non-discriminatory basis if, and only if, the

following conditions are satisfied in relation to all financial assistance provided under the scheme:

- (a) the time for taking up each offer of assistance is reasonable;
- (b) the essential features of each offer of assistance are the same for at least 75% of permanent employees of the employer.

Essential features of offer of financial assistance

- (5) The essential features of an offer of financial assistance are:
 - (a) the terms and conditions of the offer; and
 - (b) the amount, the minimum amount, or the maximum amount, of assistance offered to each employee, as the case may be.
- (6) The Commissioner may determine that the condition mentioned in paragraph (2)(a), (2)(c) or (4)(b) is taken to have been satisfied in relation to a scheme if the Commissioner considers that the employer has done everything reasonably practicable to ensure that the condition was satisfied.

139GG Meaning of *provision of financial assistance*

The expression “provision of financial assistance” includes the making of a loan, giving of a guarantee, provision of security, release of an obligation and forgiving of a debt.

139GH Index of definitions

The following table lists the definitions in this Division and shows their location:

Definition	Provision
100% takeover	139GCB
Acquiring a share or right	139G
Approved stock exchange	139GD
Associate	139GE
Cessation time-rights	139CB
Cessation time-shares	139CA
Discount	139CC
Employee	139GA
Employee share scheme	139C

Part III Liability to taxation
Division 13A Employee share schemes

Section 139GH

Definition	Provision
Employer	139GA
Exemption conditions	139CE
Financial assistance	139GG
Foreign service	139GBA
Holding company	139GC
Market value of a share or right	Subdivision F
Non-discriminatory schemes	139GF
Permanent employee	139GB
Providing a share or right	139G
Qualified person	139FG
Qualifying shares and qualifying rights	139CD
Restructure	139GCC
Stapled entity	139GCD
Stapled security	139GCD
Subsidiary	139GCA

Division 15—Insurance with non-residents

141 Interpretation

In this Division:

insurance contract means a contract or guarantee whereby liability is undertaken, contingent upon the happening of any specified event, to pay any money or make good any loss or damage, but does not include a contract of life assurance.

insured event means an event upon the happening of which the liability under an insurance contract arises.

insured person means a person with whom any insurance contract is entered into by an insurer.

insured property means the property the subject of an insurance contract made or given by an insurer.

insurer means any non-resident who undertakes liability under an insurance contract.

142 Income derived by non-resident insurer

- (1) Where an insured person, whether a resident or non-resident, has entered into an insurance contract with an insurer, and the insured property at the time of the making of the contract is situated in Australia, or the insured event is one which can happen only in Australia, the premium paid or payable under the contract shall be included in the assessable income of the insurer, and shall be deemed to be derived by him from sources in Australia, and, unless the contract was made by a principal office or branch established by the insurer in Australia, this Division shall apply to that premium.
- (2) Where an insured person who is a resident has entered into an insurance contract with an insurer, and an agent or representative in Australia of the insurer was in any way instrumental in inducing the entry of the insured person into that contract, any premium paid or payable under the contract shall, wherever the insured property is situate, or the insured event may happen, be included in the

Section 143

assessable income of the insurer and shall be deemed to be derived by him from sources in Australia, and, unless the contract was made by a principal office or branch established by the insurer in Australia, this Division shall apply to that premium.

143 Taxable income of non-resident insurer

The insurer shall be deemed to have derived in any year, in respect of the premiums paid or payable in that year under such contracts, a taxable income equal to 10% of the total amount of such premiums:

Provided that, where the actual profit or loss derived or made by the insurer in respect of such premiums is established to the satisfaction of the Commissioner, the taxable income of the insurer in respect thereof, or the amount of the loss so made by him shall, subject to this Act, be calculated by reference to receipts and expenditure taken into account in calculating that profit or loss.

144 Liability of agents of insurer

The insured person and any person in Australia acting on behalf of the insurer shall be the agents of the insurer, and shall be jointly and severally liable as such for all purposes of this Act. If either of those persons pays or credits to the insurer any amount in respect of the insurance contract before arrangements have been made to the satisfaction of the Commissioner for the payment of any income tax which has been or may be assessed under this Division in respect of that amount, that person shall be personally liable to pay that tax.

145 Deduction of premiums

Notwithstanding any other provision of this Act, no such premium shall be an allowable deduction to the insured person unless arrangements have been made to the satisfaction of the Commissioner for the payment of any income tax which has been or may be assessed in respect of that premium.

146 Exporter to furnish information

Every person who exports any goods from Australia shall furnish to the Collector of Customs for transmission to the Commissioner a

copy of the customs entry for such goods, and shall show thereon such information as is prescribed regarding the insurance of such goods.

147 Rate of tax in special circumstances

Where the insurer satisfies the Commissioner that, on account of special circumstances, it is necessary that the rate of tax payable by him under this Division should be ascertained at the time when premiums are paid to him, the Commissioner may direct that the tax so payable in respect of premiums paid during any financial year shall be calculated at the rate which would have been payable if an assessment had been made in respect of those premiums at the date when they were paid.

148 Reinsurance with non-residents

- (1) Notwithstanding anything contained in this Act other than section 177F, but subject to this section, where a person carrying on the business of insurance in Australia reinsures out of Australia the whole or part of any risk with a non-resident:
 - (a) the premiums paid or credited in respect of the reinsurance shall not be:
 - (i) an allowable deduction to the person carrying on the business of insurance in Australia; or
 - (ii) included in the assessable income of the non-resident; and
 - (b) the income of the person carrying on the business of insurance in Australia shall not include sums recovered from that non-resident in respect of a loss on any risk so reinsured.
- (2) A person carrying on the business of insurance in Australia who reinsures out of Australia the whole or part of any risk with a non-resident may elect, in accordance with this section, that the provisions of subsection (1) shall not be applied in arriving at his taxable income, and thereupon:
 - (a) those provisions shall not apply in arriving at his taxable income of a year of income to which the election applies; and
 - (b) that person shall be liable to furnish returns, and to pay tax, in accordance with the succeeding provisions of this section, as agent for all non-residents with whom he so reinsures.

Section 148

- (3) Where a person makes an election under subsection (2), he shall, subject to subsection (5), be assessed and liable to pay tax as agent, on an amount equal to 10% of the sum of the gross amounts of the premiums paid or credited by him in the year of income (being a year of income to which the election applies) to non-residents in respect of all such reinsurances, as if that amount were the taxable income of a non-resident company (not being a private company) not carrying on business in Australia by means either of a principal office or a branch.
- (4) A person who has made an election under this section shall, as agent, furnish to the Commissioner, within the prescribed time, or within such further time as the Commissioner allows, in respect of every year of income to which the election applies:
- (a) a return showing the gross amounts of the premiums paid or credited by him to non-residents in respect of all such reinsurances; or
 - (b) 2 returns, of which:
 - (i) one shall show the gross amounts of such premiums paid or credited by him to non-residents which are companies; and
 - (ii) the other shall show the gross amounts of such premiums paid or credited by him to non-residents who are not companies.
- (5) Where returns are furnished by a person in accordance with paragraph (4)(b), there shall be excluded from the amount on which that person shall be assessed and liable to pay tax as agent in pursuance of subsection (3) an amount equal to 10% of the sum of the gross premiums properly shown in the return specified in subparagraph (4)(b)(ii), and that person shall, in addition to any other tax which he is liable under this section to pay as agent, be assessed and liable to pay tax as agent on the amount so excluded as if it were the taxable income of a non-resident company (being a private company) not carrying on business in Australia by means either of a principal office or a branch.
- (6) An election for the purposes of this section shall:
- (c) be made on or before the last day for the furnishing of the taxpayer's return of income of the year of income in respect of which the election is first to apply, or within such further time as the Commissioner allows;

- (d) first apply in respect of a year of income which shall be specified in the election; and
 - (e) apply in respect of all subsequent years of income.
- (7) An assessment for the purposes of subsection (3) or (5) shall be made and notified separately from any other assessment.
- (8) Where a person is liable, in pursuance of an assessment for the purposes of this section, to pay tax, in respect of any premiums, as agent for more than one non-resident, the amount which he shall be liable to pay as agent for any one of those non-residents shall be so much of the tax so payable as bears to the whole of that tax the same proportion as the total amount of such of those premiums as were paid to that non-resident bears to the total amount of those premiums.
- (9) Where a person is or may become liable under this section to pay tax as agent for a non-resident in respect of any premium paid or credited by him to that non-resident:
- (a) he shall, for the purposes of section 254, be deemed to have received the premium in his representative capacity immediately before it was so paid or credited; and
 - (b) if he pays or credits the premium before arrangements have been made to the satisfaction of the Commissioner for the payment of any tax which may be assessed in respect of that premium, he shall be personally liable to pay that tax.

Application to a life assurance company

- (10) This section applies to a life assurance company in relation to the whole or a part of a risk if, and only if, the risk or that part of the risk:
- (a) is covered by a disability policy as defined in subsection 995-1(1) of the *Income Tax Assessment Act 1997*; and
 - (b) relates to a benefit that is payable in an event mentioned in that definition.

Division 16—Averaging of incomes

149 Average income

- (1) For the purposes of the application of this Division in relation to a taxpayer in relation to a year of income, a reference in this Division to the average income of the taxpayer shall be construed as a reference to the average of the taxable incomes of the taxpayer of the years of income (in this Division referred to as *average years*) beginning with the first average year and ending with the first-mentioned year of income.

149A Capital gains, abnormal income and certain death benefits to be disregarded

- (1) For the purposes of this Division (including the purpose of determining whether this Division applies to the income of a taxpayer):
 - (a) references in this Division to the assessable income of a taxpayer shall be read as references to the amount that would have been the assessable income if the assessable income did not include any net capital gain and did not include any amount under section 82-65, 82-70 or 302-145 of the *Income Tax Assessment Act 1997*; and
 - (b) references in this Division to the taxable income of a taxpayer shall be read as references to the amount that would have been the taxable income if:
 - (i) the assessable income did not include any net capital gain and did not include any amount under section 82-65, 82-70 or 302-145 of the *Income Tax Assessment Act 1997*; and
 - (ii) the taxable income were reduced by so much of the taxable income as consists of above-average special professional income within the meaning of the *Income Tax Assessment Act 1997*.
- (2) A reference in subsection (1) to the assessable income or taxable income of a taxpayer of a year of income shall, in relation to a taxpayer in the capacity of trustee of a trust estate, be read as a

reference to the assessable income or net income, as the case may be, of the trust estate of the year of income.

150 First average year

Subject to this Division, the first average year shall be the fourth year before the year of income. A year the income of which was subject to assessment under the previous Act shall be capable of being a first or subsequent average year.

151 First application of Division in relation to a taxpayer

- (1) For the purposes of the first application of this Division in determining the tax payable by a taxpayer, the first average year shall be the first year which is otherwise capable of being an average year, and in which the taxable income is not greater than that of the next succeeding year. No year prior to that first average year shall, for the purposes of any application of this Division in determining the tax payable by a taxpayer, be capable of being an average year.
- (2) Any year in which the taxpayer was not carrying on business and was not in receipt of a taxable income shall not be counted as a first average year for the purposes of the first application of this Division in determining the tax payable by a taxpayer.
- (3) This section shall not apply to a taxpayer whose income has been or is liable to be assessed at an average rate of tax determined under the provisions of the previous Act.

152 Taxpayer not in receipt of assessable income

Any year in which the taxpayer was not carrying on business and was not in receipt of assessable income shall not be counted as an average year, and the provisions of this Division shall apply to the income thereafter derived by him as if he had never been a taxpayer before that year.

153 Taxpayer with no taxable income

Any year in which the taxpayer was carrying on business but had no taxable income shall be capable of being an average year.

154 Excess of allowable deductions

Any excess of allowable deductions over the assessable income of the taxpayer in any average year shall not be taken into account in calculating the average income.

155 Permanent reduction of income

- (1) Where a taxpayer establishes that, owing to his retirement from his occupation, or from any other cause (but not including a change in the investment of assets from which assessable income was derived into assets from which the taxpayer derives income which is not liable to be assessed under this Act), his taxable income has been permanently reduced to an amount which is less than two-thirds of his average taxable income, he shall be assessed, and the provisions of this Division shall apply to the income thereafter derived by him, as if he had never been a taxpayer before that year.
- (2) For the purposes of the application of subsection (1) in relation to a taxpayer in relation to a year of income, a reference in that subsection to the average taxable income of the taxpayer shall be construed as a reference to the amount that would be the average income of the taxpayer in relation to that year of income ascertained in accordance with section 149 if there were excluded from the assessable income of the taxpayer of the average years any income received by him from sources from which he does not usually receive income.

156 Rebate of tax for, or complementary tax payable by, certain primary producers

- (1) In this section:

actual taxable income from primary production, in relation to a taxpayer in relation to a year of income, means the amount (if any) remaining after deducting from the assessable primary production income of the taxpayer of the year of income so much of the aggregate of the relevant primary production deductions of the taxpayer of the year of income as does not exceed that assessable income.

assessable primary production income, in relation to a taxpayer in relation to a year of income, means so much of the assessable

income of the taxpayer of the year of income as was derived from the carrying on of a primary production business by the taxpayer or was included in the assessable income of the taxpayer of the year of income in consequence of the carrying on of a primary production business by the taxpayer.

deemed taxable income from primary production, in relation to a taxpayer in relation to a year of income, means:

- (a) if the taxpayer did not have a non-primary production profit in relation to the year of income—the taxable income of the taxpayer; and
- (b) in any other case—the sum of the actual taxable income from primary production of the taxpayer of the year of income and the notional taxable income from primary production of the taxpayer of the year of income.

notional taxable income from primary production, in relation to a taxpayer in relation to a year of income, being a taxpayer who had a non-primary production profit in relation to the year of income, means:

- (a) where the taxpayer did not incur a primary production loss in relation to the year of income:
 - (i) in a case to which subparagraph (ii) does not apply—the amount ascertained by deducting from the taxable income of the taxpayer of the year of income the actual taxable income from primary production of the taxpayer of the year of income; and
 - (ii) where the taxable income of the taxpayer of the year of income exceeds the actual taxable income from primary production of the taxpayer of the year of income and that excess is greater than \$5,000—\$5,000 reduced by \$1 for each whole dollar by which the amount of that excess exceeds \$5,000; and
- (b) where the taxpayer incurred a primary production loss in relation to the year of income:
 - (i) in a case where the sum of the taxable income of the taxpayer of the year of income and the amount of the primary production loss is less than or equal to \$5,000—the taxable income of the taxpayer of the year of income; and

Section 156

- (ii) in a case where the sum of the taxable income of the taxpayer of the year of income and the amount of the primary production loss (which sum is in this subparagraph referred to as the *non-farm income*) exceeds \$5,000—an amount ascertained by deducting from \$5,000 one dollar for each whole dollar by which so much of the non-farm income as does not exceed \$10,000 exceeds \$5,000 and deducting from the resultant amount so much (if any) of the amount of the primary production loss as does not exceed that resultant amount.

relevant primary production deductions, in relation to a taxpayer in relation to a year of income, means:

- (a) any deductions allowed or allowable in his assessment in respect of income of the year of income that relate exclusively to assessable primary production income of the taxpayer of a year of income;
 - (b) so much of any other deductions (other than apportionable deductions) allowed or allowable in his assessment in respect of income of the year of income as, in the opinion of the Commissioner, may appropriately be related to assessable primary production income of the taxpayer of a year of income; and
 - (c) the amount that bears to the apportionable deductions allowed or allowable in his assessment the same proportion as the amount ascertained by deduction from the assessable primary production income of the taxpayer of the year of income any deductions allowable from that assessable income in accordance with paragraphs (a) and (b) bears to the sum of the taxable income of the taxpayer of the year of income and the apportionable deductions.
- (2) For the purposes of subsection (1), a taxpayer shall be taken to have a non-primary production profit in relation to a year of income if the assessable income of the taxpayer of the year of income other than assessable primary production income exceeds the aggregate of the deductions (other than relevant primary production deductions) allowable to the taxpayer in respect of the year of income.

(3) For the purposes of subsection (1), a taxpayer shall be taken to have incurred a primary production loss in relation to a year of income if the aggregate of the relevant primary production deductions in relation to the year of income exceeds the assessable primary production income of the taxpayer of the year of income, and the amount of that loss shall be taken to be the amount of the excess.

(5) Where:

(a) this Division applies to a share of the net income of a trust estate of a year of income in respect of which a trustee is liable to be assessed and to pay tax in pursuance of subsection 98(1) or (2) or to the net income or a part of the net income of a trust estate of a year of income in respect of which a trustee is liable to be assessed and to pay tax in pursuance of section 99 (which share, net income or part, as the case may be, is in this subsection referred to as the *eligible net income*); and

(b) the amount of tax that would, apart from this section, section 94, Division 6AA and Part VIIB and but for any rebate or credit to which the trustee is entitled, be payable by the trustee in respect of the eligible net income exceeds the amount of tax that would, apart from this section, section 94, Division 6AA and Part VIIB and but for any rebate or credit to which the trustee is entitled, be payable by the trustee in respect of the eligible net income if the notional rates declared by the Parliament for the purposes of this section were the rates of tax payable by the trustee in respect of the eligible net income;

the trustee is entitled, in his assessment in respect of the eligible net income, to a rebate of tax of an amount ascertained in

accordance with the formula $\frac{AB}{C}$, where:

A is the number of whole dollars in the amount of the deemed net income from primary production.

B is the excess referred to in paragraph (b); and

C is the number of whole dollars in the eligible net income.

Section 156

(5A) Where:

- (a) this Division applies to a share of the net income of a trust estate of a year of income in respect of which a trustee is liable to be assessed and to pay tax in pursuance of subsection 98(1) or (2) or to the net income or a part of the net income of a trust estate of a year of income in respect of which a trustee is liable to be assessed and to pay tax in pursuance of section 99 (which share, net income or part, as the case may be, is in this subsection referred to as the *eligible net income*); and
- (b) the amount of tax that would, apart from this section, section 94, Division 6AA and Part VIIB and but for any rebate or credit to which the trustee is entitled, be payable by the trustee in respect of the eligible net income if the notional rates declared by the Parliament for the purposes of this section were the rates of tax payable by the trustee in respect of the eligible net income exceeds the amount of tax that would, apart from this section, section 94, Division 6AA and Part VIIB and but for any rebate or credit to which the trustee is entitled, be payable by the trustee in respect of the eligible net income;

the trustee is liable to pay complementary tax, at the rate declared by the Parliament for the purposes of this subsection, on so much of the net income of the trust estate as is equal to the deemed net income from primary production.

- (6) For the purposes of the application of this section in relation to a share of the net income of a trust estate of a year of income in respect of which a trustee is liable to be assessed and to pay tax in pursuance of subsection 98(1) or (2) or in relation to the net income or a part of the net income of a trust estate of a year of income in respect of which a trustee is liable to be assessed and to pay tax in pursuance of section 99 (which share, net income or part, as the case may be, is in this subsection referred to as the *eligible net income*):

actual net income from primary production means so much of the net income from primary production of the trust estate as is included in the eligible net income.

assessable primary production income means so much of the assessable income of the trust estate of the year of income as was

derived from the carrying on of a primary production business by the trustee or was included in the assessable income of the trust estate of the year of income in consequence of the carrying on of a primary production business by the trustee.

deemed net income from primary production means:

- (a) if the trust estate did not have a non-primary production profit in relation to the year of income—the eligible net income; and
- (b) in any other case—the sum of the actual net income from primary production of the trust estate of the year of income and the notional net income from primary production of the trust estate of the year of income.

eligible part of the primary production loss, in relation to a primary production loss incurred by the trust estate in the year of income, means so much of the primary production loss as is equal to the amount by which the eligible net income would have been increased if the aggregate of the relevant primary production deductions allowable in calculating the amount of the net income of the trust estate of the year of income had been equal to the assessable primary production income of the trust estate of the year of income.

net income from primary production means the amount (if any) remaining after deducting from the assessable primary production income of the trust estate of the year of income so much of the aggregate of the relevant primary production deductions allowable in calculating the net income of the trust estate as does not exceed that assessable primary production income.

notional net income from primary production means:

- (a) where the trust estate had a non-primary production profit in relation to the year of income and did not incur a primary production loss in relation to the year of income:
 - (i) in a case to which subparagraph (ii) does not apply—the amount ascertained by deducting from the eligible net income the actual net income from primary production (if any); and
 - (ii) where the eligible net income exceeds the actual net income from primary production in relation to the year of income and that excess is greater than \$5,000—

Section 156

\$5,000 reduced by \$1 for each whole dollar by which the amount of that excess exceeds \$5,000; and

- (b) where the trust estate had a non-primary production profit in relation to the year of income and incurred a primary production loss in relation to the year of income:
 - (i) in a case where the sum of the eligible net income and the eligible part of the primary production loss is less than or equal to \$5,000—the eligible net income; and
 - (ii) in a case where the sum of the eligible net income and the eligible part of the primary production loss (which sum is in this subparagraph referred to as the *non-farm income*) exceeds \$5,000—an amount ascertained by deducting from \$5,000 one dollar for each whole dollar by which so much of the non-farm income as does not exceed \$10,000 exceeds \$5,000 and deducting from the resultant amount so much (if any) of the eligible part of the primary production loss as does not exceed that resultant amount.

relevant primary production deductions means:

- (a) any deductions allowed or allowable in calculating the amount of the net income of the trust estate of the year of income that relate exclusively to assessable primary production income of a year of income;
 - (b) so much of any other deductions (other than apportionable deductions) allowed or allowable in calculating the amount of that net income as, in the opinion of the Commissioner, may appropriately be related to assessable primary production income of the trust estate of a year of income; and
 - (c) the amount that bears to the apportionable deductions allowed or allowable in calculating the amount of that net income the same proportion as the amount ascertained by deducting from the assessable primary production income of the trust estate of the year of income any deductions allowable from that assessable primary production income in accordance with paragraphs (a) and (b) bears to the sum of the net income of the trust estate and the apportionable deductions.
- (7) For the purposes of subsection (6), a trust estate shall be taken to have incurred a primary production loss in relation to a year of income if the aggregate of the relevant primary production

deductions allowable in calculating the amount of the net income of the trust estate of the year of income exceeds the assessable primary production income of the trust estate of the year of income, and the amount of that loss shall be taken to be the amount of the excess.

- (8) For the purposes of subsection (6), a trust estate shall be taken to have a non-primary production profit in relation to a year of income if the assessable income of the trust estate of the year of income other than assessable primary production income exceeds the aggregate of the deductions (other than relevant primary production deductions) allowable in calculating the amount of the net income of the trust estate of the year of income.

157 Application of Division to primary producers

- (1) In respect of income derived during the year ending on 30 June 1938 and during any subsequent year or during any accounting period adopted in lieu of any such year, the foregoing provisions of this Division shall not apply except in respect of income derived by a primary producer.
- (2) For the purposes of this section, *primary producer* means a person who carries on in Australia a primary production business.
- (3) Subject to subsection (3A), for the purposes only of determining whether a person is carrying on a primary production business, a beneficiary in a trust estate shall, to the extent to which he is presently entitled to the income or part of the income of that estate, be deemed to be carrying on the business carried on by the trustees of the estate which produces that income.
- (3A) Subsection (3) does not operate to deem a beneficiary in a trust estate who is presently entitled to the income or a part of the income of that estate to be carrying on the business carried on by the trustees of the trust estate in a year of income unless:
- (a) the share of the income of that trust estate of the year of income to which the beneficiary is presently entitled is not less than \$1,040; or
 - (b) the Commissioner is satisfied that the interest of the beneficiary in the trust estate was not acquired by, or granted to, the beneficiary for the purpose, or primarily for the

Section 158

purpose, of enabling the provisions of this Division to apply in respect of income derived by the beneficiary.

- (4) If in any year in respect of which this Division applies only to taxpayers who are primary producers, a taxpayer was not carrying on business as a primary producer, that year shall not be counted as an average year and the provisions of this Division shall apply to the income thereafter derived by him as if he had never been a taxpayer before that year.

158 Application of Division

This Division shall not apply in any case where there are not at least 2 average years or where the taxpayer is assessed in accordance with section 99A in respect of the year of income, and shall not apply to the taxable income of a company except income in respect of which it is assessable as a trustee.

158A Election that Division not apply

- (1) A taxpayer may elect that this Division shall not apply in relation to income of the taxpayer of a year of income specified in the election and of all subsequent years of income.
- (2) An election in pursuance of subsection (1) shall be made in writing and lodged with the Commissioner on or before the date of lodgment of the return of income of the taxpayer for the year of income specified in the election or within such further time as the Commissioner allows.
- (3) Where a taxpayer makes an election under subsection (1), this Division shall not apply in relation to income of the taxpayer of the year of income specified in the election or of any subsequent year of income.

Division 16D—Certain arrangements relating to the use of property

159GE Interpretation

(1) In this Division:

arrangement includes:

- (a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied, and whether or not enforceable, or intended to be enforceable, by legal proceedings; and
- (b) any scheme, plan, proposal, action, course of action or course of conduct whether unilateral or otherwise.

arrangement payment, in relation to an arrangement relating to the use, or the control of the use, of an item of property, means so much of any payment liable to be made under the arrangement as represents consideration for any one or more of the following:

- (a) the use of the item;
- (b) the control of the use of the item;
- (c) the sale or disposal of the item.

arrangement period, in relation to an item of eligible property that is, or is included in, arrangement property in relation to an arrangement at a particular time, means the period that is at that time the total period during which the arrangement is likely to be in force in relation to that item of eligible property (including any period before that time when the arrangement was in force in relation to that item of eligible property).

arrangement property means property that is, or is to be, used, or the use of which is, or is to be, controlled, under an arrangement.

assessable arrangement payment means an arrangement payment that, apart from this Division, would be included in whole or in part in the assessable income of a taxpayer of a year of income.

associate means, in relation to a person other than an exempt public body, any person who is an associate, within the meaning of

Part III Liability to taxation

Division 16D Certain arrangements relating to the use of property

Section 159GE

section 318, in relation to the person or, in relation to an exempt public body:

- (a) a partner of the exempt public body or a partnership in which the exempt public body is a partner; or
- (b) if a partner of the exempt public body is a natural person otherwise than in the capacity of trustee—the spouse or a child of that partner; or
- (c) a trustee of a trust where the exempt public body, or another entity that is an associate of the exempt public body because of paragraph (a), (b) or (d), benefits under the trust; or
- (d) a company where:
 - (i) the company is sufficiently influenced by:
 - (A) the exempt public body; or
 - (B) another entity that is an associate of the exempt public body because of paragraph (a), (b) or (c); or
 - (C) another company that is an associate of the exempt public body because of another application of this paragraph; or
 - (D) 2 or more entities covered by the preceding sub-subparagraphs; or
 - (ii) a majority voting interest in the company is held by:
 - (A) the exempt public body; or
 - (B) the entities that are associates of the primary entity because of subparagraph (i) of this paragraph and paragraphs (a), (b) and (c); or
 - (C) the exempt public body and the entities that are associates of the exempt public body because of subparagraph (i) of this paragraph and because of paragraphs (a), (b) and (c).

Subsections 318(6) and (7) apply for the purposes of paragraphs (a) to (d) in the same way as those subsections apply for the purposes of section 318.

capital expenditure deduction means a deduction:

- (a) under the former Division 10, 10AAA, 10AA, 10A, 10C or 10D of this Part; or
- (b) under Subdivision 40-B of the *Income Tax Assessment Act 1997* for a depreciating asset that is a forestry road or timber mill building; or

- (c) under Division 43 of that Act; or
- (d) under section 40-830 of that Act for an amount that is a project amount under subsection 40-840(1) (about mining capital expenditure and transport capital expenditure); or
- (e) under the former Subdivision 330-C, 330-H or 387-G of that Act.

control means effectively control.

depreciation deduction means a deduction:

- (a) in respect of depreciation under Division 3 of this Act or the former Division 42 of the *Income Tax Assessment Act 1997*; or
- (b) for the decline in value of a depreciating asset under Division 40 of the *Income Tax Assessment Act 1997*.

Division 10, 10AA or 10A property means property in relation to which there has been incurred:

- (a) allowable capital expenditure within the meaning of the former Division 10 or 10AA of this Part or the former Subdivision 330-C of the *Income Tax Assessment Act 1997* or mining capital expenditure within the meaning of section 40-860 of that Act;
- (b) expenditure taken into account in ascertaining an amount of residual capital expenditure specified in the former paragraph 122C(1)(a); or
- (c) capital expenditure specified in the former subsection 124F(1) or 124JA(1) of this Act or the former section 387-460 of the *Income Tax Assessment Act 1997*; or
- (d) capital expenditure on a forestry road in connection with a timber operation, or capital expenditure for the construction or acquisition of a timber mill building.

Division 10AAA property means property in relation to which there has been incurred capital expenditure to which the former Division 10AAA of this Part applies or transport capital expenditure within the meaning of the former Subdivision 330-H, or section 40-865 of the *Income Tax Assessment Act 1997*.

Division 10C or 10D property means property in relation to which there has been incurred qualifying expenditure within the meaning of the former Division 10C or 10D or for which there is a pool of

construction expenditure within the meaning of Division 43 of the *Income Tax Assessment Act 1997*.

effective life, in relation to an item of eligible property at a particular time, means the period (if any) that the Commissioner estimates will be, or would be, at that time the effective life of the property after that time assuming that it is or would be maintained in reasonably good order and condition.

eligible amount, in relation to an item of eligible property, means:

- (a) where the item is an item of eligible depreciation property—the amount that:
 - (i) was the cost of the item of property within the meaning of Division 40, or the former Division 42, of the *Income Tax Assessment Act 1997* to the taxpayer who holds it; or
 - (ii) would have been the cost of the item of property to the taxpayer for the purposes of that Division if that Division had applied in relation to the item of property; and
- (b) where the item is an item of eligible capital expenditure property—any amount of eligible capital expenditure in relation to the item of property.

eligible capital expenditure, in relation to an item of eligible capital expenditure property, means expenditure by reason of which the item of property is eligible capital expenditure property.

eligible capital expenditure property means Division 10, 10AA or 10A property, Division 10AAA property, Division 10C or 10D property or eligible spectrum licences.

eligible depreciation property means:

- (a) plant or articles within the meaning of the former section 54 of this Act; or
- (b) plant within the meaning of the former section 42-18 of the *Income Tax Assessment Act 1997* or plant within the meaning of section 45-40 of that Act; or
- (c) a depreciating asset within the meaning of Division 40 of that Act.

eligible property means:

- (a) eligible depreciation property;
- (b) Division 10, 10AA or 10A property;
- (c) Division 10AAA property;
- (d) Division 10C or 10D property; or
- (e) eligible spectrum licences.

eligible real property, means eligible property that is:

- (a) a building or a part of a building; or
- (b) a structure that is a fixture or a part of such a structure.

eligible spectrum licence means a spectrum licence within the meaning of the *Income Tax Assessment Act 1997*.

exempt public body means:

- (a) the Commonwealth, a State or a Territory; or
- (aa) an STB (within the meaning of Division 1AB) the income of which is wholly exempt from tax; or
- (b) a municipal corporation or other local governing body, the income of which is wholly exempt from tax; or
- (c) a public authority:
 - (i) that is constituted by or under a law of the Commonwealth, a State or a Territory; and
 - (ii) the income of which is wholly exempt from tax.

payment portion, in relation to an arrangement payment in relation to an eligible amount in relation to an item of eligible property, means so much of the arrangement payment as the Commissioner considers is attributable to the eligible amount in relation to the item of eligible property.

person includes an exempt public body.

total notional principal, in relation to an eligible amount in relation to an item of eligible property in relation to an application period, means the sum of all notional principal amounts (if any) in relation to payment portions of arrangement payments in relation to the eligible amount in relation to the application period.

Note: This Division applies to deductions under Division 40 (Capital allowances) and Division 43 (Capital works) of the *Income Tax Assessment Act 1997* as if you were the owner of an asset you hold

Part III Liability to taxation

Division 16D Certain arrangements relating to the use of property

Section 159GE

(under that Division) instead of any other person: see section 40-135 of that Act.

- (2) For the purposes of the definition of *arrangement period* in subsection (1), a reference in that definition to the total period during which an arrangement is, at a particular time, likely to be in force in relation to an item of eligible property that at that time is, or is included in, arrangement property in relation to the arrangement is a reference to:
- (a) where at that time the total period during which the arrangement was, or is, to be in force in relation to that item of eligible property (including any period before that time when the arrangement was in force in relation to that item) was or is specified in or ascertainable in accordance with the arrangement—that period; and
 - (b) in any other case—such period as would have been, or is, at that time the period during which the arrangement would be, or is, likely to be in force in relation to the item of property (including any period before that time when the arrangement was in force in relation to the item), having regard to the provisions of the arrangement and any other relevant circumstances in relation to the arrangement, or in relation to the item of property.
- (3) Nothing in this Division prevents an item of eligible property from being an item of eligible property by reason of the application of 2 or more paragraphs of the definition of *eligible property* in subsection (1).
- (4) For the purposes of the definition of *total notional principal* in subsection (1), where:
- (a) under section 159GK there is an interest amount within the meaning of that section in relation to a payment portion (not being a notional final payment portion within the meaning of that section) in relation to an arrangement payment; and
 - (b) the interest amount is less than the amount of the payment portion;
- there shall be taken to be a notional principal amount in relation to the payment portion of an amount equal to the difference between the interest amount and the amount of the payment portion.

- (5) Where:
- (a) under 2 or more successive arrangements relating to the use by a person, or the control by a person of the use, of property owned by another person, the same property is used by, or the use of the same property is controlled by, the same person or by persons who, in relation to each other, are associates; and
 - (b) the Commissioner considers that the arrangements should be taken, for the purposes of this Division, to be a single arrangement;
- the arrangements shall, for the purposes of this Division, be deemed to be a single arrangement entered into at the same time as the first of the arrangements, coming into force at the same time as the first of the arrangements and continuing in force until the expiration of the second or last, as the case requires, of the arrangements.
- (6) A reference in subsection (5) to successive arrangements includes a reference to:
- (a) where the arrangement periods of 2 or more arrangements overlap—those arrangements; and
 - (b) where there is a period between the expiration of an arrangement and the commencement of another arrangement and the Commissioner considers that the arrangements should be taken to be successive arrangements for the purposes of that subsection—those arrangements.
- (7) Where this Division applies in relation to an item of eligible property in relation to a qualifying arrangement, a reference in this Division to the application period in relation to that application of this Division in relation to the item of eligible property is a reference to the period commencing at the time at which this Division in that application commences to apply and ending at the time at which this Division in that application ceases to apply.
- (8) For the purposes of this Division, where one or more of the partners in a partnership uses, or controls the use of, an item of property, each of the partners in the partnership shall be taken to use, or to control the use of, the item of property and the partnership shall be taken not to use, or to control the use of, the item of property.

Part III Liability to taxation

Division 16D Certain arrangements relating to the use of property

Section 159GEA

- (10) For the purpose of this Division, disregard an acquisition or disposal of property by way of the transfer of the property for the provision or redemption of a security. Consequently this Division applies as if the person who was the owner of the property before the transfer continues to be the owner after the transfer.

159GEA Division applies to certain State/Territory bodies

In addition to any other operation that this Division has, this Division operates as if the references to an exempt public body included a reference to a prescribed excluded STB (within the meaning of Division 1AB).

159GF Residual amounts

- (1) Subject to subsection 159GJ(1), in this Division a reference to the residual amount at a particular time (in this subsection referred to as the *relevant time*) in relation to the eligible amount by reason of which an item of property is eligible depreciation property at the relevant time is a reference to the eligible amount reduced by:
- (a) where the item of property was not dealt with by the taxpayer who holds the item in the prescribed manner at any time during the period (in this subsection referred to as the *relevant period*) before the relevant time when it was held by the taxpayer (within the meaning of Division 40 of the *Income Tax Assessment Act 1997*)—the total amount of deductions for depreciation or decline in value that would, but for any deduction denying provision, have been allowable to the taxpayer under this Act or the *Income Tax Assessment Act 1997* in respect of that item of property for the relevant period if:
 - (i) at all times during the relevant period the taxpayer had wholly and exclusively dealt with the item of property in the prescribed manner; and
 - (ii) those deductions were calculated using the diminishing value method; and
 - (iii) section 57AG, as in force immediately before the commencement of section 1 of the *Taxation Laws Amendment Act 1992*, did not apply in relation to the item of property;

- (b) where the item of property was wholly and exclusively dealt with by the taxpayer who held the item in the prescribed manner at all times during the relevant period—the total amount of deductions for depreciation or decline in value that were or, but for any deduction denying provision, would have been, allowed or allowable to the taxpayer in respect of the item of property for that period under this Act or the *Income Tax Assessment Act 1997*; and
- (c) in any other case—the total amount of deductions for depreciation or decline in value that, but for any deduction denying provision, would have been allowable to the taxpayer who holds the item of property in respect of the item under this Act or the *Income Tax Assessment Act 1997* for the relevant period if:
 - (i) the taxpayer had wholly and exclusively dealt with the item of property in the prescribed manner at all times during the relevant period; and
 - (ii) in respect of any part of the relevant period for which deductions for depreciation or decline in value were or, but for any deduction denying provision, would have been allowed or allowable under this Act or the *Income Tax Assessment Act 1997*—the deductions were allowable on the same basis and at the same percentage as was or would have been allowed or allowable for that part of the relevant period; and
 - (iii) in respect of any other part (in this subparagraph referred to as the **relevant part**) of the relevant period—the deductions were allowable:
 - (A) where the relevant part was immediately succeeded by another part of the relevant period in respect of which deductions for depreciation or decline in value were or, but for any deduction denying provision, would have been allowed or allowable under this Act or the *Income Tax Assessment Act 1997*—on the same basis and at the same percentage as was or would have been allowed or allowable in respect of that other part; and
 - (B) in any other case—on the same basis and at the same percentage as was or, but for any deduction denying provision, would have been

Section 159GF

allowed or allowable under this Act or the *Income Tax Assessment Act 1997* in respect of the part of the relevant period for which deductions for depreciation or decline in value was or would have been allowed or allowable, being the part that immediately preceded the relevant part.

- (2) For the purposes of subsection (1):
- (a) an item of eligible depreciation property shall be taken to be dealt with by a taxpayer in the prescribed manner at a particular time if:
 - (i) the item of property is used by the taxpayer at that time for the purpose of producing assessable income; or
 - (ii) the item of property is, at that time, installed ready for use for the purpose of producing assessable income and held in reserve by the taxpayer; and
 - (b) a reference to a deduction denying provision is a reference to a provision of this Act that would have the effect of denying an entitlement in whole or in part to a deduction otherwise wholly allowable under this Act.
- (3) Subject to subsection 159GJ(2), where any of the following amounts (in this subsection referred to as the *attributable amount*):
- (a) an amount of residual previous capital expenditure within the meaning of the former Division 10 or 10AA;
 - (b) an amount of residual capital expenditure within the meaning of the former Division 10, 10AA or 10A;
 - (c) an amount of residual (1 May 1981 to 18 August 1981) capital expenditure within the meaning of the former Division 10 or 10AA;
 - (d) an amount of residual (19 August 1981 to 19 July 1982) capital expenditure within the meaning of the former Division 10 or 10AA;
 - (e) so much as is unrecouped of an amount of allowable (post-19 July 1982) capital expenditure within the meaning of the former Division 10 or 10AA;
 - (f) so much as is unrecouped of an amount of allowable capital expenditure within the meaning of the former Subdivision 330-C of the *Income Tax Assessment Act 1997*;

- (fa) so much of an amount of mining capital expenditure or transport capital expenditure (within the meaning of the *Income Tax Assessment Act 1997*) as has not been deducted under Division 40 of that Act;
- (g) the difference between capital expenditure and previous deductions as defined in the former subsection 387-470(1) of the *Income Tax Assessment Act 1997*;
- (h) the difference between the cost of a forestry road or timber mill building for the purposes of Division 40 of the *Income Tax Assessment Act 1997* and its adjustable value for the purposes of that Division;

ascertained as at the end of a year of income, is attributable in whole or in part to an amount of expenditure (in this subsection referred to as the *relevant expenditure*) by reason of which an item of property is Division 10, 10AA or 10A property, in this Division a reference to the residual amount at any time during the year of income in relation to the relevant expenditure is a reference to so much of the attributable amount as is attributable to the relevant expenditure.

- (4) Subject to subsection 159GJ(3), in this Division a reference to the residual amount at a particular time in relation to an amount of expenditure by reason of which an item of property is Division 10AAA property is a reference to the amount of expenditure reduced by any part of that expenditure that has been allowed or is allowable as a deduction under the former Division 10AAA of this Part or the former Subdivision 330-H of the *Income Tax Assessment Act 1997*, or under Subdivision 40-I of that Act for transport capital expenditure, from the assessable income of any taxpayer of a year of income preceding the year of income in which the particular time occurs.
- (5) Subject to subsection 159GJ(4), in this Division a reference to the residual amount at a particular time in relation to an amount of expenditure by reason of which an item of property is Division 10C or 10D property is a reference to the residual capital expenditure within the meaning of the former Division 10C or 10D of this Part, or to the undeducted construction expenditure within the meaning of Division 43 of the *Income Tax Assessment Act 1997*, as appropriate, at that time in relation to the amount of expenditure.

Section 159GG

- (6) In this Division, a reference to the residual amount at a particular time in relation to an amount of expenditure because of which an item of property is an eligible spectrum licence is a reference to:
- (a) the amount of unrecouped expenditure (within the meaning of the former section 380-20 of the *Income Tax Assessment Act 1997*) on that licence at that time; or
 - (b) the adjustable value of that licence (within the meaning of Division 40 of that Act) at that time.

159GG Qualifying arrangements

- (1) For the purposes of this Division, where at any time (in this subsection referred to as the *relevant time*) any of the following conditions is satisfied in relation to an arrangement relating to the use by a person (in this subsection referred to as the *end-user*), or to the control by a person (in this subsection also referred to as the *end-user*) of the use, of property owned by another person who is a party to the arrangement, being property that is or includes an item of eligible property:
- (a) the arrangement contains provision to the effect that:
 - (i) if:
 - (A) on the termination or expiration of the arrangement, the owner sells or otherwise disposes of the whole of the arrangement property, or part of the arrangement property that is or includes the item of eligible property, to any person; and
 - (B) the owner or an associate receives in respect of the sale or disposal no consideration, or consideration of an amount less than an amount (in this subparagraph referred to as the *guaranteed residual value*) specified in, or ascertainable under, the provision;
the end-user or an associate will pay to the owner or an associate an amount equal to the guaranteed residual value, or to the amount by which the guaranteed residual value exceeds the consideration, as the case may be;
 - (ii) at or after the termination or expiration of the arrangement, the whole of the arrangement property or part of the arrangement property that is or includes the

- item of eligible property is to be transferred (whether or not for any consideration) to the end-user or an associate;
- (iii) the end-user or an associate has or will have the right to purchase or to require the transfer of the whole of the arrangement property or part of the arrangement property that is or includes the item of eligible property; or
 - (iv) the arrangement period in relation to the item of eligible property in relation to the arrangement is a period that exceeds 1 year and the end-user or an associate will be liable to carry out, to expend money in respect of or to reimburse the owner or an associate for expenditure in respect of, repairs that may be required to the whole of the arrangement property or to part of the arrangement property that is or includes the item of eligible property;
- (b) the arrangement period in relation to the item of eligible property in relation to the arrangement is equal to or greater than:
- (i) where the item is an item of eligible real property—50% of the effective life of that item at the commencement of the arrangement period; or
 - (ii) in any other case—75% of the effective life of that item at the commencement of the arrangement period;
- (c) the sum of:
- (i) the payment portions of arrangement payments that were liable to be made at or before the relevant time in relation to the eligible amount, or in relation to all of the eligible amounts (including any eligible amount in respect of expenditure incurred after the commencement of the arrangement period), in relation to the item of eligible property; and
 - (ii) the payment portions of arrangement payments that, having regard to the provisions of the arrangement and any other relevant circumstances, are or were, at the relevant time, likely to become liable to be made after the relevant time in relation to the eligible amount, or in relation to all of the eligible amounts (including any eligible amount in respect of expenditure that, having regard to the provisions of the arrangement and any other relevant circumstances, is or was likely to be

Section 159GG

incurred during the arrangement period), in relation to the item of eligible property;

is equal to or greater than 90% of the sum of:

- (iii) the residual amount in relation to the eligible amount, or the sum of the residual amounts in relation to the eligible amounts, in respect of which expenditure was incurred before the commencement of the arrangement period in relation to the item of eligible property, as ascertained at the commencement of the arrangement period; and
- (iv) the amount of any expenditure that was, or is likely to be, incurred during the arrangement period, being expenditure giving rise to an eligible amount in relation to the item of eligible property;

the arrangement shall be taken to be, or to have been, a qualifying arrangement in relation to the item of eligible property:

- (d) at the relevant time; and
- (e) at all times before the relevant time when the arrangement was in force in relation to the item of eligible property.

(2) For the purposes of this Division, where:

- (a) an item of eligible property is, or is included in, arrangement property in relation to an arrangement relating to the use by a person (in this subsection referred to as the *end-user*), or to the control by a person (in this subsection also referred to as the *end-user*) of the use, of property owned by another person who is a party to the arrangement; and
- (b) the ownership of the item of eligible property is transferred to the end-user or an associate within 1 year after the arrangement ceases to be in force (whether by termination or expiration) in relation to the item of eligible property;

the arrangement shall be taken to have been a qualifying arrangement in relation to the item of eligible property at all times during the period during which the arrangement was in force in relation to the item of eligible property.

(3) For the purposes of subsections (1) and (2):

- (a) a lease to a person of property owned by another person shall be taken to be an arrangement relating to the use by the person of property owned by the other person; and

- (b) any arrangement entered into in relation to the lease referred to in paragraph (a) shall be taken to be part of the arrangement referred to in that paragraph.
- (4) Where, but for this subsection, an arrangement would be a qualifying arrangement in relation to an item of eligible property at a particular time (in this subsection referred to as the *relevant time*) and the Commissioner, having regard to:
 - (a) the circumstances by reason of which the arrangement is a qualifying arrangement in relation to that item of eligible property; and
 - (b) any other relevant circumstances;considers it unreasonable that the arrangement should be a qualifying arrangement at the relevant time in relation to the item of eligible property, the arrangement shall be taken not to be a qualifying arrangement at the relevant time in relation to the item of eligible property.
- (5) Where an arrangement is a qualifying arrangement in relation to an item of eligible property at a particular time (in this subsection referred to as the *relevant time*) and the arrangement ceases to be a qualifying arrangement in relation to that item of eligible property at a later time, the arrangement shall not be taken not to have been a qualifying arrangement in relation to that item of eligible property at the relevant time by reason of it ceasing to be a qualifying arrangement in relation to that item of eligible property at the later time.

159GH Application of Division in relation to property

- (1A) This Division does not apply in relation to the item of eligible property that is put to a tax preferred use (within the meaning of the *Income Tax Assessment Act 1997*) if the tax preferred use:
 - (a) starts on or after 1 July 2007; and
 - (b) does not occur under a legally enforceable arrangement entered into before 1 July 2007.
- (1B) This Division does not apply in relation to the item of eligible property that is put to a tax preferred use (within the meaning of the *Income Tax Assessment Act 1997*) if:
 - (a) the tax preferred use starts on or after 1 July 2007; and

Section 159GJ

- (b) the tax preferred use occurs under a legally enforceable arrangement that was entered into before 1 July 2007; and
 - (c) an election is made under item 71 of Schedule 1 to the *Tax Laws Amendment (2007 Measures No. 5) Act 2007* to have subitem 71(2) of that Schedule apply to the property.
- (1) Subject to subsections (1A), (1B) and (2), where:
- (a) at a particular time (in this subsection referred to as the *relevant time*) an arrangement is a qualifying arrangement under subsection 159GG(1) or (2) in relation to an item of eligible property; and
 - (b) either of the following conditions is satisfied:
 - (i) the qualifying arrangement was entered into after 5 o'clock in the afternoon, by standard time in the Australian Capital Territory, on 15 May 1984 and the end-user referred to in subsection 159GG(1) or (2) is an exempt public body;
 - (ii) the arrangement was entered into after 5 o'clock in the afternoon, by legal time in the Australian Capital Territory, on 16 December 1984 and the use of the property referred to in subsection 159GG(1) or (2) takes place, or will take place, outside Australia and is, or will be, wholly or partly for the purpose of producing exempt income;
- this Division applies in relation to the item of eligible property at the relevant time.
- (2) This Division does not apply in relation to an item of eligible property at a particular time if at that time section 51AD applies to the item of eligible property in relation to a taxpayer.

159GJ Effect of application of Division on certain deductions etc.

- (1) Where this Division applies in relation to an item of eligible depreciation property:
- (b) in relation to any year of income the whole of which is included in or comprises the application period—no depreciation deduction shall be allowable to any taxpayer in relation to the item of property for that year of income;
 - (c) in relation to any other year of income in which the whole or a part of the application period occurs:

- (i) in relation to any part (in this subsection referred to as the *pre-application part*) of the year of income that precedes the application period—there shall be allowable to a taxpayer as a depreciation deduction in relation to the item of property:
 - (A) where this Division has not previously applied in relation to the item of property—the same depreciation deduction (if any) as would, apart from this Division, be allowable to the taxpayer; and
 - (B) in any other case—the same depreciation deduction (if any) as would, but for this application of this section, be allowable to the taxpayer;
- (ii) in relation to the part of the year of income during which this Division applies—no depreciation deduction shall be allowable to any taxpayer in relation to the item of property; and
- (iii) in relation to any part (in this subsection referred to as the *post-application part*) of the year of income that occurs after the application period (not being a part that occurs after the commencement of a subsequent application period):
 - (A) the residual amount in relation to the item of eligible depreciation property at any time (in this sub-subparagraph referred to as the *relevant time*) during the post-application part is an amount ascertained in accordance with the formula:
$$A + B - C$$
where:
A is the amount that, but for this application of this section, would be the residual amount at the relevant time in relation to the eligible amount (in this subparagraph referred to as the *relevant eligible amount*) by reason of which the item is an item of eligible depreciation property.
B is:
 - (a) where paragraph (b) of this component does not apply—the amount that, in

Section 159GJ

determining the residual amount in component A, would be taken into account as depreciation under subsection 159GF(1) in respect of the application period; and

- (b) where, in determining the residual amount in component A, depreciation deductions taken into account in respect of the post-application part would be calculated under this Act or the *Income Tax Assessment Act 1997* using the diminishing value method—the amount that, in determining the residual amount in component A, would be taken into account under subsection 159GF(1) as depreciation deductions in respect of the application period and the part of the post-application part before the relevant time; and

C is:

- (a) where paragraph (a) of component B applies—an amount equal to the total notional principal in relation to the relevant eligible amount in relation to the application period; and
- (b) where paragraph (b) of component B applies—the sum of:
- (i) the total notional principal in relation to the relevant eligible amount in relation to the application period; and
 - (ii) the amount that, in determining the residual amount in component A, would be taken into account as depreciation deductions under subsection 159GF(1) in respect of the part of the post-application part before the relevant time if the depreciated value under this Act, the undeducted cost under the former Division 42 of the *Income Tax Assessment Act 1997* or the adjustable value under Division 40 of that Act, of the item of eligible depreciation property at the

beginning of the year of income in which this Division ceases to apply were equal to the residual amount at the beginning of the application period as reduced by the total notional principal in relation to the relevant eligible amount in relation to the application period;

- (B) for the purposes of any application of this Act or the *Income Tax Assessment Act 1997*, in relation to the item of property in relation to the post-application part—the depreciated value, within the meaning of Division 3 of this Part, the undeducted cost under the former Division 42 of the *Income Tax Assessment Act 1997* or the adjustable value under Division 40 of that Act, of the item of property at any time during the post-application part shall be taken to be an amount equal to the residual amount in relation to the relevant eligible amount at that time as ascertained in accordance with sub-subparagraph (A); and
- (C) the depreciation deduction (if any) allowable to a taxpayer in relation to the item of property in relation to the post-application part is the depreciation deduction that would be allowable in respect of that period if this Division did not apply and, in the case of an item of property in relation to which the former paragraph 56(1)(a) of this Act or the diminishing value method under the former Division 42, or Division 40, of the *Income Tax Assessment Act 1997* would, apart from this Division, apply, if the depreciated value, within the meaning of the former section 62 of this Act, the undeducted cost, under the former Division 42 of the *Income Tax Assessment Act 1997* or the adjustable value under Division 40 of that Act, of the item of property at the beginning of the year of income were equal to the residual amount, as ascertained under sub-subparagraph (A), in relation to the relevant

eligible amount at the commencement of the post-application part;

- (d) the residual amount at any time (in this paragraph referred to as the *relevant time*) after the year of income in which the application period ends (not being a time after the commencement of a subsequent application period) in relation to the eligible amount (in this paragraph referred to as the *relevant eligible amount*) by reason of which the item is an item of eligible depreciation property is the amount that would be the residual amount in relation to the relevant eligible amount in relation to the relevant time under sub-subparagraph (1)(c)(iii)(A) if the post-application part referred to in that sub-subparagraph extended to include the relevant time; and
 - (e) for the purpose of the application of this Act and the *Income Tax Assessment Act 1997* in relation to the item of property at any time after the year of income in which the application period ends—there shall be taken to have been allowed as a depreciation deduction in relation to the item of property in relation to the application period an amount equal to the total notional principal in relation to the eligible amount by reason of which the item of property is eligible depreciation property in relation to the application period.
- (2) Where this Division applies in relation to an item of Division 10, 10AA or 10A property:
- (a) no deduction is allowable to any taxpayer under:
 - (ii) section 40-830 of the *Income Tax Assessment Act 1997* for a project amount that is mining capital expenditure within the meaning of that Act; or
 - (iii) Subdivision 40-B of that Act for a depreciating asset that is a forestry road or timber mill building;in relation to any amount of expenditure (not being expenditure incurred after the application period) by reason of which the item is Division 10, 10AA or 10A property for any year of income in which the whole or a part of the application period occurs;
 - (b) the residual amount at any time after the application period (not being a time after the commencement of a subsequent application period) in relation to an amount of expenditure (not being expenditure incurred after the application period)

by reason of which the item is Division 10, 10AA or 10A property is an amount equal to the amount that, but for this paragraph, would be the residual amount at that time in relation to the amount of expenditure under subsection 159GF(3) reduced by an amount equal to the total notional principal in relation to the amount of expenditure in relation to the application period and any prior application period; and

- (c) for the purposes of the application of:
 - (ii) section 40-830 of the *Income Tax Assessment Act 1997* for a project amount that is mining capital expenditure within the meaning of that Act; or
 - (iii) Subdivision 40-B of that Act for a depreciating asset that is a forestry road or timber mill building;in relation to an amount of expenditure (not being expenditure incurred after the application period) by reason of which the item is Division 10, 10AA or 10A property at any time after the application period, there shall be taken to have been allowed in respect of the amount of expenditure a deduction under whichever of those provisions applies in respect of the amount of expenditure of an amount equal to the total notional principal in relation to the amount of expenditure in relation to the application period.

- (3) Where this Division applies in relation to an item of Division 10AAA property:
 - (a) no deduction is allowable to any taxpayer under section 40-830 of the *Income Tax Assessment Act 1997* for a project amount that is transport capital expenditure within the meaning of that Act in relation to any amount of expenditure (not being expenditure incurred after the application period) by reason of which the item is Division 10AAA property for any year of income in which the whole or a part of the application period occurs; and
 - (b) the residual amount at any time after the application period (not being a time after the commencement of a subsequent application period) in relation to an amount of expenditure (not being expenditure incurred after the application period) by reason of which the item is Division 10AAA property is an amount equal to the amount that, but for this paragraph, would be the residual amount at that time in relation to the

Section 159GJ

amount of expenditure under subsection 159GF(4) reduced by an amount equal to the total notional principal in relation to the amount of expenditure in relation to the application period and any prior application period; and

- (c) for the purposes of the application of section 40-830 of the *Income Tax Assessment Act 1997*, for a project amount that is transport capital expenditure within the meaning of that Act, in relation to an amount of expenditure (not being expenditure incurred after the application period) by reason of which the item is Division 10AAA property for any year of income after the year of income in which this Division ceases to apply—it is taken to be a requirement of that section that the deduction allowable under that section in respect of the amount of expenditure does not exceed the residual amount in relation to the amount of expenditure as worked out in accordance with paragraph (b).
- (4) Where this Division applies in relation to an item of Division 10C or 10D property:
 - (a) in relation to any year of income the whole of which is included in or comprises the application period—no deduction shall be allowable to any taxpayer under Division 43 of the *Income Tax Assessment Act 1997*, in relation to any amount of expenditure by reason of which the item is Division 10C or 10D property for that year of income;
 - (b) in relation to any other year of income in which the whole or a part of the application period occurs:
 - (i) in relation to any part (in this subsection referred to as the *pre-application part*) of the year of income that precedes the application period—there shall be allowable to the taxpayer as a deduction under Division 43 of the *Income Tax Assessment Act 1997* in relation to an amount of expenditure by reason of which the item is Division 10C or 10D property:
 - (A) where this Division has not previously applied in relation to the amount of expenditure—the same deduction (if any) as would, apart from this Division, be allowable under that Division; and

- (B) in any other case—the same deduction (if any) as would, but for this application of this section, be allowable under that Division;
- (ii) in relation to the part of the year of income during which this Division applies—no deduction shall be allowable to any taxpayer under Division 43 of the *Income Tax Assessment Act 1997* in relation to any amount of expenditure by reason of which the item is Division 10C or 10D property; and
- (iii) in relation to any part (in this subsection referred to as the *post-application part*) of the year of income that occurs after the application period (not being a part that occurs after the commencement of a subsequent application period):
 - (A) the residual amount at any time during the post-application part in relation to an amount of expenditure (not being expenditure incurred after the application period) by reason of which the item is Division 10C or 10D property is an amount equal to the amount that, but for this paragraph, would be the residual amount at that time in relation to the amount of expenditure under subsection 159GF(5) reduced by an amount equal to the total notional principal in relation to the amount of expenditure in relation to the application period and any prior application period; and
 - (C) the deduction (if any) allowable to a taxpayer in relation to an amount of expenditure (not being expenditure incurred after the application period) by reason of which the item is Division 10C or 10D property under Division 43 of the *Income Tax Assessment Act 1997* in relation to the post-application part is the deduction (if any) that would be allowable to the taxpayer under that Division in respect of that period if this Division (other than this sub-subparagraph) did not apply and if it were a requirement of that Division that the deduction did not exceed the residual amount in relation

Section 159GJ

to the amount of expenditure as ascertained in accordance with sub-subparagraph (A);

- (c) the residual amount at any time after the year of income in which the application period ends (not being a time after the commencement of a subsequent application period) in relation to an amount of expenditure (not being expenditure incurred after the application period) by reason of which the item is Division 10C or 10D property is the amount that, but for this paragraph, would be the residual amount at that time in relation to the amount of expenditure under subsection 159GF (5) reduced by an amount equal to the total notional principal in relation to the amount of expenditure in relation to the application period and any prior application period; and
 - (d) in the application of Division 43 of the *Income Tax Assessment Act 1997* in relation to any year of income after the year of income in which this Division ceases to apply, in relation to an amount of expenditure (not being expenditure incurred after the application period) by reason of which the item is Division 10C or 10D property it shall be taken to be a requirement of Division 43 of the *Income Tax Assessment Act 1997* that the deduction (if any) allowable to a taxpayer under that Division in respect of the amount of expenditure does not exceed the residual amount in relation to the amount of expenditure as ascertained in accordance with paragraph (c).
- (5) If this Division applies in relation to an item of property that is an eligible spectrum licence:
- (a) an amount cannot be deducted under Division 40 of the *Income Tax Assessment Act 1997* in relation to any amount of expenditure (other than expenditure incurred after the application period) by reason of which the item is an eligible spectrum licence for any year of income in which any of the application period occurs; and
 - (b) the residual amount at any time after the application period (but before the start of a later application period) in relation to an amount of expenditure (other than expenditure incurred after the application period) because of which the item is an eligible spectrum licence is an amount equal to:

- the amount that, if not for this paragraph, would be the residual amount at that time in relation to the amount of expenditure under subsection 159GF(6);
- reduced by:
- an amount equal to the total notional principal in relation to the amount of expenditure in relation to the application period and any prior application period; and
- (c) for the purposes of applying Division 40 of the *Income Tax Assessment Act 1997* in relation to an amount of expenditure (other than expenditure incurred after the application period) because of which the item is an eligible spectrum licence at any time after the application period, a deduction under that Division is taken to have been allowed, for the amount of expenditure, of an amount equal to the total notional principal in relation to the amount of expenditure in relation to the application period.

159GK Effect of application of Division on assessability of arrangement payments

- (1) Where this Division applies in relation to an item of eligible property in relation to which there is an assessable arrangement payment or assessable arrangement payments in relation to a taxpayer in respect of the application period, there shall be included in the assessable income of the taxpayer so much only of any payment portion of each assessable arrangement payment in relation to an eligible amount as does not exceed the interest amount (if any) in relation to the payment portion.
- (2) For the purposes of subsection (1), a reference to the interest amount in relation to a payment portion of an assessable arrangement payment in relation to an eligible amount is a reference to the amount (if any) ascertained in accordance with the formula $A(1 + B)^t - A$, where:

A is the eligible principal in relation to the payment portion;

B is:

- (a) where the sum of the payment portions of the likely arrangement payments in relation to the eligible amount in respect of the likely application period (including any notional final payment portion of an arrangement payment)

Section 159GK

exceeds the residual amount, as ascertained at the commencement of the application period, in relation to the eligible amount—the fraction that is the effective annual interest rate, ascertained at the commencement of the application period referred to in subsection (1), at which the sum of the present values of the payment portions equals the residual amount; and

- (b) in any other case—nil; and

t is the number of whole days in the arrangement payment period divided by 365.

- (3) For the purposes of subsection (2):

- (a) a reference in that subsection to the eligible principal in relation to a payment portion of an arrangement payment in relation to an eligible amount is a reference to:

- (i) where the arrangement payment is the first arrangement payment in the likely application period referred to in that subsection—the residual amount in relation to the eligible amount, as ascertained at the commencement of the arrangement payment period in relation to the arrangement payment; and

- (ii) in the case of any other arrangement payment—an amount ascertained in accordance with the formula $A - B + C$, where:

A is the eligible principal in relation to the payment portion of the immediately preceding arrangement payment;

B is the amount of the payment portion of the immediately preceding arrangement payment; and

C is the interest amount in relation to the payment portion of the immediately preceding arrangement payment; and

- (b) a reference in that subsection to the arrangement payment period in relation to an arrangement payment is a reference to:

- (i) where the arrangement payment is the first arrangement payment liable to be made in respect of the application period referred to in that subsection—the period commencing at the beginning of the application period

- and ending at the time at which the arrangement payment is liable to be made; and
- (ii) in the case of any other arrangement payment—the period commencing at the time at which the immediately preceding arrangement payment was liable to be made and ending at the time at which the arrangement payment concerned is liable to be made.
- (4) Where the qualifying arrangement in relation to an item of eligible property in relation to which this Division applies does not provide for the sale or disposal of the item to a person who is a party to the qualifying arrangement or to an associate, for the purposes of this section an arrangement payment (not being an assessable arrangement payment) that includes a payment portion (which portion is in this section referred to as a ***notional final payment portion***) in relation to any eligible amount by reason of which the item is an item of eligible property shall be taken to be liable to be made at the end of the likely application period of an amount equal to:
- (a) where the qualifying arrangement is a qualifying arrangement by reason of the application of subparagraph 159GG(1)(a)(i)—so much of the guaranteed residual value referred to in that subparagraph as is attributable to the eligible amount; or
- (b) in any other case—the amount that in the opinion of the Commissioner was, or would have been, at the commencement of the application period, the market value at the end of the application period of so much of the item of eligible property as is attributable to the eligible amount.
- (5) Where an amount of eligible capital expenditure is incurred in relation to an item of eligible property at any time after this Division commences to apply in relation to the item of eligible property, this section applies in respect of that expenditure as if this Division had commenced to apply in relation to the item of eligible property at the time at which the expenditure was incurred.
- (6) In this section:
- (a) ***likely application period***, in relation to an application of this Division, means the period that, having regard to the provisions of the qualifying arrangement referred to in section 159GH and to any other relevant circumstances, was,

Section 159GL

at the time at which that application of this Division commenced, the likely length of the application period; and

- (b) **likely arrangement payment**, in relation to a likely application period, means an arrangement payment that, having regard to the provisions of the qualifying arrangement referred to in section 159GH and to any other relevant circumstances, was, at the time at which the likely application period commenced, likely to become liable to be made during the likely application period.

159GL Special provision relating to Division 10C or 10D property

(1) If:

- (a) section 159GH applies in relation to an item of Division 10C or 10D property; and
- (b) at the time at which that section commenced to apply in relation to the item of property, the sum of the present values of the net Division 16D amounts, for each year of income during which the whole or a part of the likely application period occurs, in relation to an amount of expenditure by reason of which the property is Division 10C or 10D property will be less than the sum of the present values, at that time, of the net Division 10C or 10D amounts for each such year of income in relation to the expenditure;

sections 159GJ and 159GK do not apply in relation to the amount of expenditure in relation to the application period.

(2) In subsection (1):

- (a) a reference to the net Division 10C or 10D amounts for a year of income in relation to an amount of expenditure by reason of which an item of property is Division 10C or 10D property is a reference to the sum of the payment portions of any assessable arrangement payments likely to become liable to be made in relation to the amount of expenditure in relation to that year of income reduced by the deduction (if any) that, but for this Division, would be allowable under the former Division 10C or 10D of this Part, or under Division 43 of the *Income Tax Assessment Act 1997*, for the year of income in respect of the amount of expenditure;
- (b) a reference to the net Division 16D amounts for a year of income in relation to an amount of expenditure by reason of

which an item of property is Division 10C or 10D property is a reference to the sum of so much of the payment portions of any assessable arrangement payments likely to become liable to be made during the year of income in relation to the amount of expenditure as would, but for this section, be included in the assessable income of any taxpayer of the year of income under section 159GK; and

- (c) *likely application period* has the same meaning as in section 159GK.

159GM Special provision where cost of plant etc. is also eligible capital expenditure

Where:

- (a) at a particular time (in this section referred to as the *relevant time*) an item of eligible property is both eligible depreciation property and eligible capital expenditure property; and
- (b) the expenditure by reason of which the item of property is eligible capital expenditure property is the amount that:
- (i) was the cost of the item of property to the taxpayer who incurred the expenditure for the purpose of the former Subdivision 42-B, or Subdivision 40-C, of the *Income Tax Assessment Act 1997*; or
 - (ii) would have been the cost to the taxpayer for the purpose of that Subdivision if it applied in relation to the item of property;

for the purpose of ascertaining the residual amount at the relevant time in relation to the amount of expenditure:

- (c) if a capital expenditure deduction would, apart from this Division, be allowable to a taxpayer in respect of the amount of eligible capital expenditure in relation to the year of income in which the relevant time occurs—the item of eligible property shall be taken to be at the relevant time an item of eligible capital expenditure property and not an item of eligible depreciation property; and
- (d) in any other case—the item of eligible property shall be taken to be at the relevant time an item of eligible depreciation property and not an item of eligible capital expenditure property.

159GN Effect of use of property under qualifying arrangement for producing assessable income

(1) Where:

- (a) this Division applies in relation to an item of eligible property by reason of the application of subparagraph 159GH(1)(b)(i) in relation to the use by an exempt public body, or the control by an exempt public body of the use, of the item of eligible property under a qualifying arrangement;
- (b) the exempt public body jointly uses, or jointly controls the use of, the item of eligible property together with another person, or one or more other persons, who are not exempt public bodies;
- (c) the item of eligible property is or will be used during the arrangement period in relation to the qualifying arrangement for producing income of an amount that, having regard to the provisions of the qualifying arrangement and any other relevant circumstances, is not likely to be less than the total amount of the arrangement payments under the qualifying arrangement in relation to the item of eligible property; and
- (d) the income, or a part of the income, referred to in paragraph (c) will be included in the assessable income of one or more persons (which person, or each of which persons, is in this subsection referred to as an *assessable person*);

the following provisions have effect:

- (e) where all of the income referred to in paragraph (c) will be included in the assessable income of one or more persons—sections 159GJ and 159GK do not apply in relation to the item of eligible property;
- (f) where paragraph (e) does not apply:
 - (i) there is allowable to a taxpayer so much of any deduction that, but for this section, would not, by reason of the application of section 159GJ, be allowable to the taxpayer in relation to any eligible amount in relation to the item of eligible property in respect of the application period as is ascertained in accordance with the formula AB , where:
 A is the amount of the deduction that, but for this section would not, by reason of the application of section 159GJ, be allowable to the taxpayer; and

B is the assessable person fraction for the purposes of the application of this Division concerned;

- (ii) for the purposes of section 159GJ, a reference in that section to the total notional principal in relation to an eligible amount in relation to the item of eligible property in respect of the application period shall be taken to be a reference to the amount that, but for this subparagraph, would be the total notional principal, as increased by the amount of any deduction allowable under subparagraph (i) of this paragraph in relation to the eligible amount in respect of the application period; and
- (iii) for the purposes of the application of section 159GK, any eligible amount in relation to the item of property in respect of the application period shall be ascertained in accordance with the formula AB , where:
 - A** is the amount that, but for this section, would be the eligible amount; and
 - B** is the non-assessable person fraction in relation to the application of this Division concerned.

(2) For the purposes of subsection (1):

- (a) a reference in that subsection to the assessable person fraction in relation to an application of this Division in relation to an item of eligible property is a reference to the interest of all of the assessable persons in the income referred to in paragraph (1)(c) expressed as a fraction of the interests of all of the persons entitled to that income; and
- (b) a reference in that subsection to the non-assessable person fraction in relation to an application of this Division in relation to an item of eligible property is a reference to the fraction ascertained by subtracting the assessable person fraction in relation to that application of this Division in relation to the item of eligible property from the number 1.

(3) Where:

- (a) this Division applies in relation to an item of eligible property by reason of the application of subparagraph 159GH(1)(b)(ii) in relation to the use of the item of property outside Australia partly for the purpose of producing exempt income; and

Section 159GN

- (b) that use is also partly for the purpose of producing assessable income;

the following provisions have effect:

- (c) there is allowable to a taxpayer so much of any deduction that, but for this section, would not, by reason of the application of section 159GJ, be allowable to the taxpayer in relation to any eligible amount in relation to the item of eligible property in respect of the application period as is ascertained in accordance with the formula AB, where:
- A* is the amount of the deduction that, but for this section would not, by reason of the application of section 159GJ, be allowable to the taxpayer; and
- B* is the assessable income fraction for the purposes of the application of this Division concerned;
- (d) for the purposes of section 159GJ, a reference in that section to the total notional principal in relation to an eligible amount in relation to the item of eligible property in respect of the application period shall be taken to be a reference to the amount that, but for this paragraph, would be the total notional principal, as increased by the amount of any deduction allowable under paragraph (c) of this subsection in relation to the eligible amount in respect of the application period; and
- (e) for the purposes of the application of section 159GK, any eligible amount in relation to the item of property in respect of the application period shall be ascertained in accordance with the formula AB, where:
- A* is the amount that, but for this section, would be the eligible amount; and
- B* is the exempt income fraction in relation to the application of this Division concerned.
- (4) For the purposes of subsection (3):
- (a) a reference in that subsection to the assessable income fraction in relation to an application of this Division in relation to an item of eligible property is a reference to the amount of the assessable income referred to in paragraph (3)(b) expressed as a fraction of the sum of that assessable income and the exempt income referred to in paragraph (3)(a); and

- (b) a reference in that subsection to the exempt income fraction in relation to an application of this Division in relation to an item of eligible property is a reference to the fraction ascertained by subtracting the assessable income fraction in relation to that application of this Division in relation to the item of eligible property from the number 1.

159GO Special provisions relating to partnerships

(1) Where:

- (a) the individual interest of a taxpayer in the net income of a partnership has been or is to be included in the assessable income of the taxpayer of a year of income (in this subsection referred to as the *relevant year of income*), or the individual interest of a taxpayer in a partnership loss has been allowed or is allowable as a deduction from the assessable income of the taxpayer of a year of income (in this subsection also referred to as the *relevant year of income*);
- (b) either a deduction or an arrangement payment, or both, were taken into account in calculating that net income or partnership loss;
- (c) the deduction or a part of the deduction (which deduction or part of the deduction, as the case may be, is referred to in this subsection as the *relevant deduction*), or the arrangement payment or a part of the arrangement payment (which arrangement payment or part of the arrangement payment, as the case may be, is referred to in this subsection as the *relevant arrangement payment*) would not have been taken into account for the purpose of that calculation if this Division applied in relation to the partnership in relation to particular property that is arrangement property in relation to a qualifying arrangement;
- (d) this Division does not apply in relation to the partnership in relation to the property by reason only that the qualifying arrangement was entered into before the time (in this subsection referred to as the *earliest application time*) referred to in whichever subparagraph of paragraph 159GH(1)(b) would be applicable if this Division applied as mentioned in paragraph (c); and

Section 159GO

- (e) the taxpayer became a partner in the partnership under a contract entered into by the taxpayer after the earliest application time;

the following provisions have effect:

- (f) there shall be included in the assessable income of the taxpayer of the relevant year of income an amount that bears to the amount of the relevant deduction the same proportion as the individual interest of the taxpayer in that net income bears to that net income or, as the case requires, as the individual interest of the taxpayer in that partnership loss bears to that partnership loss;
- (g) there shall be allowable as a deduction in the assessment of the taxpayer of the relevant year of income an amount that bears to the amount of the relevant arrangement payment the same proportion as the individual interest of the taxpayer in that net income bears to that net income or, as the case requires, as the individual interest of the taxpayer in that partnership loss bears to that partnership loss.

(2) Where:

- (a) the individual interest of a taxpayer in the net income of a partnership has been or is to be included in the assessable income of the taxpayer of a year of income (in this subsection referred to as the **relevant year of income**), or the individual interest of a taxpayer in a partnership loss has been allowed or is allowable as a deduction from the assessable income of the taxpayer of a year of income (in this subsection also referred to as the **relevant year of income**);
- (b) either a deduction or an arrangement payment, or both, were taken into account in calculating that net income or partnership loss;
- (c) the deduction or a part of the deduction (which deduction or part of the deduction, as the case may be, is referred to in this subsection as the **relevant deduction**), or the arrangement payment or a part of the arrangement payment (which arrangement payment or part of the arrangement payment, as the case may be, is referred to in this subsection as the **relevant arrangement payment**), would not have been taken into account for the purpose of that calculation if this Division applied in relation to the partnership in relation to

particular property that is arrangement property in relation to a qualifying arrangement;

- (d) this Division does not apply in relation to the partnership in relation to the property by reason only that the qualifying arrangement was entered into before the time (in this subsection referred to as the *earliest application time*) referred to in whichever subparagraph of paragraph 159GH(1)(b) would be applicable if this Division applied as mentioned in paragraph (c);
- (e) the taxpayer became a partner in the partnership under a contract entered into by the taxpayer before the earliest application time;
- (f) after the earliest application time, the taxpayer made or agreed to make a contribution or contributions (which contribution is or contributions are in this subsection referred to as the *additional contribution*) to the capital of the partnership in addition to any contribution or contributions to the capital of the partnership that, under a contract or contracts entered into at or before that time, the taxpayer had made or agreed to make; and
- (g) by reason of making or agreeing to make the additional contribution, the individual interest of the taxpayer in that net income or partnership loss, being that individual interest expressed as a fraction of the aggregate of the individual interests of the partners in that net income or partnership loss, is greater than it would otherwise have been;

the following provisions have effect:

- (h) where a deduction was taken into account in calculating that net income or partnership loss—there shall be included in the assessable income of the taxpayer of the relevant year of income an amount ascertained in accordance with the formula $A(B - C)$;
- (j) where an arrangement payment was taken into account in calculating that net income or partnership loss—there shall be allowable as a deduction in the assessment of the taxpayer of the relevant year of income an amount ascertained in accordance with the formula $A(B - C)$;

where:

A is the amount of the relevant deduction or of the relevant arrangement payment, as the case requires;

Part III Liability to taxation

Division 16D Certain arrangements relating to the use of property

Section 159GO

B is the individual interest of the taxpayer in that net income or partnership loss, being that individual interest expressed as a fraction of the aggregate of the individual interests of the partners in that net income or partnership loss; and

C is the fraction that would be **B** if that fraction were ascertained on the basis of the individual interests of the partners immediately before the earliest application time and the net income or partnership loss at that time were equal to the net income or partnership loss of the relevant year of income.

Division 16E—Accruals assessability etc. in respect of certain security payments

159GP Interpretation

(1) In this Division, unless the contrary intention appears:

accrual amount has the meaning given by subsection 159GQB(1).

accrual period has the meaning given by section 159GQA.

agreement has the same meaning as in Subdivision D of Division 3.

annuity has the same meaning as in section 10 of the *Superannuation Industry (Supervision) Act 1993*.

associate has the same meaning as in Subdivision D of Division 3.

eligible return has the meaning given by subsection (3).

fixed return security means a qualifying security under which the amount or amounts payable are or consist of:

- (a) a specified amount or specified amounts;
- (b) an amount or amounts the method of calculation of which does not involve an interest or indexation rate or other factor, being a rate or factor that varies or may vary during the term of the security; or
- (c) any combination of amounts referred to in paragraph (a) or (b).

holder, in relation to a security at a particular time, means the person who, if the amount or amounts payable under the security were due and payable at that time, would be entitled to receive payment of the amount or amounts.

implicit interest rate has the meaning given by subsection 159GQB(2).

ineligible annuity means an annuity issued by a life assurance company to or for the benefit of a natural person other than in the capacity of trustee of a trust estate.

Section 159GP

issue, in relation to a security other than a bill of exchange, means the creation of the liability to pay an amount or amounts under the security.

issue price, in relation to a security, means the consideration (if any) for the issue of the security.

issuer, in relation to a security (other than a bill of exchange) at a particular time, means the person who, if the amount or amounts payable under the security were due and payable at that time, would be liable to pay the amount or amounts.

partial redemption, in relation to a security, means the discharging of a part (other than the final part) of a liability to pay an amount or amounts under the security representing a return of the issue price of the security.

partial redemption payment, in relation to a security, means a payment that has the effect of partially redeeming the security.

qualifying security means any security:

- (a) that is issued after 16 December 1984;
- (b) that is not a prescribed security within the meaning of section 26C;
- (ba) that is not part of an exempt series (see subsection (9A));
- (c) the term of which, ascertained as at the time of issue of the security will, or is reasonably likely to, exceed 1 year;
- (d) that has an eligible return; and
- (e) where the precise amount of the eligible return is able to be ascertained at the time of issue of the security—in relation to which the amount of the eligible return is greater than 1½% of the amount ascertained by multiplying the amount of the payment or the sum of the payments (excluding any periodic interest) liable to be made under the security by the number (including any fraction) of years in the term of the security;

but does not, except as provided by subsection (10), include an annuity.

redemption, in relation to a security, means the discharging of all liability to pay any amount or amounts under the security representing a return of the issue price of the security.

redemption payment, in relation to a security, means any payment that has the effect of redeeming the security.

security means:

- (a) stock, a bond, debenture, certificate of entitlement, bill of exchange, promissory note or other security;
- (b) a deposit with a bank or other financial institution;
- (c) a secured or unsecured loan; or
- (d) any other contract, whether or not in writing, under which a person is liable to pay an amount or amounts, whether or not the liability is secured.

taxpayer's maximum term, in relation to a security held by a taxpayer, means:

- (a) if the security was issued to the taxpayer—the term of the security; or
- (b) if the security was transferred to the taxpayer—the part of the term remaining after the transfer.

term, in relation to a security, means the period from the issue of the security until the time at which the liability to make the payment or final payment or payments, as the case requires, under the security arises.

transfer, in relation to a security, means transfer, sell, assign or dispose in any way of the security or of the right to receive payment of the amount or amounts payable under the security, but does not include a redemption or partial redemption of the security.

transfer price, in relation to the transfer of a security, means the consideration (if any) for the transfer of the security.

variable return security means a qualifying security that is not a fixed return security.

(2) Where:

- (a) the Commissioner, having regard to any connection between the parties to the issue or transfer of a security and to any other relevant circumstances, is satisfied that the parties were not dealing with each other at arm's length in relation to the issue or transfer; and
- (b) the Commissioner determines that this subsection should apply in relation to the issue or transfer;

Section 159GP

then, for the purposes of the application of the definition of *issue price* or *transfer price*, as the case may be, in subsection (1) in relation to the issue or transfer, the consideration for the issue or transfer shall be taken to be equal to:

- (c) the consideration that might reasonably be expected for the issue or transfer if the parties to the issue or transfer were independent parties dealing at arm's length with each other in relation to the issue or transfer; or
 - (d) where, for any reason (including an insufficiency of information available to the Commissioner), it is not possible or not practicable for the Commissioner to ascertain the amount referred to in paragraph (c)—such amount as the Commissioner determines.
- (3) For the purposes of this Division, there shall be taken to be an eligible return in relation to a security if at the time when the security is issued it is reasonably likely, by reason that the security was issued at a discount, bears deferred interest or is capital indexed or for any other reason, having regard to the terms of the security, for the sum of all payments (other than periodic interest payments) under the security to exceed the issue price of the security, and the amount of the eligible return is the amount of the excess.
- (6) For the purposes of this Division, where an amount of interest is payable under a security, the amount shall be taken to be periodic interest if the period between the commencement of the period in respect of which the interest is expressed to be payable and the time at which the interest is payable is less than or equal to one year.
- (7) Where:
- (a) but for this subsection, an amount of interest payable under a security would, by reason of the application of subsection (6), be taken, for the purposes of this Division, to be periodic interest; and
 - (b) the Commissioner, having regard to the amount of the interest, considers that it is properly attributable to a period in excess of one year;
- then, for purposes of the application of this Division:
- (c) the amount of interest shall not be taken to be periodic interest; and

- (d) the amount of interest shall be taken to be attributable to the period to which the Commissioner considers it is properly attributable.
- (8) Where 2 or more of the amounts payable under a security are payable to different persons and in return for consideration given by different persons, the 2 or more amounts shall, for the purposes of this Division, be taken to be payable under a separate security having such of the terms of the first-mentioned security as are relevant.
- (9) For the purposes of the application of this Division in relation to the holding of a security acquired by a taxpayer on transfer, any prior holding of the security by the taxpayer, whether on issue or transfer, shall be disregarded.
- (9A) For the purposes of paragraph (ba) of the definition of *qualifying security* in subsection (1), if:
- (a) after 16 December 1984, a person issues a security (the *first in the series*) that is not a qualifying security; and
 - (b) during the period from the end of 16 December 1984 until the issuing of the first in the series, the person did not issue any qualifying security with exactly the same payment dates, payment amounts and other terms as the first in the series; and
 - (c) after issuing the first in the series, the person issues another security (the *later security*) with exactly the same payment dates, payment amounts and other terms as the first in the series;
- the later security is *part of an exempt series*.
- (9B) In determining for the purposes of paragraph (9A)(b) or (c) whether a security has exactly the same other terms as another security, the fact that the first-mentioned security has a different issue price than the second-mentioned security is to be disregarded.
- (10) Where:
- (a) an annuity is issued on or after 29 October 1987;
 - (b) the requirements of paragraphs (b) to (e) (inclusive) of the definition of *qualifying security* in subsection (1) are satisfied in relation to the annuity; and
 - (c) the annuity is not an ineligible annuity;

Section 159GQ

the annuity is a qualifying security for the purposes of this Division.

159GQ Tax treatment of holder of qualifying security

Accrual amounts to be worked out

- (1) If a taxpayer holds a qualifying security for all or part of a year of income, the effect on the taxpayer's taxable income is determined by working out the accrual amount (see section 159GQB) for each accrual period (see section 159GQA) in the year of income and then summing the accrual amounts.

Positive sum assessable

- (2) If the sum is a positive amount, the amount is included in the assessable income of the taxpayer of the year of income.

Negative sum deductible

- (3) If the sum is a negative amount, a deduction of the amount is allowable in the assessment of the taxpayer of the year of income.

159GQA Accrual period

Taxpayer's maximum term to be divided into accrual periods

- (1) The taxpayer's maximum term for the qualifying security is divided into accrual periods in accordance with this section.

Whole year of income

- (2) If a year of income is wholly taken up by any of the taxpayer's maximum term, the year of income is divided into 2 accrual periods of 6 months.

Beginning of taxpayer's maximum term

- (3) If the taxpayer's maximum term begins after the beginning of the year of income:
 - (a) if it begins less than 6 months after the beginning of the year of income—the period from the beginning of the taxpayer's maximum term until the middle of the year of income is an

accrual period and the second 6 months of the year of income is an accrual period; and

- (b) in any other case—the part of the year of income taken up by the taxpayer’s maximum term is an accrual period.

End of taxpayer’s maximum term

- (4) If the taxpayer’s maximum term ends before the end of a year of income:
- (a) if it ends no later than 6 months after the beginning of the year of income—the part of the year of income taken up by the taxpayer’s maximum term is an accrual period; and
- (b) in any other case—the first 6 months of the year of income is an accrual period and the period from the middle of the year of income until the end of the taxpayer’s maximum term is an accrual period.

Example

- (5) For example, if the taxpayer’s year of income is a financial year and a security with a 2 year term is issued to the taxpayer on 1 April, the accrual periods will be as follows:

1st year of income	2nd year of income	3rd year of income			
1 Apr.	1 July	1 Jan.	1 July	1 Jan.	1 Apr.
3 month accrual period	6 month accrual period	6 month accrual period	6 month accrual period	3 month accrual period	

159GQB Accrual amount

Formula

- (1) The **accrual amount** for an accrual period is worked out using the formula:

$$[\text{Implicit interest rate} \times \text{Opening balance}] - \text{Periodic interest etc.}$$

Section 159GQB

Implicit interest rate

- (2) In the formula in subsection (1), ***Implicit interest rate*** means the rate of interest worked out under section 159GQC (for a fixed return security) or 159GQD (for a variable return security), properly adjusted to take account of the case where the accrual period is less than 6 months.

Opening balance

- (3) In the formula in subsection (1), ***Opening balance*** means the amount worked out using the formula:

Issue/transfer price + Previous accruals – Payments

where:

Issue/transfer price means the issue price or transfer price, as the case requires, of the security; and

Previous accruals means:

- (a) if paragraph (b) does not apply—the sum, whether positive or negative, of all accrual amounts for previous accrual periods in the taxpayer’s maximum term; or
- (b) if the accrual period is the first in the taxpayer’s maximum term—nil; and

Payments means all payments (other than of periodic interest) made or liable to be made under the security during all previous accrual periods in the taxpayer’s maximum term.

Periodic interest etc.

- (4) In the formula in subsection (1), ***Periodic interest etc.*** means the sum of:
- (a) all periodic interest payments made or liable to be made under the security during the accrual period, properly adjusted in the case of any payment made other than at the end of the period; and
- (b) if any payments (other than of periodic interest) made or liable to be made under the security during the accrual period are made or liable to be made other than at its end—an amount to adjust properly for the making of the payments other than at the end of the period.

159GQC Implicit interest rate for fixed return security

For the purposes of the formula component *Implicit interest rate* in subsection 159GQB(1), the rate of interest for a fixed return security in relation to a taxpayer is the rate of compound interest per period of 6 months at which:

(a) the sum of the present values of all amounts payable under the security during the taxpayer's maximum term;

equals:

(b) the issue price or the transfer price, as the case requires, of the security.

159GQD Implicit interest rate for variable return security

Implicit interest rate to be recalculated each year etc.

- (1) For the purposes of the formula component *Implicit interest rate* in subsection 159GQB(1), the rate of interest for a variable return security must be worked out in accordance with subsection (2) separately for each year of income during the taxpayer's maximum term. If there are 2 accrual periods of 6 months in the year of income, the rate is the same for both periods. It is possible for the rate to be negative.

Rate

- (2) The rate applicable in relation to a year of income is the rate of compound interest per period of 6 months in the calculation period (see subsection (3)) at which:

(a) the sum of the present values of all amounts payable under the security during the calculation period;

equals:

(b) the opening balance, mentioned in subsection 159GQB(1), for the accrual period that begins the calculation period.

Calculation period

- (3) The *calculation period* means the part of the taxpayer's maximum term that occurs after the beginning of the year of income.

Section 159GQD

Where amount payable is not known

- (4) For the purposes of paragraph (2)(a), if by the end of the year of income it is not possible to determine whether an amount will be payable, or the size of the amount that will be payable, after the end of the year of income, the determination is to be made by applying subsection (5), (7) or (11), or a combination of those subsections.

Assumption of constant level

- (5) Subject to subsection (7), if an amount payable is worked out to any extent by reference to the amount or level, at a particular time, of a rate, price, index or other thing, it is to be assumed that the rate, price, index or thing will be the same at all times after the end of the year of income as it was at the end of the year of income (or, if it was not available at the end of the year of income, at the time when it was last available in the year of income).

Examples

- (6) For the purposes of subsection (5):
- (a) an example of an amount worked out wholly by reference to the amount of a rate at a particular time is an interest payment under a floating rate note. The amount payable is the product of an interest rate indicator (such as the prevailing bank bill rate) and the face or par value of the note; and
 - (b) an example of an amount worked out wholly by reference to the amount of a price at a particular time is a redemption payment under a commodity linked security where the amount of the payment is the product of the prevailing price of a commodity (such as gold) and the face or par value of the security.

Assumption of continuing rate of change

- (7) If an amount payable is worked out to any extent by reference to the amount of change in an index or other thing that occurs during a period, it is to be assumed that the index or other thing will continue to change at the same rate as it did:
- (a) if the index or other thing was available at the end of the year of income—during the year of income; or

- (b) in any other case—during the period of 12 months in respect of which the index or other thing was last available in the year of income.

Example

- (8) An example for the purposes of subsection (7) is a payment whose amount is the product of the face or par value of a security and the percentage increase in the All Groups Consumer Price Index number (the *CPI*) during the year ending on 30 June 1995. If the year of income for which the implicit interest rate is being worked out is the 1993-94 year of income and the CPI increases by 2% during the year ending on 31 March 1994 (the date of the last available number during the year of income), the CPI is assumed to increase by 2% during the year ending on 30 June 1995.

Disguised continuing rate of change case

- (9) For the purposes of subsection (7), if an amount payable is worked out to any extent by reference to the quotient of:
 - (a) the amount or level of an index or other thing at a particular time; and
 - (b) either:
 - (i) the amount or level of the index or other thing at a different time; or
 - (ii) another amount that, while not expressed to be the amount or level of the index or other thing at a different time, may reasonably be regarded as representing the amount or level of the index or other thing at a different time;

the amount payable is taken to be worked out to that extent by reference to the amount of change in the index or other thing that occurs during the period between the 2 times.

Example

- (10) An example for the purposes of subsection (9) is a payment under a security issued in December 1994 that is worked out by multiplying a number of dollars by the quotient of:
 - (a) the All Groups Consumer Price Index number in respect of the quarter ending on 31 December 1997; and
 - (b) the number 114.

Part III Liability to taxation

Division 16E Accruals assessability etc. in respect of certain security payments

Section 159GR

Assume that the number in paragraph (b) is the same as the All Groups Consumer Price Index number in respect of the quarter ending on 31 December 1994. In this case, it would be reasonable to regard the number as representing the amount of the index at 31 December 1994, and therefore to apply subsection (7).

General assumption

- (11) If it is not possible to make the determination mentioned in subsection (4) in respect of the whole or part of any amount by applying subsection (5) or (7), or both, (for example, because no information about a rate, price or index was available during the year of income), the determination in respect of that whole or part is to be made on the basis of what is most likely in the circumstances.

159GR Consequences of actual payments

- (1) Where a payment (not being a payment that is, or to the extent that it consists of, a periodic interest payment, a redemption payment or a partial redemption payment) is made or liable to be made in a year of income to a taxpayer under a qualifying security:
- (a) no amount shall be included in the assessable income of the taxpayer of the year of income in respect of the payment otherwise than under section 159GQ; and
 - (b) where the taxpayer acquired the qualifying security on transfer—no amount shall be allowable as a deduction from the assessable income of the taxpayer of the year of income in respect of the payment otherwise than under section 159GQ.

159GS Balancing adjustments on transfer of qualifying security

- (1) Where there is a profit amount in relation to the transfer of a qualifying security by a taxpayer in a year of income:
- (a) if there is a net assessable amount in relation to the transfer and:
 - (i) the profit amount exceeds the net assessable amount—
an amount equal to the excess shall be included in the assessable income of the taxpayer of the year of income;
 - or

- (ii) the net assessable amount exceeds the profit amount—
an amount equal to the excess shall be allowable as a
deduction from the assessable income of the taxpayer of
the year of income; and
 - (b) if there is a net deductible amount in relation to the
transfer—an amount equal to the sum of that amount and the
profit amount shall be included in the assessable income of
the taxpayer of the year of income.
- (2) Where there is a loss amount in relation to the transfer of a
qualifying security by a taxpayer in a year of income and:
 - (a) there is a net assessable amount in relation to the transfer—
an amount equal to the net assessable amount shall be
allowable as a deduction from the assessable income of the
taxpayer of the year of income; or
 - (b) there is a net deductible amount in relation to the transfer that
exceeds the loss amount—an amount equal to the excess
shall be included in the assessable income of the taxpayer of
the year of income.
- (3) For the purposes of the application of this section in relation to the
transfer (in this subsection referred to as the *relevant transfer*) of a
qualifying security by a taxpayer:
 - (a) where the transfer price, as increased by the amount of any
payments (other than periodic interest payments) made to the
taxpayer under the security in respect of the period when the
security was held by the taxpayer exceeds:
 - (i) the issue price of the security; or
 - (ii) where the security was acquired by the taxpayer on
transfer—the transfer price in relation to that transfer;
there shall be taken to be a profit amount in relation to the
relevant transfer of an amount equal to the excess;
 - (b) where the issue price of the security or, where the security
was acquired by the taxpayer on transfer, the transfer price in
relation to that transfer exceeds the sum of the transfer price
in relation to the relevant transfer and any payments (other
than periodic interest payments) made to the taxpayer under
the security in respect of the period when the security was
held by the taxpayer, there shall be taken to be a loss amount
in relation to the relevant transfer of an amount equal to the
excess;

Section 159GT

- (c) where the sum of all amounts (if any) included under section 159GQ in the assessable income of the taxpayer in respect of the security in respect of the period when the security was held by the taxpayer exceeds the sum of all amounts (if any) allowable under those sections as deductions from the assessable income of the taxpayer in respect of the security in respect of that period, there shall be taken to be a net assessable amount in relation to the relevant transfer of an amount equal to the excess; and
- (d) where the sum of all amounts (if any) allowable under section 159GQ as deductions from the assessable income of the taxpayer in respect of the security in respect of the period when the taxpayer held the security exceeds the sum of all amounts (if any) included under those sections in the assessable income of the taxpayer in respect of the security in respect of that period, there shall be taken to be a net deductible amount in relation to the relevant transfer of an amount equal to the excess.

159GT Tax treatment of issuer of a qualifying security

- (1) Subsections (1A) and (1B) apply if a taxpayer is an issuer of a qualifying security to which this section applies during a period (the *issuer period*) comprising the whole or part of a year of income.
 - (1A) If, on the assumptions in subsection (1C), an amount would be included in the taxpayer's assessable income of the year of income in respect of the issuer period, then, subject to this section, the taxpayer is entitled to a deduction in his or her assessment for the year of income equal to that amount.
 - (1B) If, on the assumptions in subsection (1C), a deduction would be allowable in the taxpayer's assessment for the year of income, then an amount equal to the deduction is included in the taxpayer's assessable income of the year of income.
 - (1C) For the purposes of subsections (1A) and (1B), the assumptions are that:
 - (a) the security was issued to the taxpayer (rather than the taxpayer being the issuer of the security); and

- (b) the taxpayer held the security during the whole of the issuer period; and
 - (c) the taxpayer did not transfer the security at the end of the issuer period; and
 - (d) sections 159GW, 159GX and 159GY were not enacted.
- (2) A deduction is not allowable to a taxpayer under subsection (1A) in relation to a qualifying security to which this section applies unless the taxpayer would, but for this Division, be entitled to a deduction under section 8-1 of the *Income Tax Assessment Act 1997* in respect of payments (not being redemption payments, partial redemption payments or periodic interest payments) made or liable to be made under the security in respect of the relevant period referred to in that subsection.
- (3) Where a payment (not being a payment that is, or to the extent that it consists of, a periodic interest payment, a redemption payment or a partial redemption payment) is made or liable to be made in a year of income by a taxpayer under a qualifying security to which this section applies, no amount shall be allowable as a deduction from the assessable income of the taxpayer of the year of income in respect of the payment otherwise than under this section.
- (5) Subject to subsection (6), this section applies to:
- (a) any qualifying security issued on or before 22 May 1986; and
 - (b) any qualifying security issued in Australia after 22 May 1986 other than a negotiable instrument issued payable to bearer.
- (6) This section does not apply to a qualifying security issued by a taxpayer after 5 o'clock in the evening, by standard time in the Australian Capital Territory, on 23 April 1987:
- (a) to, on behalf of or otherwise for the benefit of, a non-resident or a prescribed dual resident associate of the taxpayer; or
 - (b) subject to an agreement between the taxpayer and an associate of the taxpayer under which the security is or was to be transferred to a non-resident or a prescribed dual resident associate of the taxpayer.

159GU Effect of Division on certain transfer profits and losses

- (1) Where, apart from this Division, a profit that is made by a resident taxpayer in relation to a transfer of a qualifying security that does

Section 159GV

not form part of the trading stock of the taxpayer would be included in the assessable income of the taxpayer of a year of income, the profit shall not be so included in the assessable income of the taxpayer.

- (2) Where, apart from this Division, a loss that is incurred by a resident taxpayer in relation to a transfer of a qualifying security that does not form part of the trading stock of the taxpayer would be allowable as a deduction from the assessable income of the taxpayer of a year of income and there is a net deductible amount, within the meaning of section 159GS, in relation to the transfer, so much only of the amount of the loss as exceeds the net deductible amount shall be so allowable as a deduction.

159GV Consequence of variation of terms of security

- (1) Where, after 22 May 1986, a material variation is made in the terms of a security, for the purposes of the application of this Division in relation to the security in respect of the period after the variation and before any subsequent material variation:
- (a) the security shall be taken to have been issued on the terms on which it was originally issued as varied by the material variation and any prior variation;
 - (b) where consideration for the variation is paid or payable by the holder of the security—the issue price of the security shall be taken to be an amount equal to the amount that was the issue price of the security immediately before this application of this subsection increased by the amount of that consideration;
 - (c) where consideration for the variation is paid or payable by the issuer of the security—the issue price of the security shall be taken to be an amount equal to the amount that was the issue price of the security immediately before this application of this subsection reduced by the amount of that consideration; and
 - (d) paragraph (a) of the definition of *qualifying security* in subsection 159GP(1) shall be disregarded.
- (2) Where:
- (a) subsection (1) applies in relation to a security held by a taxpayer in relation to a material variation in the terms of the security; and

(b) if:

- (i) that subsection had effect not only in relation to the period after the variation but also in relation to the whole of the term of the security before the variation; and
- (ii) any previous material variations were taken into account but any subsequent material variations were disregarded;

the sum (in this subsection referred to as the ***total notional taxable income***) of the taxable incomes of the taxpayer in respect of the year of income in which the variation is made and all previous years of income would have differed from the sum (in this subsection referred to as the ***total actual taxable income***) of the actual taxable incomes of the taxpayer of those years of income;

the following provisions have effect:

- (c) where the total notional taxable income exceeds the total actual taxable income—an amount equal to the excess shall be included in the assessable income of the taxpayer of the year of income in which the variation is made;
 - (d) where the total actual taxable income exceeds the total notional taxable income—an amount equal to the excess shall be allowable as a deduction from the assessable income of the taxpayer of the year of income in which the variation is made.
- (3) In this section, a reference to a material variation of the terms of a security is a reference to a variation of the terms of the security:
- (a) that has the effect that a security that was not a qualifying security before the variation would, if the security had been originally issued with the terms as varied and if paragraph (a) of the definition of ***qualifying security*** in subsection 159GP(1) were disregarded, have been a qualifying security when the security was issued;
 - (b) that has the effect that a security that is a qualifying security would, if originally issued with the terms as varied, not have been a qualifying security at the time of issue; or
 - (c) that has the effect that the amount, or time of making, of a payment under the security, or that the holder or issuer of the security, is varied.

Part III Liability to taxation

Division 16E Accruals assessability etc. in respect of certain security payments

Section 159GW

- (4) Where any right or option under a security to extend the term of, or otherwise vary the effect of, the security is exercised, then, for the purposes of this section, the exercise of that right or option shall be taken to be a variation of the terms of the security to provide for the extension or other effect.

159GW Effect of Division in relation to non-residents

- (1) Subject to subsection (2), where during the whole or a part of a year of income (which whole or part is in this subsection referred to as the *period of non-residence*) a taxpayer is not a resident:
- (a) no amount shall be included in, or allowable as a deduction from, the assessable income of the taxpayer of the year of income under section 159GQ in relation to the period of non-residence; and
 - (c) no amount shall be included in, or allowable as a deduction from, the assessable income of the taxpayer of the year of income under section 159GS in relation to any transfer of the security that occurred during the period of non-residence.
- (2) Where:
- (a) a payment is made or liable to be made under a qualifying security to a resident taxpayer; and
 - (b) the taxpayer was not a resident for the whole or a part (which whole or part is in this subsection referred to as the *period of non-residence*) of the period during which the taxpayer held the security;
- the following provisions have effect:
- (c) there shall be included in the assessable income of the taxpayer of the year of income in which the payment is made or liable to be made an amount equal to the amount that, but for subsection (1), would have been included in the assessable income of the taxpayer of any year or years of income under section 159GQ in respect of the payment in respect of the period of non-residence;
 - (d) there shall be allowable as a deduction from the assessable income of the taxpayer of the year of income in which the payment is made or liable to be made an amount equal to the amount that, but for subsection (1), would have been allowable as a deduction from the assessable income of the taxpayer of any year or years of income under section 159GQ

in respect of the payment in respect of the period of non-residence.

159GX Effect of Division where certain payments not assessable

Where, but for this section, an amount would be included in, or allowable as a deduction from, the assessable income of a taxpayer of a year of income under section 159GQ in respect of the whole or a part of a payment under a qualifying security, no amount shall be so included or allowable unless the payment or a part of the payment, when actually made or liable to be made, would, disregarding section 128D, be included in the assessable income of the taxpayer of a year of income.

159GY Effect of Division where qualifying security is trading stock

No amount shall be included in, or allowable as a deduction from, the assessable income of a taxpayer:

- (a) under section 159GQ in relation to a qualifying security in respect of any year or part of a year of income during which the qualifying security forms part of the trading stock of the taxpayer; or
- (c) under section 159GS in relation to the transfer of a qualifying security by the taxpayer where, immediately before the transfer, the qualifying security was or formed part of the trading stock of the taxpayer.

159GZ Stripped securities

(1) Where:

- (a) at any time a taxpayer acquires or acquired a security (in this subsection referred to as the *underlying security*) in relation to which there are or were 2 or more payment rights; and
- (b) the taxpayer transfers or transferred one or some but not all of those rights to a particular person or particular persons jointly;

for the purposes of the application of this Division (including any subsequent application of this subsection) in relation to any period after the transfer of the right or rights:

- (c) instead of the underlying security, there shall be taken to have been originally issued:

Part III Liability to taxation

Division 16E Accruals assessability etc. in respect of certain security payments

Section 159GZ

- (i) a separate security under which the payment right or payment rights transferred to the person or persons referred to in paragraph (b) were created;
 - (ii) where at the time at which that right or those rights were transferred, another payment right or other payment rights in relation to the underlying security was or were transferred to another person or to other persons jointly—a separate security under which that other right or those other rights were created; and
 - (iii) where immediately after the transfer the taxpayer retains or retained any payment right or rights—a separate security under which that right or those rights were created;
- (d) where the underlying security was issued to the taxpayer—the issue price of each separate security referred to in paragraph (c) shall be taken to be so much of the issue price of the underlying security as bears to that amount the proportion that the market value of the separate security at the time of issue of the underlying security bears to the market value of the underlying security at that time; and
- (e) where the underlying security was acquired by the taxpayer on transfer—the transfer price, in relation to that transfer, of each separate security referred to in paragraph (c) shall be taken to be so much of the transfer price of the underlying security as bears to that amount the proportion that the market value of the separate security at the time of transfer bears to the market value of the underlying security at that time.
- (2) Where, by reason of the application of subsection (1) in relation to the transfer after 16 December 1984 of a payment right or payment rights in relation to a security to a particular person or particular persons jointly, the payment right or rights is or are taken to comprise a separate security, then, for the purposes of the application of this Division in relation to the separate security in relation to any period after the transfer, paragraph (a) of the definition of *qualifying security* in subsection 159GP(1) shall be disregarded.
- (3) In subsections (1) and (2), *payment right*, in relation to a security, means a right to receive a particular payment that is liable to be made under the security.

(4) Where:

- (a) at any time a taxpayer acquires or acquired a security (in this subsection referred to as the *underlying security*) on issue or transfer;
- (b) after 16 December 1984, the taxpayer issues a qualifying security (in this subsection referred to as the *stripped security*); and
- (c) but for this subsection, a deduction of an amount equal to the whole or a part of the issue price or, where the underlying security was acquired on transfer, the transfer price of the underlying security would be allowable from the assessable income of the taxpayer of the year of income in which the taxpayer issues the stripped security in respect of the issue of the stripped security;

the amount of the deduction allowable shall be an amount that bears to the issue price or transfer price, as the case may be, of the underlying security the same proportion as the market value of the stripped security at the time of issue or purchase, as the case may be, bears to the market value of the underlying security at that time.

**Division 16J—Effect of cancellation of subsidiary's shares
in holding company**

159GZZZC Interpretation—general

- (1) In this Division:

associate has the same meaning as in section 318.

cancellation includes redemption.

disposal includes cancellation.

entity means a company, a partnership or a trust estate.

pre-cancellation period, in relation to a cancellation of shares to which this Division applies, means the period beginning when the holding company concerned became a holding company of the subsidiary concerned and ending at the time of the cancellation.

security means stock, a bond or debenture, or any other document evidencing the indebtedness of a person, whether or not the debt is secured.

- (3) For the purposes of this Division, a company is:
- (a) a subsidiary of another company; or
 - (b) the holding company of another company;
- if the first-mentioned company is such for the purposes of the *Corporations Act 2001*.
- (4) For the purposes of this Division, a reference to an interest in an entity is a reference to a legal or equitable interest in:
- (a) if the entity is a company—shares in the company;
 - (b) if the entity is a partnership—capital or profits of the partnership;
 - (c) if the entity is a trust estate—corpus or income of the trust estate; or
 - (d) in any case—securities issued by the entity.

159GZZZD Meaning of *eligible entity*, *eligible interest* and *eligible proportion*

For the purposes of this Division, where a holding company holds interests in a subsidiary of the holding company either directly or indirectly through interposed entities:

- (a) a reference to an eligible entity in relation to the holding company and the subsidiary is a reference to the holding company or any of the interposed entities;
- (b) a reference to an eligible interest of an eligible entity is a reference to any interest held by the eligible entity directly in the subsidiary or directly in any other eligible entity in relation to the holding company and the subsidiary; and
- (c) a reference to the eligible proportion in relation to an eligible interest of an eligible entity is a reference to the proportion of the total interests held directly in the subsidiary by all persons and entities that is represented by:
 - (i) if the eligible entity holds the eligible interest directly in the subsidiary—the eligible interest; or
 - (ii) if, by virtue of holding the eligible interest, the eligible entity holds an interest in the subsidiary indirectly through another eligible entity or other eligible entities—that interest in the subsidiary.

159GZZZE Share cancellations to which this Division applies

Where a holding company cancels shares in itself that are held by a subsidiary of that company, this Division applies to the cancellation of the shares.

159GZZZF Effect on subsidiary of share cancellations to which this Division applies

- (1) Where:
 - (a) this Division applies to a cancellation of shares; and
 - (b) apart from this section, either:
 - (i) the subsidiary concerned would not receive or be entitled to receive any capital proceeds in respect of the cancellation; or
 - (ii) the capital proceeds that the subsidiary concerned would receive or be entitled to receive in respect of the

Section 159GZZZG

cancellation would be less than the adjusted market value of the shares;

the following provisions have effect for the purposes of this Act:

- (c) where subparagraph (b)(i) applies—the subsidiary shall be taken to have received or to be entitled to receive, as capital proceeds in respect of the cancellation, an amount equal to the adjusted market value of the shares;
 - (d) where subparagraph (b)(ii) applies—the amount of the capital proceeds that the subsidiary receives or is entitled to receive in respect of the cancellation shall be taken to be increased by an amount so that it equals the adjusted market value of the shares.
- (2) For the purposes of subsection (1), the adjusted market value of the shares is the amount that would have been their market value at the time of the cancellation if the cancellation did not occur and was never proposed to occur.

159GZZZG Pre-cancellation disposals of eligible interests

(1) Where:

- (a) this Division applies to a cancellation of shares;
- (b) during the pre-cancellation period, there is a disposal of an eligible interest held by an eligible entity in relation to the holding company and the subsidiary concerned; and
- (c) apart from this section, either:
 - (i) the eligible entity would not have received or been entitled to receive any capital proceeds in respect of the disposal; or
 - (ii) the capital proceeds that the eligible entity would have received or been entitled to receive in respect of the disposal would have been less than the adjusted market value of the eligible interest;

the following provisions have effect for the purposes of this Act:

- (d) where subparagraph (c)(i) applies—the eligible entity shall be taken to have received or to have been entitled to receive, as capital proceeds in respect of the disposal, an amount equal to the adjusted market value of the eligible interest;
 - (e) where subparagraph (c)(ii) applies—the amount of the capital proceeds that the eligible entity received or was entitled to receive in respect of the disposal shall be taken to be
-

increased by an amount so that it equals the adjusted market value of the eligible interest.

- (2) For the purposes of subsection (1), the adjusted market value of the eligible interest is the amount that would have been its market value at the time of the disposal if the cancellation of the shares to which this Division applies did not occur and was never proposed to occur.

159GZZZH Post-cancellation disposals of eligible interests etc.

- (1) Where:
- (a) as a result of the application of section 159GZZZF in relation to a cancellation of shares, the subsidiary concerned is taken to have received or to be entitled to receive an amount of capital proceeds or an increase in an amount of capital proceeds (which amount or increase is in this section called the ***cancellation adjustment amount***) in relation to the cancellation of the shares; and
 - (b) an eligible entity in relation to the holding company and the subsidiary concerned holds an eligible interest at the time of the share cancellation;

then this section applies in relation to the eligible interest.

- (2) For the purposes of this Act (other than Parts 3-1 and 3-3 of the *Income Tax Assessment Act 1997*):
- (a) if the eligible interest is not trading stock—in determining:
 - (i) the amount of any deduction allowed or allowable to the eligible entity in respect of the acquisition of the eligible interest; or
 - (ii) the amount of any profit included in, or loss allowable as a deduction from, the assessable income of the eligible entity in respect of the acquisition and any subsequent disposal of the eligible interest;the capital proceeds in respect of the acquisition of the eligible interest shall be taken to have been reduced by the eligible interest's eligible proportion of the cancellation adjustment amount; and
 - (b) if the eligible interest is trading stock—the capital proceeds in respect of any subsequent disposal of the eligible interest

Section 159GZZZI

shall be taken to be increased by the eligible interest's eligible proportion of the cancellation adjustment amount.

- (3) For the purposes of Parts 3-1 and 3-3 of the *Income Tax Assessment Act 1997*, if a CGT event happens in relation to the eligible interest, the cost base and reduced cost base of the eligible interest is reduced by the eligible interest's eligible proportion of the cancellation adjustment amount.
- (5) This section applies in relation to the acquisition of the eligible interest held by the eligible entity, and to a CGT event happening in relation to the eligible interest, even if the entity was not an eligible entity, and the interest was not an eligible interest, at the time of the acquisition or CGT event.

159GZZZI Additional application of sections 159GZZZG and 159GZZZH to associates

- (1) Subject to this section, where a natural person is an associate of a holding company (otherwise than solely because of being the trustee of a trust estate), sections 159GZZZG and 159GZZZH apply (in addition to any application apart from this application of this section) as if references in those sections to:
 - (a) an eligible entity in relation to the holding company and the subsidiary concerned;
 - (b) an eligible interest of such an entity; or
 - (c) the eligible proportion in relation to such an interest;were references to what would, if the natural person were a holding company in relation to the subsidiary, be respectively:
 - (d) an eligible entity in relation to the natural person and the subsidiary;
 - (e) an eligible interest of such an entity; or
 - (f) the eligible proportion in relation to such an interest.
- (2) For the purposes of applying section 159GZZZG or 159GZZZH in accordance with subsection (1):
 - (a) any interest of an entity that is an eligible interest for the purposes of the application of that section apart from subsection (1) shall be taken not to be an eligible interest; and

- (b) any eligible interest of an eligible entity (including the natural person) held in the actual holding company referred to in subsection (1), or in any eligible entity interposed between the natural person and that holding company, shall be taken not to be an eligible interest.

Division 16K—Effect of buy-backs of shares

Subdivision AA—Application of Division to non-share equity interests

159GZZZIA Application of Division to non-share dividends

- (1) This Division:
 - (a) applies to a non-share equity interest in the same way as it applies to a share; and
 - (b) applies to an equity holder in the same way as it applies to a shareholder; and
 - (c) applies to a non-share dividend in the same way as it applies to a dividend.
- (2) Paragraph (1)(a) does not apply to subsection 159GZZZP(1).

Subdivision A—Interpretation

159GZZZJ Interpretation

In this Division:

buy-back has the meaning given by paragraph 159GZZZK(a).

off-market purchase has the meaning given by paragraph 159GZZZK(d).

on-market purchase has the meaning given by paragraph 159GZZZK(c).

purchase price has the meaning given by section 159GZZZM.

seller has the meaning given by paragraph 159GZZZK(b).

159GZZZK Explanation of terms

For the purposes of this Division, where a company buys a share in itself from a shareholder in the company:

- (a) the purchase is a buy-back; and
- (b) the shareholder is the seller; and

- (c) if:
- (i) the share is listed for quotation in the official list of a stock exchange in Australia or elsewhere; and
 - (ii) the buy-back is made in the ordinary course of trading on that stock exchange;
- the buy-back is an on-market purchase; and
- (d) if the buy-back is not covered by paragraph (c)—the buy-back is an off-market purchase.

159GZZZL Special buy-backs not made in ordinary course of trading on a stock exchange

For the purposes of this Division, a buy-back is not made in the ordinary course of trading on a stock exchange in Australia if, when reported to the stock exchange, the transaction under which the buy-back is made, is, under the stock exchange's rules, described as *special*.

159GZZZM Purchase price in respect of buy-back

For the purposes of this Division, the purchase price in respect of a buy-back of a share is:

- (a) if the seller has received or is entitled to receive an amount or amounts of money as a result of or in respect of the buy-back—that amount or the sum of those amounts; or
- (b) if the seller has received or is entitled to receive property other than money as a result of or in respect of the buy-back—the market value of that property at the time of the buy-back; or
- (c) if the seller has received or is entitled to receive both an amount or amounts of money and property other than money as a result of or in respect of the buy-back—the sum of that amount or those amounts and the market value of that property at the time of the buy-back.

Subdivision B—Company buying-back shares

159GZZZN Buy-back and cancellation disregarded for certain purposes

If a company buys-back a share then the buy-back, and any subsequent cancellation of the share, are disregarded for the purposes of:

- (a) determining for the purposes of this Act:
 - (i) whether an amount is included in the assessable income of the company under a provision of this Act (other than a provision of Part 3-1 or 3-3 of the *Income Tax Assessment Act 1997* (about CGT)); or
 - (ii) whether an amount is allowable as a deduction to the company; or
- (b) determining whether the company makes a capital gain or capital loss.

Subdivision C—Off-market purchases

159GZZZP Part of off-market purchase price is a dividend

- (1) For the purposes of this Act, but subject to subsection (1A), where a buy-back of a share or non-share equity interest by a company is an off-market purchase, the difference between:

- (a) the purchase price; and
- (b) the part (if any) of the purchase price in respect of the buy-back of the share or non-share equity interest which is debited against amounts standing to the credit of:
 - (i) the company's share capital account if it is a share that is bought back; or
 - (ii) the company's share capital account or non-share capital account if it is a non-share equity interest that is bought back;

is taken to be a dividend paid by the company:

- (c) to the seller as a shareholder in the company; and
- (d) out of profits derived by the company; and
- (e) on the day the buy-back occurs.

Section 159GZZZQ

- (1A) If the dividend is included to any extent in the seller's assessable income of any year of income, it is not taken into account to that extent under section 118-20 of the *Income Tax Assessment Act 1997*.
- (2) The remainder of the purchase price is taken not to be a dividend for the purposes of this Act.

159GZZZQ Consideration in respect of off-market purchase

- (1) Subject to this section, if a buy-back of a share is an off-market purchase, then:
 - (a) in determining, for the purposes of this Act:
 - (i) whether an amount is included in the assessable income of the seller under a provision of this Act other than Parts 3-1 and 3-3 of the *Income Tax Assessment Act 1997* (about CGT); or
 - (ii) whether an amount is allowable as a deduction to the seller; or
 - (b) whether the seller makes a capital gain or capital loss; in respect of the buy-back, the seller is taken to have received or to be entitled to receive, as consideration in respect of the sale of the share, an amount equal to the purchase price in respect of the buy-back.

Deemed consideration increased to market value

- (2) If apart from this section:
 - (a) the purchase price in respect of the buy-back; is less than:
 - (b) the amount that would have been the market value of the share at the time of the buy-back if the buy-back did not occur and was never proposed to occur;then, subject to subsection (3), in making the determinations mentioned in paragraphs (1)(a) and (b), the amount of consideration that the seller is taken to have received or to be entitled to receive in respect of the sale of the share is equal to the market value mentioned in paragraph (b) of this subsection.

Section 159GZZZQ

Deemed consideration reduced where dividend assessable etc.

- (3) Subject to subsection (8), if there is a reduction amount in respect of the buy-back (see subsection (4)), then, in making the determinations mentioned in paragraphs (1)(a) and (b), the amount of consideration that the seller is taken to have received or to be entitled to receive in respect of the sale of the share, after any application of subsection (2), is reduced by the reduction amount.

Reduction amount

- (4) The following steps are to be taken in working out whether there is a reduction amount in respect of the buy-back:
- (a) first, work out whether the whole or part of the purchase price in respect of the buy-back is taken to be a dividend by section 159GZZZP;
 - (b) second, for any amount satisfying paragraph (a), work out whether the whole or part of it is either:
 - (i) included in the seller's assessable income of any year of income (disregarding section 128D of this Act and section 802-15 of the *Income Tax Assessment Act 1997*); or
 - (ii) an eligible non-capital amount (see subsection (5)).

The amount worked out is the **reduction amount** in respect of the buy-back.

Eligible non-capital amount

- (5) An amount is an **eligible non-capital amount** if it is neither:
- (a) debited against a share capital account or a reserve to the extent that it consists of profits from the revaluation of assets of the company that have not been disposed of by the company; nor
 - (b) attributable, either directly or indirectly, to amounts that were transferred from such an account or reserve of the company.

Debit for deemed dividend

- (7) For the purposes of subsection (5), an amount of the purchase price that is taken to be a dividend by section 159GZZZP is taken to have been debited against the account or reserves against which the purchase price was debited, and to the same extent.

Offsettable amount excluded from reduction where loss

- (8) If:
- (aa) the seller is a corporate tax entity; and
 - (a) the amount of consideration that the seller is taken by subsection (1) or (2) to have received or to be entitled to receive in respect of the sale of the share is, apart from this subsection, reduced by a reduction amount under subsection (3); and
 - (b) the dividend mentioned in paragraph (4)(a), so far as it does not exceed the reduction amount, consists to any extent of an offsettable amount (see subsection (9)); and
 - (c) disregarding this subsection, as a result of the operation of this section:
 - (i) for the purposes of Parts 3-1 and 3-3 of the *Income Tax Assessment Act 1997* (about CGT), the seller incurs a capital loss or an increased capital loss (which loss or increase is the **loss amount**) in respect of the buy-back; or
 - (ii) a loss, or an increased loss, (which loss or increase is also the **loss amount**) in respect of the buy-back is allowable as a deduction to the seller under a provision of a Part of this Act other than Part 3-1 or 3-3 of the *Income Tax Assessment Act 1997*; or
 - (iii) the amount of a deduction allowable from the seller's assessable income of any year of income in respect of the issue or acquisition of the share exceeds, or exceeds by a greater amount, (the excess or increased excess is also the **loss amount**) the amount included in the seller's assessable income of any year of income in respect of the buy-back of the share;
- then the reduction in the amount of the consideration under subsection (3) is instead a reduction equal to:
- (d) the reduction amount;
- less:
- (e) so much of the offsettable amount as does not exceed the loss amount.

Section 159GZZZR

Meaning of offsettable amount

- (9) For the purposes of subsection (8), if the seller is entitled to a tax offset under Division 207 of the *Income Tax Assessment Act 1997* in the seller's assessment for a year of income in respect of the dividend, the dividend consists of an **offsettable amount** worked out using the formula:

$$\frac{\text{Amount of offset}}{\text{Corporate tax rate}}$$

Subdivision D—On-market purchases

159GZZZR No part of on-market purchase price is a dividend

For the purposes of this Act, where a buy-back by a company of a share is an on-market purchase, no part of the purchase price in respect of the buy-back of the share is taken to be a dividend.

159GZZZS Consideration in respect of on-market purchase

Where a buy-back is an on-market purchase, then:

- (a) in determining, for the purposes of this Act:
- (i) whether an amount is included in the assessable income of the seller under a provision of this Act other than Parts 3-1 and 3-3 of the *Income Tax Assessment Act 1997* (about CGT); or
 - (ii) whether an amount is allowable as a deduction to the seller; or
- (b) whether the seller makes a capital gain or capital loss; in respect of the buy-back, the seller is taken to have received or to be entitled to receive, as consideration in respect of the sale of the share, the purchase price in respect of the buy-back of the share.

Division 16L—Tax-exempt infrastructure borrowings

Note: The issue of certificates that give rise to the tax concessions in this Division has been terminated for new cases by the *Taxation Laws Amendment (Infrastructure Borrowings) Act 1997*.

159GZZZZD Interpretation

In this Division:

certificate has the same meaning as in Chapter 3 of the DAA Act.

DAA means the Development Allowance Authority appointed under Chapter 4 of the DAA Act.

DAA Act means the *Development Allowance Authority Act 1992*.

direct infrastructure borrowing has the same meaning as in Chapter 3 of the DAA Act.

exemption period, in relation to an infrastructure borrowing, means:

- (a) in the case of a direct infrastructure borrowing or an indirect infrastructure borrowing—the period of 15 years beginning at the time of the borrowing; or
- (b) in the case of a refinancing infrastructure borrowing—so much of the period that under paragraph (a) is the exemption period in respect of the direct infrastructure borrowing, or the indirect infrastructure borrowing, to which the refinancing infrastructure borrowing relates as remains at the time of the refinancing infrastructure borrowing.

IB amount, in relation to a taxpayer, means:

- (a) a payment of interest, or in the nature of interest, made or liable to be made to the taxpayer under an infrastructure borrowing; or
- (b) an amount included in the assessable income of the taxpayer under section 159GQ in relation to an infrastructure borrowing.

indirect infrastructure borrowing has the same meaning as in Chapter 3 of the DAA Act.

Section 159GZZZZE

infrastructure borrowing has the same meaning as in Chapter 3 of the DAA Act.

infrastructure period, in relation to a certificate that is cancelled, means the period from the time of the borrowing to which the certificate applied until the conditions under section 93R of the DAA Act would, if the certificate had not been cancelled, have ceased to apply to the holder.

refinancing infrastructure borrowing has the same meaning as in Chapter 3 of the DAA Act.

tax benefit amount, in relation to a certificate that is cancelled, in relation to a year of income (being the year of income in which the cancellation occurs or any earlier or later year of income), means:

- (a) a payment of interest, or in the nature of interest, that, because of paragraph 159GZZZZE(1)(a), is not allowable as a deduction from the assessable income of the year of income of a taxpayer in respect of the borrowing to which the certificate applies; or
- (b) an amount that, because of paragraph 159GZZZZE(2)(d), is not allowable as a deduction under section 159GT from the assessable income of the year of income of a taxpayer in respect of the borrowing to which the certificate applies.

159GZZZZE Infrastructure borrowings to be non-assessable and non-deductible

Basic non-assessability/non-deductibility provision

- (1A) This section applies to an infrastructure borrowing if a certificate is issued in relation to the borrowing, regardless of whether the certificate is later cancelled.
- (1) Subject to section 159GG, no amount is included in, or allowable as a deduction from, the assessable income of a taxpayer of a year of income in respect of:
 - (a) payments of principal or interest, or in the nature of interest, made or liable to be made by or to the taxpayer under the infrastructure borrowing during the exemption period in relation to the borrowing; or
 - (b) amounts received or receivable, or paid or payable, by the taxpayer by way of consideration for the acquisition or

disposal, during the exemption period in relation to the infrastructure borrowing, of:

- (i) rights or liabilities in respect of the borrowing; or
- (ii) any bond, debenture, discounted security, or other document evidencing indebtedness, in respect of the borrowing; or
- (c) any profit or loss of the taxpayer in respect of a disposal mentioned in paragraph (b), or in respect of the repayment of the infrastructure borrowing by or to the taxpayer during the exemption period in relation to the borrowing; or
- (d) the writing off or extinguishing of the whole or part of any debt that consists of a payment or amount to which this subsection applies that is liable to be made to, or is receivable by, the taxpayer.

Special provision relating to Division 16E

- (2) Subject to section 159GZZZZG, no amount is included in, or allowable as a deduction from, the assessable income of a taxpayer of a year of income:
 - (a) under section 159GQ in relation to the exemption period in respect of the infrastructure borrowing; or
 - (c) under section 159GS in relation to any transfer, during the exemption period in respect of the infrastructure borrowing, of:
 - (i) rights or liabilities in respect of the borrowing; or
 - (ii) any bond, debenture, discounted security, or other document evidencing indebtedness, in respect of the borrowing; or
 - (d) under section 159GT in respect of the exemption period in relation to the infrastructure borrowing.

Deemed re-acquisition after exemption period

- (3) For the purposes of this Act:
 - (a) if a taxpayer holds a bond, debenture, discounted security, or other document evidencing indebtedness, in respect of the infrastructure borrowing—that bond, debenture, discounted security or other document; or
 - (b) in any other case—all rights of a taxpayer under the infrastructure borrowing;

Section 159GZZZZF

is or are taken to have been disposed of by the taxpayer immediately before the end of the exemption period and to have been re-acquired by the taxpayer immediately after the end of the period for their market value at that time.

159GZZZZF Tax exemption to be disregarded for certain purposes

The exclusion under section 159GZZZZE of amounts from assessable income is to be disregarded for the purpose of applying any provision of this Act to determine allowable deductions in respect of infrastructure borrowings (other than deductions to which section 159GZZZZE applies).

159GZZZZG Rebate election

Basic case

- (1) If:
- (a) if subsections 159GZZZZE(1) and (2) did not apply to IB amounts, the assessable income of a year of income of a taxpayer who is:
 - (i) a company or a natural person (other than a company or natural person in the capacity of a trustee); or
 - (ii) a corporate unit trust within the meaning of Division 6B in relation to the year of income; or
 - (iii) a public trading trust within the meaning of Division 6C in relation to the year of income; or
 - (iv) a complying superannuation fund, a non-complying superannuation fund, a complying approved deposit fund, a non-complying approved deposit fund or a pooled superannuation trust in relation to the year of income;would include one or more IB amounts; and
 - (b) the taxpayer's return of income of the year of income includes all of the IB amounts;
- then:
- (c) all of the IB amounts are included in the taxpayer's assessable income of the year of income; and
 - (d) the taxpayer is entitled to a rebate in the taxpayer's assessment for that year of an amount equal to 30% of the IB amounts.

Beneficiary assessment

- (2) If:
- (a) apart from this subsection, a share of the net income of a trust estate of a year of income is included in a taxpayer's assessable income under section 97; and
 - (b) if subsections 159GZZZZE(1) and (2) did not apply to IB amounts included in the assessable income of the trust estate, or of any other trust estate or partnership, that share of the net income would be increased by an amount (the **IB attributable amount**); and
 - (c) the taxpayer's return of income of the year of income is prepared on the basis that all of the IB amounts are included in the assessable income of the trust estate, or of the other trust estate or partnership;
- then:
- (d) for the purposes only of working out the share of the net income to be included in the taxpayer's assessable income, the assessable income of the trust estate, or of the other trust estate or partnership, includes all of the IB amounts; and
 - (e) the taxpayer is entitled to a rebate in the taxpayer's assessment for the year of income of an amount equal to 30% of the IB attributable amount.

Trustee assessment

- (3) If:
- (a) apart from this subsection, the trustee of a trust estate is assessed and liable to pay tax:
 - (i) in respect of a share of the net income of the trust estate of a year of income under section 98; or
 - (ii) in respect of the whole or part of the net income of the trust estate under section 99 or 99A; and
 - (b) if subsections 159GZZZZE(1) and (2) did not apply to IB amounts included in the assessable income of the trust estate, or of any other trust estate or partnership, of the year of income, the amount of the share, or of the whole or the part, of the net income would be increased by an amount (the **IB attributable amount**); and
 - (c) the trustee's return of income in respect of the share, or the whole or the part of the net income, of the year of income is

Section 159GZZZZG

prepared on the basis that all of the IB amounts are included in the assessable income of the trust estate, or of the other trust estate or partnership;

then:

- (d) for the purposes only of working out the amount of:
 - (i) the share, or of the whole or the part, of the net income; and
 - (ii) the individual interest of a beneficiary in the net income of the trust estate that is to be included in the beneficiary's assessable income under section 100, where the share of the net income to which subparagraph (a)(i) of this subsection applies is that of the beneficiary;

the assessable income of the trust estate, or of the other trust estate or partnership, includes all of the IB amounts; and

- (e) the trustee is entitled to a rebate in the trustee's assessment in respect of the share, or of the whole or the part, of the net income of the year of income to an amount equal to 30% of the IB attributable amount.

Partner assessment

(4) If:

- (a) apart from this subsection, a share of the net income of a partnership of a year of income is included in a taxpayer's assessable income under section 92; and
- (b) if subsections 159GZZZZE(1) and (2) did not apply to IB amounts included in the assessable income of the partnership, or of any other partnership or trust estate, that share of the net income would be increased by an amount (the ***IB attributable amount***); and
- (c) the taxpayer's return of income of the year of income is prepared on the basis that all of the IB amounts are included in the assessable income of the partnership, or of the other partnership or trust estate;

then:

- (d) for the purposes only of working out the share of the net income included in the taxpayer's assessable income, the assessable income of the partnership, or of the other partnership or trust estate, includes all of the IB amounts; and

- (e) the taxpayer is entitled to a rebate in the taxpayer's assessment for the year of income of an amount equal to 30% of the IB attributable amount.
- (5) The inclusion of an IB amount in the assessable income of a person under this section does not affect the denial of allowability of a deduction to another person in respect of the same amount under subsection 159GZZZZE(1) or (2).

159GZZZZH Tax payable where infrastructure borrowing certificate cancelled

Tax payable

- (1) If:
 - (a) the DAA cancels a certificate in relation to an infrastructure borrowing; and
 - (b) for any year of income (whether the one in which the cancellation takes place or an earlier or later one), there is a tax benefit amount in relation to the certificate;

the holder of the certificate at the time of the cancellation is liable to pay tax on an amount (an ***infrastructure certificate cancellation amount***) worked out using the formula:

$$15\% \times \text{Tax benefit amount} \times \text{Factor}$$

where

Factor means:

- (a) if the year of income to which the tax benefit amount relates is:
 - (i) the year of income in which the act or omission that was the ground, or the first act or omission that was a ground, relied on by the DAA for cancelling the certificate occurred; or
 - (ii) an earlier year of income;

the fraction worked out using the formula:

$$\frac{\text{Part of infrastructure period occurring after the act or omission}}{\text{Infrastructure period}} ; \text{ or}$$

- (b) in any other case—the number 1.

Assessment of amount

- (2) The Commissioner may make an assessment of the tax payable by a taxpayer under this section. In making or amending the assessment, and in dealing with any objection, appeal or review in relation to the assessment or amended assessment, the Commissioner may rely in whole or in part on advice given by the DAA under section 93ZF of the DAA Act.

Incorporation in other notices

- (3) This Act does not prevent notice of the assessment being incorporated in a notice of any other assessment made in respect of the taxpayer under this Act.

References in other provisions

- (4) Unless the contrary intention appears, in sections 172, 174, 204, 254 and 255 and former sections 215 and 216, but not in any other section of this Act, *income tax* or *tax* includes tax payable under this section.

Division 17—Rebates**Subdivision A—Concessional rebates****159H Application**

- (1) This Subdivision applies in relation to an assessment in respect of the income of a taxpayer if and only if:
 - (a) the taxpayer is a resident and is not a company, and the assessment is not in respect of income derived by him in a representative capacity as an agent or trustee; or
 - (b) the taxpayer is a trustee who is liable to be assessed under section 98 in respect of a share of the net income of a trust estate and the beneficiary who is presently entitled to the share of the income of the trust estate is a resident and is not a company.
- (2) A reference in this Subdivision to a resident shall, in relation to assessments in respect of income of the year of income that commenced on 1 July 1975, be read as including a reference to a resident of Papua New Guinea.

159HA Indexation of rebate amounts in sections 159J, 159K and 159L

- (1) Sections 159J and 159L apply in relation to an indexing year of income as if each indexable amount were replaced by the amount calculated using the formula:

Previous indexable amount \times Indexation factor

where:

Previous indexable amount is the indexable amount concerned for the previous year of income.

Indexation factor is the indexation factor for the indexing year of income.

Section 159HA

- (2) Where, apart from this subsection, an amount calculated under subsection (1) would be an amount of dollars and cents:
 - (a) if the number of cents is less than 50—the amount shall be rounded down to the nearest whole dollar; and
 - (b) in any other case—the amount shall be rounded up to the nearest whole dollar.
- (3) The indexation factor for an indexing year of income is the number (calculated to 3 decimal places) ascertained by dividing the sum of the index numbers for the quarters of the 12 month period ending on 31 March immediately before the indexing year of income by the sum of the index numbers for the quarters of the preceding 12 month period ending on 31 March.
- (4) If the factor ascertained under subsection (3) in relation to an indexing year of income would, if it were calculated to 4 decimal places, end with a number greater than 4, the factor ascertained under that subsection in relation to that indexing year of income shall be taken to be the factor calculated to 3 decimal places and increased by 0.001.
- (5) Subject to subsection (6), if at any time, whether before or after the commencement of this section, the Australian Statistician has published or publishes an index number in respect of a quarter in substitution for an index number previously published by the Australian Statistician in respect of that quarter, the publication of the later index number shall be disregarded for the purposes of this section.
- (6) If at any time, whether before or after the commencement of this section, the Australian Statistician has changed or changes the reference base for the Consumer Price Index, then, for the purposes of the application of this section after the change took place or takes place, regard shall be had only to the index numbers published in terms of the new reference base.
- (6A) If the indexation factor for an indexing year of income is less than 1.000, sections 159J and 159L apply in relation to the indexing year of income as if each indexable amount were the same as the previous indexable amount (as defined in subsection (1)). This subsection has effect despite subsection (1).

(7) In this section:

indexable amount means:

- (a) an amount specified in subsection 159J(1B) or (2) (other than the amounts specified in column 3 of the table in subsection 159J(2) in respect of a dependant included in class 3 or 4); or
- (b) the amounts specified in subsection 159L(2); or
- (c) the amount specified in:
 - (i) sub-subparagraph 23AB(7)(a)(ii)(D); or
 - (ii) paragraph (d) of the definition of ***relevant rebate amount*** in subsection 79A(4); or
 - (iii) paragraph (d) of the definition of ***concessional rebate amount*** in subsection 79B(6);

or, if any such amount has been altered under this section in relation to the 2008-09 year of income or a later year of income, the altered amount.

indexation factor means the indexation factor ascertained under subsection (3).

indexing year of income means the year of income commencing on 1 July 2008 or a later year of income.

index number, in relation to a quarter, means the All Groups Consumer Price Index number, being the weighted average of the 8 capital cities, published by the Australian Statistician in respect of that quarter.

159J Rebates for dependants

- (1) Where, during the year of income, a taxpayer contributes to the maintenance of a person (in this section referred to as a ***dependant***) specified in column 2 of the table set out in subsection (2) and that person is a resident, the taxpayer is entitled, in his assessment in respect of income of that year of income, to a rebate of tax ascertained in accordance with this section.
- (1A) A taxpayer is not entitled in his assessment in respect of income of a year of income after the year of income that ends on 30 June 1976 to a rebate under this section in respect of a person by reason that the person is included in class 3 or class 4 in the table set out in subsection (2).

Part III Liability to taxation

Division 17 Rebates

Section 159J

- (1AA) A taxpayer is not entitled, in his or her assessment in respect of a year of income, to a rebate under this section in respect of a dependant included in class 1 or 2 in the table in subsection (2), if, during the whole of that year of income:
- (a) the taxpayer, or the taxpayer's spouse while being the taxpayer's partner as defined in the *A New Tax System (Family Assistance) Act 1999*, was eligible for family tax benefit at the Part B rate within the meaning of that Act; and
 - (b) clause 31 of Schedule 1 to that Act did not apply to the Part B rate.
- (1B) Where, but for subsection (1A), a taxpayer would be entitled in his assessment in respect of income of a year of income to a rebate under this section in respect of a dependant included in class 3 or 4 in the table in subsection (2), the entitlement of the taxpayer to a rebate under this section in that assessment in respect of any dependant included in class 2 of that table shall be calculated as if the the reference in that table to \$1,711 were a reference to \$2,051.
- (2) Subject to this section, the amount of the rebate allowable in the assessment of the taxpayer in respect of a dependant under this section is the relevant amount specified in column 3 of the following table:

Column 1	Column 2	Column 3
Class	Dependant	Amounts of Rebate
1	Spouse of the taxpayer	\$2,100
2	Child-housekeeper	\$1,711
3	Child less than 21 years of age (not being a student)	In respect of 1 such child—\$376 In respect of each other such child—\$282
4	Student	\$376
5	Invalid relative	\$770
6	Parent of the taxpayer or of the taxpayer's spouse	\$1,540

- (3) Where:
- (a) the taxpayer contributes to the maintenance of a dependant during part only of the year of income;

- (aa) a dependant is a resident during part only of the year of income;
- (b) during the whole or part of the year of income, 2 or more persons contribute to the maintenance of a person who is a dependant in relation to 1 or more of the persons so contributing;
- (c) a dependant, being the spouse of the taxpayer, is the spouse of the taxpayer during part only of the year of income;
- (d) a dependant, being a child-housekeeper, is wholly engaged in keeping house for the taxpayer during part only of the year of income; or
- (e) a dependant, being a child included in class 3 in the table in subsection (2), a student or an invalid relative, is such a dependant during part only of the year of income;

the rebate allowable to the taxpayer in respect of that dependant shall be such part of the relevant amount specified in column 3 of that table as, in the opinion of the Commissioner, is reasonable in the circumstances.

(3AA) If:

- (a) but for this subsection, a taxpayer would be entitled, in his or her assessment in respect of a year of income, to a rebate under this section in respect of a dependant included in class 1 or 2 in the table in subsection (2); and
- (b) during part only of that year of income:
 - (i) the taxpayer, or the taxpayer's spouse while being the taxpayer's partner as defined in the *A New Tax System (Family Assistance) Act 1999*, was eligible for family tax benefit at the Part B rate within the meaning of that Act; and
 - (ii) clause 31 of Schedule 1 to that Act did not apply in respect of the Part B rate;

then:

- (c) the taxpayer has no entitlement to a rebate under this section in respect of that dependant for that part of the year of income; and
- (d) the rebate allowable to the taxpayer in respect of that dependant for the remainder of that year of income is, subject to the operation of subsection (3AB), such part of the relevant rebate amount specified in column 3 of the table in

Section 159J

subsection (2) as, in the opinion of the Commissioner, is reasonable in the circumstances.

(3AB) If:

- (a) but for this subsection, a taxpayer would be entitled, in his or her assessment in respect of a year of income, to a rebate under this section in respect of a dependant included in class 1 or 2 of the table in subsection (2); and
- (b) during the whole or a part of the year of income concerned:
 - (i) the taxpayer, or the taxpayer's spouse while being the taxpayer's partner as defined in the *A New Tax System (Family Assistance) Act 1999*, was eligible for family tax benefit at the Part B rate within the meaning of that Act; and
 - (ii) clause 31 of Schedule 1 to that Act applied in respect of that Part B rate because of the determination of a particular specified percentage under subsection 59(1) of that Act;

the rebate allowable to the taxpayer for the year of income, or that part of the year of income, (the *shared care period*) is to be worked out using the formula:

$$\left[1 - \frac{A}{B} \right] \times \text{Applicable rebate amount}$$

where:

A is the standard rate in respect of the taxpayer or the taxpayer's spouse worked out under clause 31 of Schedule 1 to the *A New Tax System (Family Assistance) Act 1999*.

applicable rebate amount is the amount of rebate that would have been allowable under this section in respect of the shared care period but for the application of this subsection.

B is the rate that would be the standard rate in respect of the taxpayer or the taxpayer's spouse under clause 30 of Schedule 1 to that Act had clause 31 of that Schedule not applied and had the FTB child in respect of whom the standard rate was determined under clause 31 been the only FTB child of the taxpayer or the taxpayer's spouse, as the case requires.

- (3A) In the application of the definition of *resident* in subsection 6(1) for the purposes of this section, a dependant included in class 1, 2, 3 or 4, and a child of the taxpayer being a dependant included in class 5, in the table in subsection (2) shall be deemed to have a domicile in Australia at all times when the taxpayer has a domicile in Australia.
- (4) The amount of the rebate otherwise allowable under this section in respect of a dependant shall be reduced by \$1 for every \$4 by which the separate net income derived by the dependant in the year of income exceeds \$282.
- (5) Where, during the whole or a part of the year of income, the taxpayer and a person of a kind specified in column 2 of the table in subsection (2) resided together and that person has a separate net income in that year, then, for the purposes of this section, the taxpayer shall be regarded, unless the contrary is established to the satisfaction of the Commissioner, as having contributed to the maintenance of that person during the whole or that part of the year of income, as the case may be.
- (5A) Subject to subsection (5B), where, but for this subsection, a taxpayer would, by reason that he or she contributed to the maintenance of 2 or more dependants included in class 1 in the table in subsection (2) during the whole or a part of the year of income, be entitled in his or her assessment in respect of income of the year of income to more than one rebate under this section, the taxpayer shall be regarded as having contributed to the maintenance of only one of those dependants during the whole or that part of the year of income, as the case may be, being the dependant in respect of whom the lesser, or least, of the rebates would, but for this subsection, be allowable to the taxpayer under this section in respect of those dependants.
- (5B) Where subsection (5A) applies but the Commissioner is of the opinion that, because of special circumstances, it would be reasonable to regard the taxpayer as having contributed during the whole or a part of the year of income to the maintenance of a dependant included in class 1 in the table in subsection (2), other than the dependant in respect of whom a rebate is allowable under this section by virtue of the operation of subsection (5A), the taxpayer shall be regarded as having contributed to the maintenance of that other dependant only and the rebate allowable
-

to the taxpayer under this section in respect of that other dependant shall be such amount, not exceeding the relevant amount specified in column 3 of the table in subsection (2), as is, in the opinion of the Commissioner, reasonable in the circumstances.

(5C) Where:

- (a) during the whole or a part of the year of income, a taxpayer contributed to the maintenance of 2 or more dependants included in class 1 in the table in subsection (2); and
- (b) by virtue of the operation of subsection (4), a rebate is not allowable to the taxpayer under this section in respect of one of those dependants;

the taxpayer shall be regarded as not having contributed to the maintenance of any of those dependants during the whole or that part of the year of income, unless the Commissioner is of the opinion that, because of special circumstances, it would be unreasonable to do so, in which case the rebate (if any) allowable under this section in the assessment of the taxpayer in respect of income of the year of income in respect of a dependant included in class 1 in that table shall be such amount, not exceeding the relevant amount specified in column 3 of that table, as is, in the opinion of the Commissioner, reasonable in the circumstances.

(5D) Where, by reason that, during the whole or a part of the year of income, a taxpayer contributes to the maintenance of a dependant included in class 1 in the table in subsection (2), the taxpayer is entitled, or would, but for subsection (4) be entitled, in his or her assessment in respect of income of the year of income, to a rebate under this section, a child of the taxpayer shall be deemed not to have been engaged in keeping house for the taxpayer during the whole or that part of the year of income, as the case may be.

(6) In this section:

child-housekeeper means the child of a taxpayer who is wholly engaged in keeping house for the taxpayer.

invalid relative means a person who is not less than 16 years of age and is a child, brother or sister of the taxpayer, being a person:

- (a) to whom a disability support pension or a special needs disability support pension is being paid under the *Social Security Act 1991*;

- (b) to whom a rehabilitation allowance is being paid under that Act and who, immediately before becoming eligible to receive that allowance, was eligible to receive an invalid pension under that Act; or
- (c) in respect of whom the taxpayer obtains a certificate issued by a medical officer of the Department of Health, or by a medical practitioner appointed by the Secretary to the Department of Social Security for the purpose of examining claimants for disability support pensions under that Act, certifying that the person has a continuing inability to work within the meaning of Part 2.3 of that Act.

separate net income, in relation to a dependant:

- (aa) includes any amount that is included in the assessable income of the dependant by Part 3-1 or 3-3 of the *Income Tax Assessment Act 1997* (about CGT); and
- (ab) does not include family tax payment paid under the *Social Security Act 1991* as in force immediately before the commencement of item 1 of Schedule 10 to the *A New Tax System (Family Assistance) (Consequential and Related Measures) Act (No. 2) 1999*; and
- (ac) does not include child care benefit, child care tax rebate, family tax benefit, maternity allowance, maternity payment, baby bonus, maternity immunisation allowance or one-off payment to families paid under the *A New Tax System (Family Assistance) (Administration) Act 1999*; and
- (aca) does not include payments to families under the scheme determined under Schedule 3 to the *Family Assistance Legislation Amendment (More Help for Families—One-off Payments) Act 2004*; and
- (ad) does not include any of the following paid under the *Social Security Act 1991*:
 - (i) carer allowance;
 - (ia) child disability assistance;
 - (ii) one-off payment to carers (carer payment related);
 - (iii) one-off payment to carers (carer allowance related);
 - (iv) 2005 one-off payment to carers (carer payment related);
 - (v) 2005 one-off payment to carers (carer service pension related);

Section 159J

- (vi) 2005 one-off payment to carers (carer allowance related);
- (vii) 2006 one-off payment to carers (carer payment related);
- (viii) 2006 one-off payment to carers (wife pension related);
- (ix) 2006 one-off payment to carers (partner service pension related);
- (x) 2006 one-off payment to carers (carer service pension related);
- (xi) 2006 one-off payment to carers (carer allowance related);
- (xii) 2007 one-off payment to carers (carer payment related);
- (xiii) 2007 one-off payment to carers (wife pension related);
- (xiv) 2007 one-off payment to carers (partner service pension related);
- (xv) 2007 one-off payment to carers (carer service pension related);
- (xvi) 2007 one-off payment to carers (carer allowance related); and
- (adaa) does not include 2006 one-off payment to older Australians under the *Social Security Act 1991* or the *Veterans' Entitlements Act 1986*; and
- (adab) does not include payments to older Australians under a scheme determined under Schedule 2 to the *Social Security and Veterans' Entitlements Legislation Amendment (One-off Payments to Increase Assistance for Older Australians and Carers and Other Measures) Act 2006*; and
- (adac) does not include 2007 one-off payment to older Australians under the *Social Security Act 1991* or the *Veterans' Entitlements Act 1986*; and
- (adad) does not include payments to older Australians under a scheme determined under Schedule 2 to the *Social Security and Veterans' Affairs Legislation Amendment (One-off Payments and Other 2007 Budget Measures) Act 2007*; and
- (ada) does not include payments to carers under the scheme determined under Schedule 3 to the *Family Assistance Legislation Amendment (More Help for Families—One-off Payments) Act 2004*; and
- (adb) does not include payments to carers under the scheme determined under Schedule 2 to the *Social Security*

Legislation Amendment (One-off Payments for Carers) Act 2005; and

- (adc) does not include payments to carers under the scheme determined under Schedule 4 to the *Social Security and Veterans' Entitlements Legislation Amendment (One-off Payments to Increase Assistance for Older Australians and Carers and Other Measures) Act 2006; and*
- (add) does not include payments to carers under the scheme determined under Schedule 4 to the *Social Security and Veterans' Affairs Legislation Amendment (One-off Payments and Other 2007 Budget Measures) Act 2007; and*
- (ae) does not include maternity allowance, maternity immunisation allowance, family allowance, family allowance supplement or non-benefit PP (partnered) within the meaning of the *Social Security Act 1991* as in force immediately before the commencement of item 1 of Schedule 10 to the *A New Tax System (Family Assistance) (Consequential and Related Measures) Act (No. 2) 1999; and*
- (a) subject to paragraph (c), does not include home child care allowance within the meaning of the *Social Security Act 1991* as in force immediately before the commencement of Schedule 1 to the *Social Security (Parenting Allowance and Other Measures) Legislation Amendment Act 1994*, non-benefit parenting allowance within the meaning of the *Social Security Act 1991* as in force immediately before the commencement of Schedule 1 to the *Social Security Legislation Amendment (Parenting and Other Measures) Act 1997* or amounts paid under a scheme for the provision by the Commonwealth of assistance in connexion with the education of isolated children; and
- (aaa) does not include any part of benefit parenting allowance paid under the *Social Security Act 1991* as in force immediately before the commencement of Schedule 1 to the *Social Security Legislation Amendment (Parenting and Other Measures) Act 1997*, that is exempt because of paragraph (e) of the item dealing with "Parenting allowance (benefit parenting allowance)" in section 52-15 of the *Income Tax Assessment Act 1997* as in force immediately before the commencement of Schedule 1 to the *Social Security Legislation Amendment (Parenting and Other Measures) Act 1997; and*

Section 159J

- (aab) does not include child care assistance or child care rebate paid under the *Child Care Payments Act 1997*; and
- (aac) does not include any amount paid under the Division 26 of the *Private Health Insurance Act 2007*; and
- (aad) does not include any part of benefit PP (partnered) paid under the *Social Security Act 1991*, as in force immediately before the commencement of item 1 of Schedule 10 to the *A New Tax System (Family Assistance) (Consequential and Related Measures) Act (No. 2) 1999*, that is exempt under section 52-10 because of paragraph (e) of the item dealing with parenting payment (benefit PP (partnered)) in the table in section 52-15 of the *Income Tax Assessment Act 1997*; and
- (b) in the case of a dependant included in class 3 or class 4 in the table in subsection (2):
 - (i) includes the value or amount of any assistance (other than family allowance or family allowance supplement within the meaning of the *Social Security Act 1991* as in force immediately before the commencement of item 1 of Schedule 10 to the *A New Tax System (Family Assistance) (Consequential and Related Measures) Act (No. 2) 1999*, a carer allowance or an amount paid under a scheme for the provision by the Commonwealth of assistance in connexion with the education of isolated children) provided to the dependant or any other person by the Commonwealth or a State by way of, or for the purpose of, maintenance or accommodation of the dependant in connexion with the education of the dependant; and
 - (ii) does not include the value or amount of any scholarship, bursary, exhibition or prize, except to the extent that it consists of assistance referred to in subparagraph (i); and
- (c) includes amounts paid:
 - (i) under the scheme known as the Assistance for Isolated Children Scheme in respect of a period commencing at or after the time the dependant attained the age of 16 years; and
 - (ii) for the purpose of maintenance or accommodation of the dependant in connection with the education of the dependant.

student means a person who is less than 25 years of age and is receiving full-time education at a school, college or university.

159K Sole parent rebate

- (1) Where, during the whole of the year of income, a taxpayer has the sole care of a dependant or dependants included in class 3 or class 4 in the table in subsection 159J(2), being a dependant or dependants in respect of whom he would be entitled to a rebate of tax under section 159J in his assessment in respect of income of the year of income but for subsection 159J(1A), he is entitled, subject to subsection (3), to a rebate of tax, in his assessment in respect of income of that year of income, of:
 - (a) if he is not entitled, in respect of the year of income, to a rebate of tax under section 159J in respect of a spouse or child-housekeeper or under section 159L in respect of a housekeeper—an amount of \$1,607; and
 - (b) if he is entitled to a rebate of tax under section 159J in respect of a child-housekeeper, or under section 159L in respect of a housekeeper, in respect of a period that is part of the year of income, or the taxpayer contributed during a period that is part of the year of income, to the maintenance of his spouse—an amount of \$1,607 less an amount that bears to \$1,607 the same proportion as the number of days in that period (or, if there is more than one such period, in those periods) bears to 365.
- (1A) A taxpayer is not entitled to a rebate under this section in his or her assessment in respect of the 2000-2001 year of income or a later year of income.
- (2) Where, during part only of the year of income, a taxpayer has the sole care of a dependant or dependants included in class 3 or class 4 in the table in subsection 159J(2), being a dependant or dependants in respect of whom he would be entitled to a rebate of tax under section 159J in his assessment in respect of income of the year of income but for subsection 159J(1A), and the taxpayer would, if he had had the sole care of that dependant or those dependants during the whole of the year of income, have been entitled to a rebate under subsection (1), the taxpayer is entitled, subject to subsection (3), to a rebate of tax, in his assessment in respect of income of the year of income, of an amount not

Section 159L

exceeding \$1,607 that, in the opinion of the Commissioner, is reasonable in the circumstances.

- (3) Where the taxpayer is the spouse of another person during the whole or part of the year of income:
 - (a) the taxpayer is not entitled to a rebate under this section in respect of that year of income unless the Commissioner is of the opinion that, because of special circumstances, it is just to allow a rebate; and
 - (b) the rebate (if any) shall be such amount not exceeding \$1,607 as, in the opinion of the Commissioner, is reasonable in the circumstances.

159L Housekeeper

- (1) Where, during the year of income, a person (in this section referred to as a *housekeeper*) is wholly engaged in keeping house in Australia for a taxpayer and in caring for:
 - (a) a child of the taxpayer less than 21 years of age;
 - (b) a dependant included in class 3, or a dependant less than 21 years of age included in class 4, in the table in subsection 159J(2) in respect of whom the taxpayer would be entitled to a rebate under section 159J in his assessment in respect of income of the year of income but for subsection 159J(1A);
 - (ba) a dependant included in class 5 in the table in subsection 159J(2) in respect of whom the taxpayer is entitled to a rebate under section 159J in his assessment in respect of income of the year of income; or
 - (c) the spouse of the taxpayer, being a spouse in receipt of a disability support pension under the *Social Security Act 1991*; the taxpayer is entitled, in his assessment in respect of income of that year of income, to a rebate of tax ascertained in accordance with this section.
- (2) Subject to this section, the amount of the rebate allowable under this section in the assessment of the taxpayer in respect of income of a year of income shall be:
 - (a) in the case of a taxpayer who would, but for subsection 159J(1A), be entitled to a rebate in that assessment under section 159J in respect of a dependant included in class 3 or class 4 in the table in subsection 159J(2)—\$2,051; and

- (b) in any other case—\$1,711.
- (3) Where, by reason of the fact that, during a part of the year of income, the taxpayer contributes to the maintenance of a dependant included in class 1 or class 2 in the table in subsection 159J(2), not being a dependant specified in paragraph (1)(c) of this section, the taxpayer is entitled to a rebate of tax under section 159J in his assessment in respect of income of the year of income, a housekeeper shall be deemed not to have been wholly engaged in keeping house for the taxpayer during that part of the year of income.
- (3A) A taxpayer is not entitled, in his or her assessment in respect of a year of income, to a rebate under this section in respect of a person wholly engaged in keeping house in Australia for the taxpayer if, during the whole of that year of income:
- (a) the taxpayer, or the taxpayer's spouse while being the taxpayer's partner as defined in the *A New Tax System (Family Assistance) Act 1999*, was eligible for family tax benefit at the Part B rate within the meaning of that Act; and
 - (b) clause 31 of Schedule 1 to that Act did not apply to the Part B rate; and
 - (c) the taxpayer did not contribute to the maintenance of a dependant specified in paragraph (1)(c).
- (4) Where a taxpayer has a spouse and the housekeeper is not, during the year of income, engaged in caring for the spouse of the taxpayer, being a spouse in receipt of a disability support pension under the *Social Security Act 1991*:
- (a) he is not entitled to a rebate under this section in his assessment in respect of income of the year of income unless the Commissioner is of the opinion that, because of special circumstances, it is just to allow a rebate; and
 - (b) the rebate (if any) shall be of such amount, not exceeding the amount specified in subsection (2) in relation to the taxpayer as, in the opinion of the Commissioner, is reasonable in the circumstances.
- (5) Where a housekeeper is wholly engaged in keeping house for the taxpayer and in caring for the child, dependant or spouse during part only of the year of income, the rebate allowable in respect of that housekeeper under this section in the assessment of the

Section 159L

taxpayer in respect of income of that year of income shall be such part of the amount specified in subsection (2) in relation to the taxpayer as, in the opinion of the Commissioner, is reasonable in the circumstances.

(5A) If:

- (a) but for this subsection, a taxpayer would be entitled, in his or her assessment in respect of a year of income, to a rebate under this section in respect of a person wholly engaged in keeping house in Australia for the taxpayer; and
- (b) during part only of that year of income:
 - (i) the taxpayer, or the taxpayer's spouse while being the taxpayer's partner as defined in the *A New Tax System (Family Assistance) Act 1999*, was eligible for family tax benefit at the Part B rate within the meaning of that Act; and
 - (ii) clause 31 of Schedule 1 to that Act did not apply in respect of the Part B rate; and
 - (iii) the taxpayer did not contribute to the maintenance of a dependant specified in paragraph (1)(c);

then:

- (c) the taxpayer has no entitlement to a rebate under this section for that part of the year of income; and
- (d) the rebate allowable to the taxpayer for the remainder of that year of income is, subject to the operation of subsection (5B), such part of the rebate specified in subsection (2) in relation to the taxpayer as, in the opinion of the Commissioner, is reasonable in the circumstances.

(5B) If:

- (a) but for this subsection, a taxpayer would be entitled, in his or her assessment in respect of a year of income, to a rebate under this section in respect of a person wholly engaged in keeping house in Australia for the taxpayer; and
- (b) during the whole or a part of the year of income concerned:
 - (i) the taxpayer, or the taxpayer's spouse while being the taxpayer's partner as defined in the *A New Tax System (Family Assistance) Act 1999*, was eligible for family tax benefit at the Part B rate within the meaning of that Act; and

- (ii) clause 31 of Schedule 1 to that Act applied in respect of that Part B rate because of the determination of a particular specified percentage under subsection 59(1) of that Act; and
- (iii) the taxpayer did not contribute to the maintenance of a dependant specified in paragraph (1)(c);

the rebate allowable to the taxpayer for the year of income, or that part of the year of income, (the *shared care period*) is to be worked out using the formula:

$$\left[1 - \frac{A}{B} \right] \times \text{Applicable rebate amount}$$

where:

A is the standard rate in respect of the taxpayer or the taxpayer's spouse worked out under clause 31 of Schedule 1 to the *A New Tax System (Family Assistance) Act 1999*.

applicable rebate amount is the amount of rebate that would have been allowable under this section in respect of the shared care period but for the application of this subsection.

B is the rate that would be the standard rate in respect of the taxpayer or the taxpayer's spouse under clause 30 of Schedule 1 to that Act had clause 31 of that Schedule not applied and had the FTB child in respect of whom the standard rate was determined under clause 31 been the only FTB child of the taxpayer or the taxpayer's spouse, as the case requires.

- (6) For the purposes of subsections (1) and (4), a person who is receiving a rehabilitation allowance under the *Social Security Act 1991* and who, immediately before he became eligible to receive that allowance, was eligible to receive an invalid pension under that Act, shall be taken to be in receipt of a disability support pension under that Act.

159M Double concessional rebates

Where, but for this section, a taxpayer would be entitled, under the provisions of sections 159J and 159L, to more than one rebate of tax in his assessment in respect of income of a year of income in respect of the same person, the rebate or rebates shall be of such

amount as is or such amounts as are, in the opinion of the Commissioner, reasonable in the circumstances.

159N Rebate for certain low-income taxpayers

- (1) If a taxpayer's taxable income of a year of income is less than \$48,750, the taxpayer is entitled to a rebate of tax in the taxpayer's assessment for the year of income.
- (2) The amount of the rebate is \$750, reduced by 4 cents for every \$1 of the amount (if any) by which the taxpayer's taxable income of the year of income exceeds \$30,000.

159P Rebate for medical expenses

- (1) An amount paid by the taxpayer in the year of income as medical expenses in respect of himself or herself, or in respect of a dependant who is a resident, less any amount paid to the taxpayer or any other person, and any amount which the taxpayer or any other person is entitled to be paid, in respect of those medical expenses by a government or public authority or by a society, association or fund (whether incorporated or not) shall, for the purposes of this section, be treated as a rebatable amount in respect of that year of income.
- (3) Where an amount is paid in the year of income by the trustee of a trust estate out of income of the trust estate as medical expenses in respect of a beneficiary who is a resident, that amount, less the sum of any amounts that have been paid to the trustee or any other person or that the trustee or any other person is entitled to be paid, in respect of those medical expenses by a government or public authority, or by a society, association or fund (whether incorporated or not) shall, for the purposes of this section, be treated as a rebatable amount:
 - (a) where the trustee is liable to be assessed under section 98 in respect of income of the year of income to which that beneficiary is presently entitled—in the assessment of the trustee in respect of that income; and
 - (b) where that beneficiary is liable to be assessed in respect of any income of the year of income—in the assessment of that beneficiary in respect of that income.

(3A) Where:

(a) a rebatable amount is, or rebatable amounts are, applicable to a taxpayer in respect of a year of income; and

(b) that rebatable amount, or the aggregate of those rebatable amounts, exceeds \$1,500;

the taxpayer is entitled to a rebate of tax in the taxpayer's assessment in respect of income of that year of income of an amount equal to 20% of the excess.

(3B) Where the trustee of the estate of a deceased person pays an amount as medical expenses in respect of a liability incurred by the deceased person in the deceased person's lifetime, being an amount that would have been treated, for the purposes of this section, as a rebatable amount if it had been paid by the deceased person during the deceased person's lifetime, there shall be allowed, in the assessment of the trustee upon the assessable income derived by the deceased person during the year of income in which the deceased person died, a rebate of tax equal to the rebate that would have been allowable to the deceased person under this section in respect of that amount if it had been paid by the deceased person during the year of income in which the deceased person died.

(4) In this section:

dependant means:

(a) the spouse of the taxpayer;

(b) a child of the taxpayer less than 21 years of age;

(c) a person in respect of whom the taxpayer is entitled to a rebate under section 159J; or

(d) a person included in class 3 or class 4 in the table in subsection 159J(2) in respect of whom the taxpayer would be entitled to a rebate under section 159J but for subsection 159J(1A).

ineligible medical expenses means payments:

(a) to a legally qualified medical practitioner, nurse or chemist, or a public or private hospital, in respect of a cosmetic operation that is not a professional service for which a medicare benefit is payable under Part II of the *Health Insurance Act 1973*; or

(b) to a legally qualified dentist for:

(i) dental services; or

(ii) treatment;

that is solely cosmetic.

medical expenses means payments:

- (a) to a legally qualified medical practitioner, nurse or chemist, or a public or private hospital, in respect of an illness or operation; or
- (b) to a legally qualified dentist for dental services or treatment or the supply, alteration or repair of artificial teeth; or
- (c) to a person registered under a law of a State or Territory as a dental mechanic in respect of charges lawfully made by that person for the supply, alteration or repair of artificial teeth; or
- (d) for therapeutic treatment administered by direction of a legally qualified medical practitioner; or
- (e) in respect of an artificial limb (or part of a limb), artificial eye or hearing aid; or
- (f) in respect of a medical or surgical appliance (not otherwise specified in this definition) prescribed by a legally qualified medical practitioner; or
- (g) for:
 - (i) the testing of eyes or the prescribing of spectacles by a person legally qualified to perform those services; or
 - (ii) the supply of spectacles in accordance with any such prescription; or
- (h) as remuneration of a person for services rendered by him as an attendant of a person who is blind or permanently confined to a bed or an invalid chair; or
- (i) for the maintenance of a dog used for the guidance or assistance of, but not social therapy for, a person with a disability, being a dog that the Commissioner is satisfied is properly trained in the guidance or assistance of persons with disabilities;

but does not include ineligible medical expenses.

professional service has the meaning given by subsection 3(1) of the *Health Insurance Act 1973*.

- (5) For the purposes of the definitions of **ineligible medical expenses** and **medical expenses** in subsection (4), a payment made to an employer (not being a public or private hospital) of a person (in this subsection referred to as the **relevant person**) who is a legally qualified medical practitioner, nurse or chemist in respect of the

provision of services or treatment, or the supply of goods, by the relevant person shall be taken to be a payment made to the relevant person in respect of the provision of those services or that treatment or in respect of the supply of those goods.

- (6) For the purposes of the definitions of *ineligible medical expenses* and *medical expenses* in subsection (4), a payment made to an employer of a legally qualified dentist in respect of the provision of dental services or treatment, or the supply, alteration or repair of artificial teeth, by the dentist shall be taken to be a payment made to the dentist in respect of the provision of those services or that treatment or in respect of the supply, alteration or repair of those artificial teeth.
- (7) For the purposes of paragraph (c) of the definition of *medical expenses* in subsection (4), a payment made to an employer of a person registered under a law of a State or Territory as a dental mechanic in respect of charges lawfully made by the employer in respect of the supply, alteration or repair of artificial teeth by the dental mechanic shall be taken to be a payment made to the dental mechanic in respect of charges lawfully made by the dental mechanic for the supply, alteration or repair of those artificial teeth.
- (8) A reference in subsection (5), (6) or (7) to an employer of a legally qualified medical practitioner, nurse or chemist, a legally qualified dentist or a person registered under a law of a State or Territory as a dental mechanic shall be read as including a reference to a person with whom the medical practitioner, nurse, chemist, dentist or dental mechanic has entered into a contract for services.

Subdivision AB—Lump sum payments in arrears

159ZR Interpretation

- (1) In this Subdivision, unless the contrary intention appears:

accrual year, in relation to the total arrears amount, means a year of income in which any part of the total arrears amount accrued.

annual arrears amount, in relation to an accrual year, means so much of the total arrears amount as accrued in that year.

associate has the same meaning as in section 318.

current year means the year of income for which the rebate is being calculated.

distant accrual year means an accrual year that is not a recent accrual year.

eligible income means:

- (a) salary or wages to the extent to which they accrued during a period ending more than 12 months before the date on which they are paid;
- (b) salary or wages paid to a person after re-instatement to duty following a period of suspension of the person from duty, to the extent to which the salary or wages accrued during the period of suspension;
- (c) a payment covered by section 12-80 or 12-120 in Schedule 1 to the *Taxation Administration Act 1953*;
- (d) a Commonwealth education or training payment (see subsection 6(1));
- (e) a payment that is covered by Division 52, 53 or 55 of the *Income Tax Assessment Act 1997*, but that is not exempt from income tax under that Division;
- (f) a payment under a law of a foreign country that is similar to a payment covered by paragraph (e);

but does not include so much of any such amount as was taken into account in calculating the amount of a tax reimbursement payment by the Commonwealth that was authorised under section 33 of the *Financial Management and Accountability Act 1997*.

eligible lump sum, in relation to a year of income, means a lump sum payment of eligible income received on or after 1 July 1986 that is included in the assessable income of the year of income and accrued, in whole or in part, in an earlier year or years of income.

gross tax means the tax payable before the allowance of any rebates or credits.

law of a foreign country includes a law of any part of, or place in, a foreign country.

normal taxable income is the amount that would be the taxable income if:

- (a) no amount were included in assessable income under Division 82, section 83-10 or 83-80 or Division 301 or 302 of the *Income Tax Assessment Act 1997* or Division 82 of the *Income Tax (Transitional Provisions) Act 1997*; and
- (b) the taxable income were reduced by any above-average special professional income included in the taxable income under section 405-15 of the *Income Tax Assessment Act 1997*; and
- (c) no amount were included in assessable income under section 102-5 of the *Income Tax Assessment Act 1997* (about including net capital gains in assessable income).

notional tax amount has the meaning given by sections 159ZRC and 159ZRD.

rebated tax means the tax payable after the allowance of any tax offset under Division 82, 83, 301 or 302 of the *Income Tax Assessment Act 1997*, subsection 392-35(2) of that Act (which allows some primary producers tax offsets) or Division 82 of the *Income Tax (Transitional Provisions) Act 1997*, but before the allowance of any other tax offsets or any credits.

rebate year means a year of income for which the conditions in paragraphs 159ZRA(1)(a) and (b) are satisfied.

recent accrual year, in relation to the total arrears amount, means:

- (a) if there are 3 or more accrual years for the total arrears amount—the most recent 2 of those years; or
- (b) in any other case—the accrual year, or each of the accrual years, for the total arrears amount.

salary or wages means payments covered by sections 12-35, 12-40 (except payments of remuneration to a director of the company who is also an associate of the company), 12-45, 12-80, 12-110, 12-115 and 12-120 in Schedule 1 to the *Taxation Administration Act 1953*.

total arrears amount, in relation to a year of income, means the aggregate of the eligible lump sums included in the assessable income of the year of income to the extent to which those eligible lump sums accrued in an earlier year or years of income.

159ZRA Eligibility for rebate

- (1) Where:
 - (a) the assessable income of the taxpayer of a year of income (in this Subdivision called the *current year*) includes one or more eligible lump sums; and
 - (b) the total arrears amount is not less than 10% of the amount (if any) remaining after deducting that total arrears amount from the normal taxable income of the current year;the taxpayer is entitled to a rebate of tax, in the taxpayer's assessment for the current year, of the amount (if any) calculated in accordance with this Subdivision.
- (2) The rebate is only available to a natural person (otherwise than in the capacity of a trustee).

159ZRB Calculation of rebate

The rebate is calculated in accordance with the formula:

Tax on arrears – Notional tax on arrears

where:

Tax on arrears is the amount by which the rebated tax on the taxable income of the current year exceeds the rebated tax on the taxable income of the current year, being that taxable income reduced by the total arrears amount.

Notional tax on arrears is the total of the notional tax amounts for the accrual years.

159ZRC Notional tax amount for recent accrual years

The notional tax amount for a recent accrual year is calculated in accordance with the formula:

Tax on increased income – Tax on actual income

where:

Tax on increased income is the rebated tax on the taxable income of the accrual year, being that taxable income adjusted as follows:

- (a) the annual arrears amount for the accrual year is to be added;
- (b) if the accrual year is also a rebate year—the total arrears amount for the accrual year is to be deducted; and

- (c) if, during the accrual year, there accrued an amount that is, or is part of, the total arrears amount for a rebate year before the current year—the amount that so accrued during the accrual year is to be added.

Tax on actual income is the rebated tax on the taxable income of the accrual year, being that taxable income adjusted as follows (if applicable):

- (d) if the accrual year is also a rebate year—the total arrears amount for the accrual year is to be deducted; and
- (e) if, during the accrual year, there accrued an amount that is, or is part of, the total arrears amount for a rebate year before the current year—the amount that so accrued during the accrual year is to be added.

159ZRD Notional tax amount for distant accrual years

- (1) The notional tax amount for a distant accrual year is calculated in accordance with the formula:

Arrears amount × Average tax rate on recent arrears

where:

Arrears amount is the annual arrears amount in relation to the accrual year.

Average tax rate on recent arrears is the average of the rates calculated in accordance with the following formula in respect of each of the recent accrual years:

$$\frac{\text{Increased normal tax} - \text{Normal tax}}{\text{Arrears amount}}$$

where:

Increased normal tax is the gross tax on the normal taxable income of the recent accrual year, being that normal taxable income adjusted as follows:

- (a) the annual arrears amount for the recent accrual year is to be added;
- (b) if the recent accrual year is also a rebate year—the total arrears amount for the recent accrual year is to be deducted; and

Part III Liability to taxation

Division 17 Rebates

Section 160AAAA

- (c) if, during the recent accrual year, there accrued an amount that is, or is part of, the total arrears amount for a rebate year before the current year—the amount that so accrued during the recent accrual year is to be added.

Normal tax is the gross tax on the normal taxable income of the recent accrual year, being that normal taxable income adjusted as follows (if applicable):

- (d) if the recent accrual year is also a rebate year—the total arrears amount for the recent accrual year is to be deducted; and
- (e) if, during the recent accrual year, there accrued an amount that is, or is part of, the total arrears amount for a rebate year before the current year—the amount that so accrued during the recent accrual year is to be added.

Arrears amount is the annual arrears amount for the recent accrual year.

- (2) A rate calculated for the purposes of subsection (1) in respect of a recent accrual year shall be calculated as a decimal fraction to 3 decimal places.
- (3) If a rate so calculated would end with a number greater than 4 if it were calculated to 4 decimal places, the rate shall be increased by 0.001.

Subdivision B—Miscellaneous

160AAAA Tax rebate for low income aged persons

- (1) A taxpayer who is an individual (other than in the capacity as trustee) is entitled to a rebate of tax in the taxpayer's assessment in respect of income of a year of income of an amount (if any), ascertained in accordance with the regulations, if the taxpayer satisfies the conditions in subsections (2) and (3).
- (2) The first condition is that, on at least one day during the year of income, either:
 - (a) the taxpayer:
 - (i) is eligible for a pension, allowance or benefit under the *Veterans' Entitlements Act 1986* (other than Part VII); and

- (ii) has reached pension age, within the meaning of that Act; and
 - (iii) is not in gaol; or
 - (b) the taxpayer:
 - (i) is qualified for an age pension under the *Social Security Act 1991*; and
 - (ii) is not in gaol.
- (3) The second condition is that the taxpayer has a taxable income for the year of income less than an amount ascertained in accordance with the regulations.
- (4) For the purposes of subsection (3), if the taxpayer is the spouse of another person, the taxable income of the taxpayer is taken to be half of the sum of:
 - (a) the taxable income of the taxpayer; and
 - (b) any share of the net income of a trust estate to which the spouse is presently entitled and that is assessed under section 98; and
 - (c) the actual taxable income of the spouse (reduced by any amount included in the spouse's assessable income under section 100).
- (5) Regulations made for the purposes of this section may be expressed to apply in relation to a year of income any part of which occurred before the notification of the regulations.

160AAAB Tax rebate for low income aged persons—trustees assessed under section 98

- (1) A taxpayer who is a trustee who is liable to be assessed under section 98 in respect of a beneficiary's share of the net income of the trust estate is entitled to a rebate of tax in the trustee's assessment in respect of income of a year of income of an amount (if any), ascertained in accordance with the regulations, if the conditions in subsections (2) and (3) are satisfied.
- (2) The first condition is that, on at least one day during the year of income, either:
 - (a) the beneficiary:

Section 160AAAB

- (i) is eligible for a pension, allowance or benefit under the *Veterans' Entitlements Act 1986* (other than Part VII); and
 - (ii) has reached pension age, within the meaning of that Act; and
 - (iii) is not in gaol; or
- (b) the beneficiary:
 - (i) is qualified for an age pension under the *Social Security Act 1991*; and
 - (ii) is not in gaol.
- (3) The second condition is that the beneficiary has a taxable income for the year of income less than an amount ascertained in accordance with the regulations.
- (4) For the purposes of subsection (3), if the beneficiary is not the spouse of another person, the taxable income of the beneficiary is taken to be the beneficiary's share of the net income of the trust estate.
- (5) For the purposes of subsection (3), if the beneficiary is the spouse of another person, the taxable income of the beneficiary is taken to be half of the sum of:
 - (a) the beneficiary's share of the net income of the trust estate; and
 - (b) any share of the net income of a trust estate to which the spouse is presently entitled and that is assessed under section 98; and
 - (c) the actual taxable income of the spouse (reduced by any amount included in the spouse's assessable income under section 100).
- (6) Regulations made for the purposes of this section may be expressed to apply in relation to a year of income any part of which occurred before the notification of the regulations.

160AAA Rebate in respect of certain pensions, benefits etc.

(1) In this section:

rebatable benefit means an amount:

- (a) paid by way of a benefit under Part 2.8A, 2.11, 2.11A, 2.12, 2.12B, 2.14, 2.15, 2.15A or 3.15A of the *Social Security Act 1991*; or
- (aa) paid by way of parenting payment that is PP (partnered) under the *Social Security Act 1991*, to the extent that the amount is not exempt under Division 52 of the *Income Tax Assessment Act 1997*; or
- (b) consisting of a Commonwealth education or training payment (see subsection 6(1)), except where the recipient, or the individual on whose behalf the recipient receives the payment, is an employee of any person who is entitled to a Commonwealth subsidy in respect of the employment; or
- (c) paid as a wage to a participant in a project under the Community Development Employment Projects program from the wages component of a grant made under the program; or
- (d) paid by way of Northern Territory CDEP transition payment under Part 2.27 of the *Social Security Act 1991*; or
- (da) paid by way of exceptional circumstances relief payment or farm help income support under the *Farm Household Support Act 1992*; or
- (db) paid by way of a grant of financial assistance as farm household support under the *Farm Household Support Act 1992*; or
- (e) paid by way of income support to farmers and small business owners affected by Cyclone Larry or Cyclone Monica; or
- (f) known as an interim income support payment and paid under section 33 of the *Financial Management and Accountability Act 1997*.

rebatable pension means a pension, allowance or benefit under:

- (a) the *Veterans' Entitlements Act 1986* (other than Part VII); or
- (b) the *Social Security Act 1991* (other than Part 2.8A, 2.10 to the extent it provides for parenting payment that is a PP (partnered), 2.11, 2.11A, 2.12, 2.12B, 2.14, 2.15, 2.15A, 2.18 or 3.15A).

Section 160AAB

- (2) Subject to subsections (4) and (4A), where the assessable income of a taxpayer of a year of income includes an amount of rebatable pension, the taxpayer is entitled in the taxpayer's assessment in respect of income of the year of income to a rebate of tax of an amount (if any) ascertained in accordance with the regulations.
- (3) Subject to subsections (4) and (4A), where the assessable income of a taxpayer of a year of income includes an amount of rebatable benefit, the taxpayer is entitled in the taxpayer's assessment in respect of income of the year of income to a rebate of tax of an amount (if any) ascertained in accordance with the regulations.
- (4) Where, apart from this subsection, the taxpayer would be entitled in his or her assessment in respect of income of a year of income to a rebate of tax under both subsections (2) and (3):
 - (a) if the amounts of the rebates are the same—the taxpayer is entitled to only one of the rebates; and
 - (b) if the amounts of the rebates are not the same—the taxpayer is not entitled to the lesser of the rebates.
- (4A) A taxpayer is not entitled to a rebate under this section for a year of income if:
 - (a) the taxpayer is entitled to a rebate of tax for the year of income under section 160AAAA; or
 - (b) the taxpayer is the beneficiary of a trust where the trustee of the trust is entitled to a rebate of tax for the year of income under section 160AAAB in respect of the taxpayer.
- (5) Regulations made for the purposes of this section may be expressed to apply in relation to a year of income any part of which occurred before the notification of the regulations.

160AAB Rebate in respect of amounts assessable under section 26AH

- (1) In this section:

eligible 26AH amount, in relation to a year of income, means an amount included in assessable income under section 26AH in relation to an eligible policy within the meaning of that section issued by:

- (a) a life assurance company, not being a life assurance company the whole of the income of which of the year of income is exempt from tax;
- (c) the Government Insurance Office of New South Wales;
- (d) Suncorp Insurance and Finance, being a body corporate established by a law of Queensland;
- (e) the State Government Insurance Commission established by a law of South Australia;
- (f) the State Insurance Office established by a law of Victoria; or
- (g) the State Government Insurance Corporation established by a law of Western Australia.

statutory percentage means:

- (a) if the policy concerned was issued by a friendly society:
 - (i) if the year of income is earlier than the 2002-03 year of income—33%; or
 - (ii) if the year of income is the 2002-03 year of income or a later year of income—30%; or
 - (b) otherwise:
 - (i) if the year of income is earlier than the 2001-02 year of income—39%; or
 - (ii) if the year of income is the 2001-02 year of income—34%; or
 - (iii) if the year of income is the 2002-03 year of income or a later year of income—30%.
- (2) A taxpayer, not being a taxpayer in the capacity of trustee of a trust estate, is entitled in his assessment in respect of income of a year of income to a rebate of tax equal to the statutory percentage of an eligible 26AH amount included in his assessable income of the year of income.
- (3) Where:
- (a) an amount is included under section 97, 98A or 100 in the assessable income of a year of income of a taxpayer being a beneficiary of a trust estate otherwise than in the capacity of trustee of another trust estate; and
 - (b) the whole or a part of the amount so included (which whole or part is in this subsection referred to as the *rebatable amount*) is attributable to an eligible 26AH amount included

Section 160AAB

in the assessable income of the year of income of the trust estate or of another trust estate;

the taxpayer is entitled in his assessment in respect of income of the year of income to a rebate of tax equal to the statutory percentage of the rebatable amount.

(4) Where:

- (a) a taxpayer being the trustee of a trust estate is liable to be assessed and to pay tax in pursuance of section 98 in respect of a share of the net income of the trust estate of a year of income; and
- (b) the whole or part of that share (which whole or part is in this subsection referred to as the *rebatable amount*) is attributable to an eligible 26AH amount included in the assessable income of the year of income of the trust estate or of another trust estate;

the taxpayer is entitled in that assessment to a rebate of tax equal to the statutory percentage of the rebatable amount.

(5) Where:

- (a) a taxpayer being the trustee of a trust estate is liable to be assessed and to pay tax in pursuance of section 99 or 99A in respect of the whole or a part (which whole or part is in this subsection referred to as the *relevant trust income*) of the net income of the trust estate of a year of income; and
- (b) the whole or a part of the relevant trust income (which whole or part is in this subsection referred to as the *rebatable amount*) is attributable to an eligible 26AH amount included in the assessable income of the year of income of the trust estate or of another trust estate;

the taxpayer is entitled in that assessment to a rebate of tax equal to the statutory percentage of the rebatable amount.

- (5A) A taxpayer being the trustee of a complying superannuation fund, a non-complying superannuation fund, a complying approved deposit fund, a non-complying approved deposit fund or a pooled superannuation trust is entitled in the taxpayer's assessment in respect of income of a year of income to a rebate of tax equal to the statutory percentage of any eligible section 26AH amount included in the taxpayer's assessable income of the year of income.

- (6) Where an eligible 26AH amount is included in the assessable income of a partnership of a year of income in the calculation of the net income or partnership loss of the partnership of the year of income, a partner in the partnership is entitled in his assessment in respect of income of the year of income to a rebate of tax equal to the statutory percentage of the amount by which the taxable income of the partner of the year of income exceeds the amount that could reasonably be expected to be that taxable income if the eligible 26AH amount had not been included in the assessable income of the partnership of the year of income.

160AD Maximum amount of rebates

Notwithstanding anything contained in this or any other Act, the sum of the rebates allowable under this Act shall not exceed the amount of tax which would otherwise be payable by the taxpayer.

160ADA Most tax offsets under the 1997 Assessment Act are treated as rebates

A tax offset under a provision of the *Income Tax Assessment Act 1997* is taken to be a rebate for the purposes of this Act, unless that provision corresponds to a provision of this Act that provides for a credit.

Note: If the tax offset provision does correspond to a credit provision, the tax offset is treated as a credit: see section 6D.

Part IIIB—Australian branches of foreign banks

Division 1—Preliminary

160ZZVA Object

- (1) The object of this Part is:
 - (a) to assist in calculating that part of a foreign bank's taxable income that is referable to certain activities of its Australian branch; and
 - (b) to make it clear that withholding tax will apply to amounts that are taken by this Part to be interest paid by the branch to the bank.

Note: This Part also:

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

See Division 4.

- (2) For the purpose of achieving the object mentioned in subsection (1), this Part requires, in the circumstances stated in this Part and not otherwise, that the Australian branch is to be treated as if it were a separate legal entity from the bank.

160ZZVB Application

- (1) It is the intention that, in so far as this Part is to be applied to identify amounts of income and expenditure that are taken into account in calculating that part of a foreign bank's taxable income of a year of income that is referable to certain activities of its Australian branch, the provisions of this Part are to be applied in their entirety.
- (2) If, as a result of the application of this Part:
 - (a) the taxable income of a year of income of a foreign bank that is attributable to activities carried on by the bank through its Australian branch is greater than the amount that would be that taxable income if this Part did not apply; or

- (b) a foreign bank would be taken not to incur a loss in a year of income in respect of activities carried on by the bank through its Australian branch that it would be taken to have incurred if this Part did not apply; or
 - (c) the amount of a loss that a foreign bank would be taken to incur in a year of income in respect of activities carried on by the bank through its Australian branch is less than the amount of the loss that it would be taken to have incurred if this Part did not apply;
- and an agreement within the meaning of the *Income Tax (International Agreements) Act 1953* that has the force of law applies in relation to the bank, the bank may elect that this Part is not to apply in the calculation of its taxable income of that year of income.
- (3) If a foreign bank makes an election as mentioned in subsection (2):
- (a) this Part does not apply in the calculation of the bank's taxable income of the year of income to which the election relates and the bank may furnish returns, and is liable to pay tax, accordingly; but
 - (b) the election does not affect the operation of this Part in respect of the application of withholding tax to amounts that are taken by this Part to be interest paid by the branch to the bank.

160ZZV Definitions

In this Part, unless the contrary intention appears:

accounting records includes:

- (a) invoices, receipts, vouchers and other documents of prime entry; and
- (b) any working papers and other documents that are necessary to explain the methods and calculations by which accounts are made up.

Australian branch, in relation to a foreign bank, means a permanent establishment in Australia through which the bank carries on banking business.

derivative transaction means a transaction entered into for the purpose of eliminating, reducing or altering the risk of adverse

financial consequences that might result from changes in rates of interest or changes in rates of exchange between currencies, or for the purpose of making a profit from such changes, but does not include a transaction for the provision of finance or a foreign exchange transaction.

interest has the same meaning as in Division 11A of Part III.

foreign bank means a body corporate that is a foreign ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*.

foreign exchange transaction means a transaction by which different currencies are exchanged.

offshore banking unit has the same meaning as in Division 11A of Part III.

time of establishment, in relation to an Australian branch of a foreign bank, means the time when the bank began to carry on business through the permanent establishment in Australia that constitutes the branch.

160ZZW Certain provisions to apply as if Australian branch of foreign bank were a separate legal entity

- (1) Subsections (2), (3), (4) and (5) apply only:
 - (a) for the purposes of sections 160ZZZ, 160ZZZA, 160ZZZC, 160ZZZE and 160ZZZF as they have effect in the determination under this Act of the liability of a foreign bank to tax (other than withholding tax) in respect of income derived from an Australian branch of the bank; and
 - (b) for the purposes of the provisions of this Act other than this Part as those provisions apply in relation to amounts that are taken by this Part to have been received from a foreign bank by its Australian branch or to have been paid to a foreign bank by its Australian branch; and
 - (c) for the purposes of section 160ZZZJ as it has effect in determining the liability of a foreign bank to withholding tax in respect of amounts paid to the bank by an Australian branch of the bank.

- (2) The branch and the bank are taken to be, and to have been since the time of establishment of the branch, separate legal entities.
- (3) The branch is taken to be, and to have been since the time of its establishment, a company having a share capital all the shares in which are or were beneficially owned by the bank.
- (4) The branch is taken to be a non-resident and to have been a non-resident since the time of its establishment.
- (5) For the purposes of Division 13 of Part III, the branch is taken not to be, and not to have been at any time since its establishment, a permanent establishment in Australia of the bank.

Division 2—Provisions relating to income tax

160ZZX Income of branch to have Australian source

All income derived by a foreign bank through its Australian branch is taken, for the purposes of this Act, to be income derived from a source in Australia.

160ZZZ Notional borrowing by branch from bank

- (1) If an amount has been made available by a foreign bank for use by an Australian branch of the bank and is recorded in the branch's accounting records as having been provided by the bank to the branch, that amount is taken, for the purposes of this Act, to have been borrowed by the branch from the bank when the amount became so available and to have been so borrowed in the currency in which the amount became so available.
- (2) If an amount has been made available by the branch to the bank in purported repayment of an amount that is taken, under subsection (1), to have been borrowed by the branch from the bank and the amount so made available is recorded in the branch's accounting records as having been repaid by the branch to the bank, the amount that was so taken to have been borrowed is taken, for the purposes of this Act, to have been repaid by the branch to the bank when the amount became so available and to have been so repaid in the currency in which the amount became so available.

160ZZZA Notional payment of interest by branch to bank

- (1) If, under section 160ZZZ, an amount is taken, for the purposes of this Act, to have been borrowed (the *notional borrowing*) in a particular currency from a foreign bank by an Australian branch of the bank, the following provisions have effect:
 - (a) at any time (the *relevant time*) when, in respect of the notional borrowing, an amount (the *notional amount of interest*) is entered in the branch's accounting records as interest for a period fixed by the bank, interest is taken, for the purposes of this Act, to be incurred by the branch, paid by the branch to the bank, and derived by the bank, in respect of the notional borrowing;

- (b) subject to the application of paragraph (c), the notional amount of interest is taken, for the purposes of this Act, to be the amount of interest so taken to be paid;
 - (c) if the interest on the notional borrowing at the relevant time was at a rate of interest that exceeded the LIBOR that was applicable at the beginning of the relevant interest calculation period in relation to the notional borrowing, there is taken to have been entered in the branch's accounting records at the relevant time, in lieu of the notional amount of interest, the amount that would have been so entered if interest on the notional borrowing for the relevant interest calculation period had been calculated at the LIBOR that was applicable at the beginning of that period.
- (2) For the purposes of this section, a reference to the LIBOR that was applicable at the beginning of the relevant interest calculation period in relation to the notional borrowing is a reference to:
- (a) the LIBOR applicable at the beginning of that period in respect of advances in the currency of that borrowing for a term the number of days in which was equal to the number of days in that period; or
 - (b) if there was no LIBOR applicable at the beginning of that period in respect of advances in the currency of that borrowing for such a term:
 - (i) the LIBOR applicable at the beginning of that period in respect of advances in that currency for a term the number of days in which most nearly approximated the number of days in that period; or
 - (ii) if there were different LIBORs so applicable for different terms the number of days in each of which could be described as having most nearly approximated the number of days in that period—the LIBOR so applicable for the shorter of those terms.
- (3) For the purposes of this section:
- (a) a reference to LIBOR, in relation to a particular time, is a reference to the rate of interest applicable at that time in relation to banks in the London inter bank market as determined by reference to the Reuter Monitor Money Rates Service or any other published source; and

Section 160ZZZC

- (b) a reference to the relevant interest calculation period in relation to a notional borrowing from a foreign bank by an Australian branch of the bank is a reference to the period fixed by the bank for the calculation of the notional amount of interest in respect of the notional borrowing.

160ZZZC Offshore banking units

If:

- (a) apart from this section, a foreign bank would be an offshore banking unit under a declaration published under subsection 128AE(2); and
 - (b) the foreign bank has an Australian branch;
- this Act has effect as if the Australian branch were the offshore banking unit under the declaration.

160ZZZE Notional derivative transactions between branch and bank

If the accounting records of an Australian branch of a foreign bank reflect a derivative transaction notionally entered into by the branch with the bank:

- (a) the notional transaction is taken to be a transaction entered into by the branch with the bank; and
- (b) any amount entered in the branch's accounting records as a payment or receipt in respect of the notional transaction is taken, for the purposes of this Act, to be an amount paid or received by the branch, as the case may be, in respect of the derivative transaction when the amount was so entered.

160ZZZF Notional foreign exchange transactions between branch and bank

If the accounting records of an Australian branch of a foreign bank reflect a foreign exchange transaction notionally entered into by the branch with the bank:

- (a) the notional transaction is taken to be a transaction entered into by the branch with the bank; and
- (b) any amount entered in the branch's accounting records as a payment or receipt in respect of the notional transaction is taken, for the purposes of this Act, to be an amount paid or

received by the branch, as the case may be, in respect of the foreign exchange transaction when the amount was so entered.

160ZZZG Losses

Subdivision 170-A of the *Income Tax Assessment Act 1997* has effect as if an Australian branch of a foreign bank were a subsidiary of the bank and a resident of Australia.

160ZZZH Net capital losses

Subdivision 170-B of the *Income Tax Assessment Act 1997* (about transfer of net capital losses within wholly-owned groups of companies) has effect as if an Australian branch of a foreign bank were a 100% subsidiary (within the meaning of that Act) of the bank and an Australian resident (within the meaning of that Act).

160ZZZI Certain transactions to be disregarded

Any transaction entered into by a foreign bank otherwise than through its Australian branch:

- (a) under which finance is provided to the bank; or
- (b) that is a derivative transaction or a foreign exchange transaction;

is to be disregarded for the purpose of determining whether a deduction is allowable to the bank under this Act.

Division 3—Provisions relating to withholding tax

160ZZZJ Withholding tax on interest paid by branch to bank

- (1) If:
- (a) an amount of interest is taken under section 160ZZZA to be paid to, and derived by, a foreign bank by an Australian branch of the bank; and
 - (b) apart from this section, section 128B of this Act, and Subdivision 12-F in Schedule 1 to the *Taxation Administration Act 1953*, would apply to an amount (the **taxable amount**) that comprises the whole or a part of the amount so taken to be paid;
- the following subsections have effect.
- (2) Section 128B of this Act, and Subdivision 12-F in Schedule 1 to the *Taxation Administration Act 1953*, apply only to the amount worked out using the formula:
- $$\frac{\text{Taxable amount}}{2}$$
- (3) An amount to which section 128B applies because of subsection (2) of this section is taken, for the purposes of section 128C, to be income that was derived by the bank when the amount of interest referred to in paragraph (1)(a) is taken to have been paid to the bank.

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

160ZZZK Treatment like Australian branches of foreign banks

Objects

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

Foreign financial entities treated like foreign banks

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

Australian permanent establishments treated like Australian branches

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

Definitions

- (4) In this section:

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

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

Part IV—Returns and assessments

161 Annual returns

Requirement to lodge a return

- (1) Every person must, if required by the Commissioner by notice published in the *Gazette*, give to the Commissioner a return for a year of income within the period specified in the notice.

Note: The Commissioner may defer the time for giving the return: see section 388-55 in Schedule 1 to the *Taxation Administration Act 1953*.

- (1A) The Commissioner may, in the notice, exempt from liability to furnish returns such classes of persons not liable to pay income tax as the Commissioner thinks fit, and a person so exempted need not furnish a return unless the person is required by the Commissioner to do so.
- (2) If the taxpayer is absent from Australia, or is unable from physical or mental infirmity to make such return, the return may be signed and delivered by some person duly authorized.
- (3) Nothing in this section prevents an approval by the Commissioner of a form of return under section 35D of the *Superannuation Industry (Supervision) Act 1993* from requiring or permitting a return under that section to be attached to, or to form part of, a return under this section.

Note: However, the rules applicable to a return under section 35D of the *Superannuation Industry (Supervision) Act 1993* are those specified in that Act.

161A Form and content of returns

- (1) The return must be in the approved form.

Electronic returns

- (2) An approval given by the Commissioner of a form of return may require or permit the return to be given on a specified kind of data processing device, or by way of electronic transmission, in accordance with specified software requirements.

161AA Contents of returns of full self-assessment taxpayers

A full self-assessment taxpayer must, in a return for a year of income, specify:

- (a) its taxable income or its net income for that year of income (or that it has no taxable income or net income for that year); and
- (b) the amount of the tax payable on that taxable income or net income (or that no tax is payable); and
- (c) the amount of interest (if any) payable by the taxpayer under section 102AAM for that year of income; and
- (d) for a company that is an RSA provider, or a trustee of a fund that is an eligible superannuation fund (as defined in section 267) in relation to the year of income:
 - (i) its no-TFN contributions income as defined by section 295-610 of the *Income Tax Assessment Act 1997* (or that it has no no-TFN contributions income); and
 - (ii) the amount of the income tax payable on that income (or that no income tax is payable).

161G Tax agent to give taxpayer copy of notice of assessment

Where a taxpayer has given the address of a registered tax agent as the taxpayer's address for service, the registered tax agent must give the taxpayer the original of, or a copy of, any notice of assessment in respect of that taxpayer that is delivered to that address.

Penalty: 30 penalty units.

162 Further returns and information

A person must, if required by the Commissioner, whether before or after the end of the year of income, give the Commissioner, within the time required and in the approved form:

- (a) a return or a further or fuller return for a year of income or a specified period, whether or not the person has given the Commissioner a return for the same period; or
- (b) any information, statement or document about the person's financial affairs.

163 Special returns

Every person, whether a taxpayer or not, if required by the Commissioner, shall, in the approved form and within the time required by him, furnish any return required by the Commissioner for the purposes of this Act.

163A Late lodgement penalty—relevant entities, instalment taxpayers and full self-assessment taxpayers

- (1) Subject to subsection (2), if:
 - (a) a person who is a relevant entity, an instalment taxpayer or a full self-assessment taxpayer is required to furnish a return under section 161, 162 or 163 in relation to a year of income; and
 - (b) the return is not furnished within:
 - (i) in the case of section 161—the period specified in the notice under that section or any further period allowed by the Commissioner under that section; or
 - (ii) in the case of section 162 or 163—the time required by the Commissioner under that section;

the person is liable to pay, by way of penalty, \$10 for each week or part of a week that occurs after the end of the period, the further period or the time mentioned in paragraph (b) and before the return is furnished.

Note: The penalty is payable even if the return is never furnished.

Maximum penalty

- (2) The maximum penalty payable under subsection (1) in respect of the return is \$200.

Notification requirements

- (3) The Commissioner must give the person a notice in writing stating that the person is liable to penalty under this section in relation to the year of income and specifying:
 - (a) the amount of the penalty; and
 - (b) the day on which the penalty is due and payable.

The day specified must be at least 30 days after the day on which the notice is given, and the amount is due and payable on the day specified.

Note: A person who fails to pay on time some or all of the penalty is liable to pay the general interest charge on the unpaid amount: see section 163AA.

Notice in assessment notice

- (4) The notice may be included in any other notice of assessment in respect of the person.

Remission of penalty

- (5) The Commissioner may, in his or her discretion, remit the whole or any part of the penalty.

Notice in writing of decision

- (6) If the Commissioner makes a decision to remit part only of the penalty, or not to remit any part of the penalty, the Commissioner must:
- (a) if the decision is made before the Commissioner gives the notice under subsection (3)—advise the person of the decision in the notice under subsection (3); or
 - (b) in any other case—give notice in writing of the decision to the person.

Objections

- (7) If the person is dissatisfied with:
- (a) the notice given to the person under subsection (3); or
 - (b) a decision of the Commissioner under subsection (5) in relation to the person;
- the person may object against the notice, or against the decision, as the case requires, in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

Income tax or tax includes penalty

- (8) Unless the contrary intention appears, in sections 254 and 255 and former sections 215 and 216, but not in any other section of this

Section 163AA

Act, a reference to *income tax* or *tax* includes a reference to the penalty.

Definitions

(9) In this section:

instalment taxpayer has the same meaning as in former Division 1C of Part VI.

relevant entity has the same meaning as in former Division 1B of Part VI.

(10) This section does not apply to a return for the 2000-01 year of income or a later year of income.

Note: See instead Division 286 in Schedule 1 to the *Taxation Administration Act 1953*.

163AA General interest charge on unpaid penalty

A person who fails to pay some or all of a penalty under section 163A by the time by which the penalty is due to be paid is liable to pay the general interest charge on the unpaid amount for each day in the period that:

- (a) started at the beginning of the day by which the penalty was due to be paid; and
- (b) finishes at the end of the last day on which, at the end of the day, any of the following remains unpaid:
 - (i) the penalty;
 - (ii) general interest charge on any of the penalty.

Note: The general interest charge is worked out under Part IIA of the *Taxation Administration Act 1953*.

163B Late lodgment of returns by persons other than relevant entities, instalment taxpayers and full self-assessment taxpayers

(1) If:

- (a) a person (other than a relevant entity, an instalment taxpayer or a full self-assessment taxpayer) is required to furnish a return under section 161, 162 or 163 in relation to a year of income; and

- (b) the return is not furnished within:
 - (i) in the case of section 161—the period specified in the notice under that section or any further period allowed by the Commissioner under that section; or
 - (ii) in the case of section 162 or 163—the time required by the Commissioner under that section; and
- (c) an assessment (other than an amended assessment) is made of the income tax payable by the person for the year of income (whether or not on the basis of a return that is later furnished by the person);

the person is liable to pay the general interest charge on the amount in subsection (2) and the amount of the charge is taken to be **additional tax** payable under this section.

Note: The general interest charge is worked out under Division 1 of Part IIA of the *Taxation Administration Act 1953*.

- (1A) The person is liable to pay the general interest charge for each day in the period that:
 - (a) started at the beginning of the day by which the return was required to be furnished; and
 - (b) finishes at the end of the day before the return is furnished, or the day before the Commissioner made the assessment, whichever is earlier.

Amount on which additional tax payable

- (2) The additional tax is payable on the lesser of:
 - (a) the amount of income tax payable under the assessment (after allowing any rebate or deduction under subsection 100(2) and before any crediting, applying or other payment); and
 - (b) the person's net tax payable (see subsection (3)).

Meaning of net tax payable

- (3) The person's **net tax payable** is the amount worked out using the formula:

Tax liabilities – Crediting amounts and payments on account

where:

Tax liabilities means the sum of the following amounts (worked out disregarding any payment on account of the amounts):

Section 163B

- (a) income tax payable under the assessment (after allowing any rebate or deduction under subsection 100(2) and before allowing any crediting, applying or refunding, notified in the notice of assessment, of an income tax crediting amount);
- (b) additional tax for the year of income payable by the person under Part VII immediately before any such crediting, applying or refunding;
- (c) interest for the year of income payable by the person under section 102AAM immediately before any such crediting, applying or refunding;
- (d) an HEC assessment debt or compulsory repayment amount notified in the notice of assessment;
- (e) an FS assessment debt notified in the notice of assessment.

Crediting amounts and payments on account means the sum of:

- (a) any income tax crediting amounts notified in the notice of assessment; and
- (b) any payments made on account of the amounts in paragraphs (a) to (e) of the definition of ***Tax liabilities***.

Income tax or tax includes additional tax

- (8) Unless the contrary intention appears, in sections 204, 205, 206, 215, 216, 254, 255, 258 and 259, but not in any other section of this Act, a reference to ***income tax*** or ***tax*** includes a reference to the additional tax.

Minimum amount

- (9) If less than \$20 of additional tax is payable under this section, the additional tax is taken to be \$20.

Definitions

- (10) In this section:

compulsory repayment amount has the same meaning as in the *Higher Education Support Act 2003*.

FS assessment debt means an FS assessment debt under:

- (a) subsection 19AB(2) of the *Social Security Act 1991*; or
- (b) the *Student Assistance Act 1973* as in force at a time on or after 1 July 1998.

HEC assessment debt has the same meaning as in Chapter 5A of the *Higher Education Funding Act 1988*.

income tax crediting amount, in relation to the income tax payable by a person for a year of income, means an amount of a credit applied under Division 3 of Part IIB of the *Taxation Administration Act 1953* against the income tax.

instalment taxpayer has the same meaning as in Division 1C of Part VI.

relevant entity has the same meaning as in Division 1B of Part VI.

- (11) This section does not apply to a return for the 2000-01 year of income or a later year of income.

Note: See instead Division 286 in Schedule 1 to the *Taxation Administration Act 1953*.

164 Returns deemed to be duly made

Every return purporting to be made or signed by or on behalf of any person shall be deemed to have been duly made by him or with his authority until the contrary is proved.

166 Assessment

From the returns, and from any other information in his possession, or from any one or more of these sources, the Commissioner shall make an assessment of the amount of the taxable income (or that there is no taxable income) of any taxpayer, and of the tax payable thereon (or that no tax is payable).

166A Deemed assessment

- (1) Where a taxpayer that is a relevant entity within the meaning of former Division 1B of Part VI furnishes a return in respect of income of a year of income to which that Division applied:
- (a) the Commissioner is taken to have made, on the day on which the return is furnished, an assessment of the relevant taxable income or net income, as the case may be, and of the tax payable on that taxable income or net income, being those respective amounts as specified in the return; and

Section 166A

- (b) on and after the day on which the Commissioner is deemed to have made the assessment, the return is deemed to be a notice of the deemed assessment and to be under the hand of the Commissioner; and
 - (c) the notice referred to in paragraph (b) is deemed to have been served on the entity on the day on which the Commissioner is deemed to have made the assessment.
- (2) Where:
- (aa) at a particular time, a taxpayer to which former Division 1C of Part VI applied gives a return in respect of income of a year of income to which that Division applied; and
 - (ab) before that time, no return has been given, and no assessment has been made, in relation to the taxpayer in respect of the income of the year of income:
- the following provisions apply:
- (a) the Commissioner is deemed to have made an assessment of the taxable income or net income, and the tax payable on that income, equal to those respective amounts specified in the return;
 - (b) the assessment is deemed to have been made on the day on which the return is lodged;
 - (c) on and after the day on which the Commissioner is deemed to have made the assessment, the return is deemed to be a notice of the deemed assessment:
 - (i) under the hand of the Commissioner; and
 - (ii) served on the taxpayer on the day on which the Commissioner is deemed to have made the assessment.
- (3) If:
- (a) at a particular time, a full self-assessment taxpayer gives a return in respect of a year of income for which the taxpayer is a full self-assessment taxpayer; and
 - (b) before that time, no return has been given, and no assessment has been made, in relation to the taxpayer in respect of the income of the year of income;
- the following provisions apply:
- (c) the Commissioner is taken to have made an assessment of the taxable income or net income (or an assessment that there is no taxable income or net income), and the tax payable on that

income (or that no tax is payable), in accordance with what the taxpayer specified in the return;

- (d) the assessment is taken to have been made on the day on which the return is lodged;
- (e) on and after the day on which the Commissioner is taken to have made the assessment, the return is taken to be a notice of the assessment:
 - (i) under the hand of the Commissioner; and
 - (ii) served on the taxpayer on the day on which the Commissioner is taken to have made the assessment.

167 Default assessment

If:

- (a) any person makes default in furnishing a return; or
- (b) the Commissioner is not satisfied with the return furnished by any person; or
- (c) the Commissioner has reason to believe that any person who has not furnished a return has derived taxable income;

the Commissioner may make an assessment of the amount upon which in his judgment income tax ought to be levied, and that amount shall be the taxable income of that person for the purpose of section 166.

168 Special assessment

- (1) The Commissioner may at any time during any year, or after its expiration, make an assessment of the taxable income derived (or that there is no taxable income) in that year or any part of it by any taxpayer, and of the tax payable thereon (or that no tax is payable).
- (2) Where the income, in respect of which such an assessment is made, is derived in a period less than a year, the assessment shall be made as if the beginning and end of that period were the beginning and end respectively of the year of income.

169 Assessments on all persons liable to tax

Where under this Act any person is liable to pay tax (including a nil liability), the Commissioner may make an assessment of the amount of such tax (or an assessment that no tax is payable).

169A Reliance by Commissioner on returns and statements

- (1) Where a return of income of a taxpayer of a year of income is furnished to the Commissioner (whether or not by the taxpayer), the Commissioner may, for the purposes of making an assessment in relation to the taxpayer under this Act, accept, either in whole or in part, a statement in the return of the assessable income derived by the taxpayer and of any allowable deductions or rebates to which it is claimed that the taxpayer is entitled and any other statement in the return or otherwise made by or on behalf of the taxpayer.
- (2) Despite subsection (1), if, in a document given with a return of income of a taxpayer of a year of income and signed by or on behalf of the taxpayer, a question is raised:
 - (a) that is relevant to the liability of the taxpayer in respect of the year of income; and
 - (b) on which the taxpayer is not entitled to apply for a private ruling under Division 359 in Schedule 1 to the *Taxation Administration Act 1953*;the Commissioner must give attention to that question.
- (3) In determining whether an assessment is correct, any determination, opinion or judgment of the Commissioner made, held or formed in connection with the consideration of an objection against the assessment shall be deemed to have been made, held or formed when the assessment was made.

170 Amendment of assessments

(1) The Commissioner may amend an assessment as follows:

Amendment of assessments	
Time of amendment	Qualification
1 The Commissioner may amend an assessment of an individual for a year of income within 2 years after the day on which the Commissioner gives notice of the assessment to the individual.	<p>This item does not apply:</p> <ul style="list-style-type: none"> (a) if the individual carries on a business at any time in that year unless the individual is a small business entity for that year; or (b) if the individual is a partner in a partnership that carries on a business at any time in that year unless the partnership is a small business entity for that year; or (c) to an individual in the capacity of a trustee of a trust estate at any time in that year (see item 3 for this case); or (d) if the individual is a beneficiary of a trust estate at any time in that year unless the trust is a small business entity for that year or the trustee of the trust (in that capacity) is a full self-assessment taxpayer for that year; or (e) if it is reasonable to conclude that any person entered into or carried out a scheme (either alone or with others) for the sole or dominant purpose of the individual obtaining a scheme benefit in relation to income tax from the scheme for that year; or (f) in any other circumstance prescribed by the regulations. <p>This item is subject to items 5 and 6.</p>

Section 170

Amendment of assessments

Time of amendment	Qualification
<p>2 The Commissioner may amend an assessment of a company that is a small business entity for the year of income to which the assessment relates within 2 years after the day on which the Commissioner gives notice of the assessment to the company.</p>	<p>This item does not apply:</p> <ul style="list-style-type: none"> (a) if the company is a partner in a partnership that carries on a business at any time in that year unless the partnership is a small business entity for that year; or (b) to a company in the capacity of a trustee of a trust estate at any time in that year (see item 3 for this case); or (c) if the company is a beneficiary of a trust estate at any time in that year unless the trust is a small business entity for that year or the trustee of the trust (in that capacity) is a full self-assessment taxpayer for that year; or (d) if it is reasonable to conclude that any person entered into or carried out a scheme (either alone or with others) for the sole or dominant purpose of the company obtaining a scheme benefit in relation to income tax from the scheme for that year; or (e) in any other circumstance prescribed by the regulations. <p>This item is subject to items 5 and 6.</p>

Amendment of assessments	
Time of amendment	Qualification
<p>3 The Commissioner may amend an assessment of a person (in the capacity of a trustee of a trust estate) for a year of income if the trust is a small business entity for that year.</p> <p>The Commissioner may amend the assessment within 2 years after the day on which he or she gives notice of the assessment to the person.</p>	<p>This item does not apply:</p> <p>(a) if the person (in that capacity) is a partner in a partnership that carries on a business at any time in that year unless the partnership is a small business entity for that year; or</p> <p>(b) if the person (in that capacity) is a beneficiary of another trust estate at any time in that year unless the other trust is a small business entity for that year or the trustee of the other trust (in that capacity) is a full self-assessment taxpayer for that year; or</p> <p>(c) if it is reasonable to conclude that any person entered into or carried out a scheme (either alone or with others) for the sole or dominant purpose of the person (in that capacity) obtaining a scheme benefit in relation to income tax from the scheme for that year; or</p> <p>(d) in any other circumstance prescribed by the regulations.</p> <p>This item is subject to items 5 and 6.</p>
<p>4 If item 1, 2 or 3 does not apply, the Commissioner may amend an assessment within 4 years after the day on which he or she gives notice of the assessment to the taxpayer.</p>	<p>This item is subject to items 5 and 6.</p>
<p>5 The Commissioner may amend an assessment at any time if he or she is of the opinion there has been fraud or evasion.</p>	<p>None.</p>

Section 170

Amendment of assessments

Time of amendment	Qualification
6 The Commissioner may amend an assessment at any time:	None.
(a) to give effect to a decision on a review or appeal; or	
(b) as a result of an objection made by the taxpayer or pending a review or appeal.	

Note 1: This section applies to assessments where no tax is payable: see the definition of *assessment* in subsection 6(1).

Note 2: This section also applies to amended assessments: see section 173. However, there are limits on how amended assessments can be amended: see subsections (2) and (3) of this section.

Note 3: The amendment period mentioned in item 1, 2, 3 or 4 may be extended: see subsections (5) to (7).

Limit on amending amended assessments under subsection (1)

- (2) The Commissioner cannot amend an amended assessment under item 1, 2, 3 or 4 of the table in subsection (1) if the limited amendment period for the original assessment concerned has ended.

Note: The Commissioner can amend amended assessments at any time under item 5 or 6 of the table in subsection (1).

Refreshed amendment period for amending amended assessments

- (3) If the Commissioner amends an assessment (the *earlier assessment*) as set out in column 2 of the following table, he or she may, under this subsection, amend the assessment (the *later assessment*) that results from that amendment in the way set out in column 3 within:

- (a) if item 1, 2 or 3 of the table in subsection (1) applies to the original assessment concerned (which may or may not be the earlier assessment)—2 years after the day on which he or she gives notice of the later assessment to the taxpayer; or
- (b) otherwise—4 years after that day.

Amendment of later assessment

Column 1 Item	Column 2 In this case:	Column 3 the position is:
1	The Commissioner amends the earlier assessment about a particular in a way that reduces a taxpayer's liability and the Commissioner accepts a statement made by the taxpayer in making the amendment	The Commissioner may amend the later assessment about that particular in a way that increases the taxpayer's liability.
2	The Commissioner amends the earlier assessment about a particular in a way that: (a) increases a taxpayer's liability; or (b) reduces a taxpayer's liability (other than in a case covered by item 1)	The Commissioner may amend the later assessment about that particular in a way that reduces the taxpayer's liability.

Note 1: The earlier assessment may be the original assessment or an amended assessment.

Note 2: The Commissioner can amend the later assessment at any time under item 5 or 6 of the table in subsection (1).

Note 3: The amendment period mentioned in paragraph (3)(a) or (b) may be extended: see subsections (5) to (7).

- (4) The Commissioner cannot amend an assessment under item 2 of the table in subsection (3) about a particular if he or she has previously amended an assessment under item 1 of that table about that particular.

Extensions—applications by taxpayer

- (5) The Commissioner may amend an assessment even though the limited amendment period has ended if, before the end of that period, the taxpayer applies for an amendment in the approved form. The Commissioner may amend the assessment to give effect to the decision on the application.

Section 170

Extensions—giving effect to private rulings

- (6) The Commissioner may amend an assessment even though the limited amendment period has ended if:
- (a) the taxpayer applies for a private ruling under Division 359 in Schedule 1 to the *Taxation Administration Act 1953* before the end of that period; and
 - (b) the Commissioner makes a private ruling under that Division because of the application.

The Commissioner may amend the assessment to give effect to the ruling.

Extensions—Federal Court orders or taxpayer consent

- (7) If:
- (a) the Commissioner has started to examine the affairs of a taxpayer in relation to an assessment; and
 - (b) the Commissioner has not completed the examination before the end of the limited amendment period or that period as extended;
- the limited amendment period may be extended as follows:

Extensions of limited amendment period

In this case:	the position is:
1 The Commissioner, before the end of the limited amendment period or that period as extended, applies to the Federal Court of Australia for an order extending the limited amendment period	The Court may order an extension of the limited amendment period for a specified period if it is satisfied that it was not reasonably practicable, or it was inappropriate, for the Commissioner to complete the examination within the limited amendment period, or that period as extended, because of: <ul style="list-style-type: none">(a) any action taken by the taxpayer; or(b) any failure of the taxpayer to take action that would have been reasonable for the taxpayer to take.

Extensions of limited amendment period

In this case:	the position is:
2 The Commissioner, before the end of the limited amendment period or that period as extended, requests the taxpayer to consent to extending the limited amendment period	The taxpayer may, by notice in writing, consent to extending the limited amendment period for a specified period.

- (8) The limited amendment period for an assessment may be extended more than once under subsection (7).

Other amendment periods

- (9) Notwithstanding anything contained in this section, when the assessment of the taxable income of any year includes an estimated amount of income, or of profits or gains of a capital nature, derived by the taxpayer in that year from an operation or series of operations the profit or loss on which was not ascertainable at the end of that year owing to the fact that the operation or series of operations extended over more than one or parts of more than one year, the Commissioner may at any time within 4 years after ascertaining the total profit or loss actually derived or arising from the operation or series of operations, amend the assessment so as to ensure its completeness and accuracy on the basis of the profit or loss so ascertained.
- (9B) Subject to subsection (9C), nothing in this section prevents the amendment, at any time, of an assessment for the purpose of giving effect to a prescribed provision or a relevant provision.
- (9C) Subsection (9B) does not authorize the Commissioner, for the purpose of giving effect to a prescribed provision or a relevant provision, to amend an assessment made in relation to a taxpayer in relation to a year of income where:
- (a) in a case where the purpose of the amendment is to give effect to the prescribed provision in relation to the supply or acquisition of property—the prescribed provision has been previously applied, in relation to that supply or acquisition, in making or amending an assessment in relation to the taxpayer in relation to the year of income; or
 - (b) in any other case—the prescribed provision or the relevant provision, as the case may be, has been previously applied, in

Section 170

relation to the same subject matter, in making or amending an assessment in relation to the taxpayer in relation to the year of income.

- (9D) This section does not prevent the amendment of an assessment at any time if the amendment is made, in relation to a contract that after the making of the assessment is found to be void *ab initio*, to ensure that Part 3-1 or 3-3 of the *Income Tax Assessment Act 1997* (about CGT) is taken always to have applied to the contract as if the contract had never been made.
- (10) Nothing in this section prevents the amendment, at any time, of an assessment for the purpose of giving effect to any of the provisions of this Act set out in this table.

Amendment of assessments		
Item	Provision	Brief description
1	Section 23AB	Income of certain persons serving with an armed force under the control of the United Nations
3	Section 26AG	Certain film proceeds included in assessable income
4	Subsection 47(2B)	Distributions by liquidator
5	Section 51AD	Deductions not allowable in respect of property used under certain leveraged arrangements
6	Section 51AH	Deductions not allowable where expenses incurred by employee are reimbursed
10	Section 78A	Certain gifts not to be allowable deductions
12	Section 82KJ	Deduction not allowable in respect of certain pre-paid outgoings
13	Section 82KK	Schemes designed to postpone tax liability
14	Section 82KL	Tax benefit not allowable in respect of certain recouped expenditure
16	Subsection 82SA(2)	Interest on certain convertible notes to be an allowable deduction—where loan made on or after 1 January 1976
17	Section 100A	Present entitlement arising from reimbursement agreement

Amendment of assessments		
Item	Provision	Brief description
18	Subdivision C of Division 6D of Part III	Trustee beneficiary non-disclosure tax on share of net income
20	Section 105AB	Additional period for distribution by liquidator
21	Section 121AT	Other tax consequences of demutualisation
22	Division 9C of Part III	Assessable income diverted under certain tax avoidance schemes
23	Division 10BA of Part III	Australian films
24	Section 136AF	Consequential adjustments to assessable income and allowable deductions
25	Division 16D of Part III	Certain arrangements relating to the use of property
26	Subsection 159GZZZH(2)	Post-cancellation disposals of eligible interests etc.
27	Section 160ABB	Rebate in respect of certain payments by the Commonwealth Savings Bank of Australia
28	Section 271-105 in Schedule 2F	Amounts subject to family trust distribution tax not assessable
29	Schedule 2G	Farm management deposits

(10AA) Nothing in this section prevents the amendment, at any time, of an assessment for the purpose of giving effect to any of the provisions of the *Income Tax Assessment Act 1997* set out in this table.

Amendment of assessments		
Item	Provision	Brief description
1A	Subsection 15-65(2)	Sugar industry exit grant becomes assessable because of breach of undertaking
1	Subdivision 20-B	Disposal of a car for which lease payments have been deducted
5	Subsection 26-25(3)	Deduction for interest or royalty if withholding tax paid
20	The former section 42-290	Balancing adjustment relief for plant
22	Section 59-30	Repayment of amounts

Section 170

Amendment of assessments		
Item	Provision	Brief description
25	Subdivision 61-G	Private health insurance offset complementary to Part 2-2 of the <i>Private Health Insurance Act 2007</i>
24	Subdivision 61-I	Tax offset for first child
30	Subsection 104-10(3) or (6) Subsection 104-25(2) Subsection 104-45(2) Subsection 104-90(2) Subsection 104-110(2) Subsection 104-205(2) Subsection 104-225(5) Subsection 104-230(5)	The time of a CGT event is decided by there being a contract entered into
40	Paragraph 104-15(4)(a)	CGT event B1: agreement ends without title passing
50	Subsection 104-40(5)	Exception to CGT event D2 where option is exercised
60	Section 108-15	Disposal of collectable that is part of a set
70	Section 108-25	Disposal of personal use asset that is part of a set
80	Section 116-45	Modification to capital proceeds for non-receipt
90	Section 116-50	Modification to capital proceeds for amounts you repay
100	Subsection 122-25(4)	Right or option etc. exercised after roll-over to acquire trading stock
110	Subsection 122-135(4)	Right or option etc. exercised after roll-over to acquire trading stock
120	Subdivision 124-B	Roll-over for assets compulsorily acquired, lost or destroyed
130	Subsection 126-5(3)	CGT event B1: agreement ends without title passing
140	Subsection 126-45(3)	CGT event B1: agreement ends without title passing
150	Subsection 126-50(3)	Right or option etc. exercised after roll-over to acquire trading stock
160	Section 126-70	Capital loss disregarded despite choice for no roll-over

Amendment of assessments		
Item	Provision	Brief description
165	Subsection 138-15(5)	CGT event B1: agreement ends without title passing
170	Subsection 165-115ZA(2)	Reduction in respect of reduced cost base etc. of debt disregarded if commercial debt forgiveness provisions apply
173	Division 250	Asset is put to a tax preferred use by a tax preferred end user
174	Section 295-25	Commissioner makes an assessment as if an entity were a complying superannuation entity or a pooled superannuation trust for the income year and: (a) the entity does not become one; or (b) the Australian Prudential Regulation Authority (APRA) does not receive certain documents about the entity within a specified period
175	Section 295-30	Notice under section 342 of the <i>Superannuation Industry (Supervision) Act 1993</i> or under regulations made for the purposes of that section is revoked, or the decision to give the notice is set aside
176	Subsection 295-195(3)	An amount is excluded from the assessable income of a complying superannuation fund or an RSA provider because of the exercise of an option by the trustee or provider
177	Section 295-270	Commissioner makes an assessment on the basis of an amount of pre-1 July 88 funding credits being anticipated for an income year and: (a) it becomes clear that those credits will not be available; or (b) APRA does not receive certain documents within a specified period
178	295-490(2)	Deduction is denied because financial assistance funding levy is remitted or there is a refund of an overpayment of the levy

Section 170

Amendment of assessments		
Item	Provision	Brief description
180	The former section 330-175 The former section 330-245	An amount in an agreement to transfer deduction entitlements exceeds the maximum amount capable of being transferred
185	Subdivision 375-H	Deductions for shares in a film licensed investment company
190	Subdivision 385-E	Primary producer elects to spread or defer tax on profit from forced disposal or death of live stock
200	Section 385-160	Disentitling event happens in relation to your primary production business

(10A) Nothing in this section prevents the amendment, at any time, of an assessment to increase the liability of a taxpayer for the purpose of giving effect to section 73B, 73BH, 73BA, 73BF, 73BM, 73C, 73CB, 73I, 73QA or 73QB.

(11) Nothing in this section prevents the amendment, at any time, of an assessment to decrease the liability of a taxpayer for the purpose of giving effect to section 24 of the *International Tax Agreements Act 1953*.

Definitions

(14) In this section, unless the contrary intention appears:

double taxation agreement means an agreement within the meaning of the *International Tax Agreements Act 1953*.

limited amendment period, for an assessment, means the period within which the Commissioner may amend the assessment:

- (a) under item 1, 2, 3 or 4 of the table in subsection (1); or
- (b) under paragraph (3)(a) or (b).

prescribed provision means section 136AD or 136AE.

relevant provision means:

- (a) a provision of a double taxation agreement that attributes to a permanent establishment or to an enterprise the profits it

might be expected to derive if it were independent and dealing at arm's length; or

- (b) paragraph 7, 8 or 9 of Article 5, or Article 7, of the Taxation Code in Annex G to the Timor Sea Treaty or a provision of any other international tax sharing treaty that corresponds with any of those paragraphs or that Article.

scheme has the meaning given by subsection 995-1(1) of the *Income Tax Assessment Act 1997*.

scheme benefit has the meaning given by section 284-150 in Schedule 1 to the *Taxation Administration Act 1953*.

170C Power of Commissioner to reduce amount of tax payable in certain cases

For the purposes of the making of an assessment on or after 1 July 1966, the Commissioner may reduce by One cent the amount of tax that would, but for this section, be payable by a taxpayer being a person other than a company or being a company in the capacity of a trustee, before deducting any rebate or credit to which the taxpayer is entitled.

171 Where no notice of assessment served

- (1) Where a taxpayer has duly furnished to the Commissioner a return of income, or of profits or gains of a capital nature, and no notice of assessment in respect thereof has been served within 12 months thereafter, he may in writing by registered post request the Commissioner to make an assessment.
- (2) If within 3 months after the receipt by the Commissioner of the request a notice of assessment is not served upon the taxpayer, any assessment issued thereafter in respect of that income, or of those profits or gains, shall be deemed to be an amended assessment, and for the purpose of determining whether such amended assessment may be made, the taxpayer shall be deemed to have been served on the last day of the 3 months with a notice of assessment in respect of which income tax was payable on that day.

Section 171A

171A Limited period to make assessments for nil liability returns for the 2003-04 year of income or earlier

- (1) If the circumstances set out in column 2 of the following table apply to a taxpayer in relation to the 2003-04 year of income (a *nil year*) or an earlier year of income (also a *nil year*), the Commissioner cannot make an original assessment for that taxpayer for that year in the circumstances set out in column 3:

Making assessments		
Column 1 Item	Column 2 In this case:	Column 3 the position is:
1	<p>The taxpayer's return of income for a nil year disclosed, or the Commissioner has given the taxpayer a notice for a nil year that stated, either of the following:</p> <p>(a) the taxpayer had an amount of taxable income, and that no tax was payable;</p> <p>(b) the taxpayer had no taxable income because the taxpayer's deductions equalled the taxpayer's assessable income;</p> <p>and the taxpayer did not deduct a tax loss in the nil year</p>	<p>The Commissioner cannot make an original assessment for the taxpayer for the nil year after the later of the following:</p> <p>(a) 31 October 2008;</p> <p>(b) the period of 4 years beginning on the day on which the taxpayer lodged the taxpayer's return of income for the nil year.</p>

Making assessments

Column 1 Item	Column 2 In this case:	Column 3 the position is:
2	<p>The taxpayer's return of income for a nil year disclosed, or the Commissioner has given the taxpayer a notice for a nil year that stated, either of the following:</p> <p>(a) the taxpayer had an amount of taxable income, and that no tax was payable;</p> <p>(b) the taxpayer had no taxable income because the taxpayer's deductions equalled the taxpayer's assessable income; and the taxpayer did deduct a tax loss in the nil year</p>	<p>The Commissioner cannot make an original assessment for the taxpayer for the nil year after the period of 6 years beginning on the later of the following:</p> <p>(a) the day on which the taxpayer lodged the taxpayer's return of income for the 2004-05 year of income or, if the taxpayer is a member of a consolidated group at the end of that year of income, the day on which head company's return of income for that year of income is lodged;</p> <p>(b) the day on which the taxpayer lodged the taxpayer's return of income for the nil year.</p>
3	<p>The taxpayer had a tax loss in a nil year, none of which has been carried forward to the 2004-05 year of income</p>	<p>The Commissioner cannot make an original assessment for the taxpayer for the nil year after the period of 6 years beginning on the later of the following:</p> <p>(a) the day on which the taxpayer lodged the taxpayer's return of income for the 2004-05 year of income or, if the taxpayer is a member of a consolidated group at the end of that year of income, the day on which head company's return of income for that year of income is lodged;</p> <p>(b) the day on which the taxpayer lodged the taxpayer's return of income for the nil year.</p>

Section 172

Making assessments

Column 1 Item	Column 2 In this case:	Column 3 the position is:
4	(a) the taxpayer had a tax loss in a nil year, some or all of which has been carried forward to the 2004-05 year of income; and (b) the taxpayer or, if the taxpayer is a member of a consolidated group at the end of the 2004-05 year of income, the head company notifies the Commissioner, in the approved form, that the taxpayer or the head company had a tax loss in the nil year	The Commissioner cannot make an original assessment for the taxpayer for the nil year after the period of 6 years beginning on the later of the following: <ul style="list-style-type: none"> (a) the day on which the Commissioner received the notification; (b) the day on which the taxpayer lodged the taxpayer's return of income for the nil year.

- (2) Subsection (1) does not apply in relation to a nil year if:
- (a) the Commissioner is of the opinion there has been fraud or evasion; or
 - (b) had the Commissioner made an assessment, in accordance with the taxpayer's return of income, that the taxpayer had no taxable income or that no tax was payable by the taxpayer (assuming that such an assessment could have been made)—this Act would not have prevented the Commissioner amending the assessment at any time.

172 Refunds of amounts overpaid

- (1) Where, by reason of an amendment of an assessment, a person's liability to tax (the *earlier liability*) is reduced:
- (a) the amount by which the tax is so reduced is taken never to have been payable for the purposes of:
 - (i) provisions of this Act that apply the general interest charge; and
 - (ii) Division 280 in Schedule 1 to the *Taxation Administration Act 1953* (which applies the shortfall interest charge); and
 - (b) the Commissioner must apply the amount of any tax overpaid in accordance with Divisions 3 and 3A of Part IIB of the *Taxation Administration Act 1953*.

(1A) However, if a later amendment of an assessment is made and all or some of the person's earlier liability in relation to a particular is reinstated, paragraph (1)(a) is taken not to have applied, or not to have applied to the extent that the earlier liability is reinstated.

(2) In subsection (1), unless the contrary intention appears, *tax* includes the general interest charge under a provision of this Act, additional tax under Part VII and shortfall interest charge.

Note 1: The general interest charge is worked out under of Part IIA of the *Taxation Administration Act 1953*.

Note 2: Subsection 8AAB(4) of that Act lists the provisions that apply the charge.

173 Amended assessment to be an assessment

Except as otherwise provided every amended assessment shall be an assessment for all the purposes of this Act.

174 Notice of assessment

(1) As soon as conveniently may be after any assessment is made, the Commissioner shall serve notice thereof in writing by post or otherwise upon the person liable to pay the tax.

(3) In subsection (1), *tax* includes additional tax under Part VII.

175 Validity of assessment

The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with.

175A Objections against assessments

(1) A taxpayer who is dissatisfied with an assessment made in relation to the taxpayer may object against it in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

(2) A taxpayer cannot object under subsection (1) against an assessment ascertaining that:

(a) the taxpayer has no taxable income; or

(b) the taxpayer has an amount of taxable income and no tax is payable;

Section 176

unless the taxpayer is seeking an increase in the taxpayer's liability.

176 Judicial notice of signature

All courts and all persons having by law or consent of parties authority to hear, receive and examine evidence, shall take judicial notice of the signature of every person who is or has been the Commissioner, a Second Commissioner or a Deputy Commissioner, provided such signature is attached or appended to any official document.

177 Evidence

- (1) The production of a notice of assessment, or of a document under the hand of the Commissioner, a Second Commissioner, or a Deputy Commissioner, purporting to be a copy of a notice of assessment, shall be conclusive evidence of the due making of the assessment and, except in proceedings under Part IVC of the *Taxation Administration Act 1953* on a review or appeal relating to the assessment, that the amount and all the particulars of the assessment are correct.
- (2) The production of a *Gazette* containing a notice purporting to be issued by the Commissioner shall be conclusive evidence that the notice was so issued.
- (3) The production of a document under the hand of the Commissioner, a Second Commissioner, or a Deputy Commissioner, purporting to be a copy of a document issued by either the Commissioner, a Second Commissioner, or a Deputy Commissioner, shall be conclusive evidence that the document was so issued.
- (4) The production of a document under the hand of the Commissioner, a Second Commissioner, or a Deputy Commissioner, purporting to be a copy of or extract from any return or notice of assessment shall be evidence of the matter therein set forth to the same extent as the original would be if it were produced.

- (5) To avoid doubt, subsection (4) applies to a copy or an extract of a document that was given to the Commissioner on a data processing device or by way of electronic transmission unless the taxpayer can show that the taxpayer did not authorise the document.

Part IVA—Schemes to reduce income tax

177A Interpretation

- (1) In this Part, unless the contrary intention appears:

capital loss has the meaning given by subsection 995-1(1) of the *Income Tax Assessment Act 1997*.

foreign income tax offset means a tax offset allowed under Division 770 of the *Income Tax Assessment Act 1997*.

scheme means:

- (a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings; and
- (b) any scheme, plan, proposal, action, course of action or course of conduct.

taxpayer includes a taxpayer in the capacity of a trustee.

- (2) The definition of *taxpayer* in subsection (1) shall not be taken to affect in any way the interpretation of that expression where it is used in this Act other than this Part.
- (3) The reference in the definition of *scheme* in subsection (1) to a scheme, plan, proposal, action, course of action or course of conduct shall be read as including a reference to a unilateral scheme, plan, proposal, action, course of action or course of conduct, as the case may be.
- (4) A reference in this Part to the carrying out of a scheme by a person shall be read as including a reference to the carrying out of a scheme by a person together with another person or other persons.
- (5) A reference in this Part to a scheme or a part of a scheme being entered into or carried out by a person for a particular purpose shall be read as including a reference to the scheme or the part of the scheme being entered into or carried out by the person for 2 or

more purposes of which that particular purpose is the dominant purpose.

177B Operation of Part

- (1) Subject to subsection (2), nothing in the provisions of this Act other than this Part or in the *International Tax Agreements Act 1953* or in the *Petroleum (Timor Sea Treaty) Act 2003* shall be taken to limit the operation of this Part.
- (2) This Part shall not be taken to affect the operation of Schedule 2G.
- (3) Where a provision of this Act other than this Part is expressed to have effect where a deduction would be allowable to a taxpayer but for or apart from a provision or provisions of this Act, the reference to that provision or to those provisions, as the case may be, shall be read as including a reference to subsection 177F(1).
- (4) Where a provision of this Act other than this Part is expressed to have effect where a deduction would otherwise be allowable to a taxpayer, that provision shall be deemed to be expressed to have effect where a deduction would, but for subsection 177F(1), be otherwise allowable to the taxpayer.

177C Tax benefits

- (1) Subject to this section, a reference in this Part to the obtaining by a taxpayer of a tax benefit in connection with a scheme shall be read as a reference to:
 - (a) an amount not being included in the assessable income of the taxpayer of a year of income where that amount would have been included, or might reasonably be expected to have been included, in the assessable income of the taxpayer of that year of income if the scheme had not been entered into or carried out; or
 - (b) a deduction being allowable to the taxpayer in relation to a year of income where the whole or a part of that deduction would not have been allowable, or might reasonably be expected not to have been allowable, to the taxpayer in relation to that year of income if the scheme had not been entered into or carried out; or
 - (ba) a capital loss being incurred by the taxpayer during a year of income where the whole or a part of that capital loss would
-

Section 177C

not have been, or might reasonably be expected not to have been, incurred by the taxpayer during the year of income if the scheme had not been entered into or carried out; or

- (bb) a foreign income tax offset being allowable to the taxpayer where the whole or a part of that foreign income tax offset would not have been allowable, or might reasonably be expected not to have been allowable, to the taxpayer if the scheme had not been entered into or carried out;

and, for the purposes of this Part, the amount of the tax benefit shall be taken to be:

- (c) in a case to which paragraph (a) applies—the amount referred to in that paragraph; and
 - (d) in a case to which paragraph (b) applies—the amount of the whole of the deduction or of the part of the deduction, as the case may be, referred to in that paragraph; and
 - (e) in a case to which paragraph (ba) applies—the amount of the whole of the capital loss or of the part of the capital loss, as the case may be, referred to in that paragraph; and
 - (f) in a case where paragraph (bb) applies—the amount of the whole of the foreign income tax offset or of the part of the foreign income tax offset, as the case may be, referred to in that paragraph.
- (2) A reference in this Part to the obtaining by a taxpayer of a tax benefit in connection with a scheme shall be read as not including a reference to:
- (a) the assessable income of the taxpayer of a year of income not including an amount that would have been included, or might reasonably be expected to have been included, in the assessable income of the taxpayer of that year of income if the scheme had not been entered into or carried out where:
 - (i) the non-inclusion of the amount in the assessable income of the taxpayer is attributable to the making of an agreement, choice, declaration, agreement, election, selection or choice, the giving of a notice or the exercise of an option (expressly provided for by this Act or the *Income Tax Assessment Act 1997*) by any person, except one under Subdivision 126-B, 170-B or 960-D of the *Income Tax Assessment Act 1997*; and
 - (ii) the scheme was not entered into or carried out by any person for the purpose of creating any circumstance or

state of affairs the existence of which is necessary to enable the declaration, agreement, election, selection, choice, notice or option to be made, given or exercised, as the case may be; or

- (b) a deduction being allowable to the taxpayer in relation to a year of income the whole or a part of which would not have been, or might reasonably be expected not to have been, allowable to the taxpayer in relation to that year of income if the scheme had not been entered into or carried out where:
 - (i) the allowance of the deduction to the taxpayer is attributable to the making of a declaration, agreement, election, selection or choice, the giving of a notice or the exercise of an option by any person, being a declaration, agreement, election, selection, choice, notice or option expressly provided for by this Act or the *Income Tax Assessment Act 1997*, except one under Subdivision 960-D of the *Income Tax Assessment Act 1997*; and
 - (ii) the scheme was not entered into or carried out by any person for the purpose of creating any circumstance or state of affairs the existence of which is necessary to enable the declaration, agreement, election, selection, choice, notice or option to be made, given or exercised, as the case may be; or
- (c) a capital loss being incurred by the taxpayer during a year of income the whole or part of which would not have been, or might reasonably be expected not to have been, incurred by the taxpayer during the year of income if the scheme had not been entered into or carried out where:
 - (i) the incurring of the capital loss by the taxpayer is attributable to the making of a declaration, agreement, choice, election or selection, the giving of a notice or the exercise of an option (expressly provided for by this Act or the *Income Tax Assessment Act 1997*) by any person, except one under Subdivision 126-B, 170-B or 960-D of the *Income Tax Assessment Act 1997*; and
 - (ii) the scheme was not entered into or carried out by any person for the purpose of creating any circumstance or state of affairs the existence of which is necessary to enable the declaration, agreement, election, selection,

Section 177C

notice or option to be made, given or exercised, as the case may be; or

- (d) a foreign income tax offset being allowable to the taxpayer the whole or a part of which would not have been, or might reasonably be expected not to have been, allowable to the taxpayer if the scheme had not been entered into or carried out, where:
 - (i) the allowance of the foreign income tax offset to the taxpayer is attributable to the making of a declaration, agreement, election, selection or choice, the giving of a notice or the exercise of an option by any person, being a declaration, agreement, election, selection, choice, notice or option expressly provided for by this Act; and
 - (ii) the scheme was not entered into or carried out by any person for the purpose of creating any circumstance or state of affairs the existence of which is necessary to enable the declaration, agreement, election, selection, choice, notice or option to be made, given or exercised, as the case may be.

(2A) A reference in this Part to the obtaining by a taxpayer of a tax benefit in connection with a scheme is to be read as not including a reference to:

- (a) the assessable income of the taxpayer of a year of income not including an amount that would have been included, or might reasonably be expected to have been included, in the assessable income of the taxpayer of that year of income if the scheme had not been entered into or carried out where:
 - (i) the non-inclusion of the amount in the assessable income of the taxpayer is attributable to the making of a choice under Subdivision 126-B of the *Income Tax Assessment Act 1997* or an agreement under Subdivision 170-B of that Act; and
 - (ii) the scheme consisted solely of the making of the agreement or election; or
- (b) a capital loss being incurred by the taxpayer during a year of income the whole or part of which would not have been, or might reasonably be expected not to have been, incurred by the taxpayer during the year of income if the scheme had not been entered into or carried out where:

- (i) the incurring of the capital loss by the taxpayer is attributable to the making of a choice under Subdivision 126-B of the *Income Tax Assessment Act 1997* or an agreement under Subdivision 170-B of that Act; and
 - (ii) the scheme consisted solely of the making of the agreement or election.
- (3) For the purposes of subparagraph (2)(a)(i), (b)(i), (c)(i) or (d)(i) or (2A)(a)(i) or (b)(i):
 - (a) the non-inclusion of an amount in the assessable income of a taxpayer; or
 - (b) the allowance of a deduction to a taxpayer; or
 - (c) the incurring of a capital loss by a taxpayer; oris taken to be attributable to the making of a declaration, election, agreement or selection, the giving of a notice or the exercise of an option where, if the declaration, election, agreement, selection, notice or option had not been made, given or exercised, as the case may be:
 - (ca) the allowance of a foreign income tax offset to a taxpayer;
 - (d) the amount would have been included in that assessable income; or
 - (e) the deduction would not have been allowable; or
 - (f) the capital loss would not have been incurred; or
 - (g) the foreign income tax offset would not have been allowable.
- (4) To avoid doubt, paragraph (1)(a) applies to a scheme if:
 - (a) an amount of income is not included in the assessable income of the taxpayer of a year of income; and
 - (b) an amount would have been included, or might reasonably be expected to have been included, in the assessable income if the scheme had not been entered into or carried out; and
 - (c) instead, the taxpayer or any other taxpayer makes a discount capital gain (within the meaning of the *Income Tax Assessment Act 1997*) for that or any other year of income.
- (5) Subsection (4) does not limit the generality of any other provision of this Part.

177CA Withholding tax avoidance

- (1) This section applies in relation to a particular amount if a taxpayer is not liable to pay withholding tax on an amount where that taxpayer would have, or could reasonably be expected to have, been liable to pay withholding tax on the amount if a scheme had not been entered into or carried out.
- (2) For the purposes of this Part, if this section applies in relation to an amount, the taxpayer is taken to have obtained a tax benefit in connection with the scheme of an amount equal to the amount mentioned in subsection (1).

177D Schemes to which Part applies

This Part applies to any scheme that has been or is entered into after 27 May 1981, and to any scheme that has been or is carried out or commenced to be carried out after that date (other than a scheme that was entered into on or before that date), whether the scheme has been or is entered into or carried out in Australia or outside Australia or partly in Australia and partly outside Australia, where:

- (a) a taxpayer (in this section referred to as the *relevant taxpayer*) has obtained, or would but for section 177F obtain, a tax benefit in connection with the scheme; and
- (b) having regard to:
 - (i) the manner in which the scheme was entered into or carried out;
 - (ii) the form and substance of the scheme;
 - (iii) the time at which the scheme was entered into and the length of the period during which the scheme was carried out;
 - (iv) the result in relation to the operation of this Act that, but for this Part, would be achieved by the scheme;
 - (v) any change in the financial position of the relevant taxpayer that has resulted, will result, or may reasonably be expected to result, from the scheme;
 - (vi) any change in the financial position of any person who has, or has had, any connection (whether of a business, family or other nature) with the relevant taxpayer, being

a change that has resulted, will result or may reasonably be expected to result, from the scheme;

- (vii) any other consequence for the relevant taxpayer, or for any person referred to in subparagraph (vi), of the scheme having been entered into or carried out; and
- (viii) the nature of any connection (whether of a business, family or other nature) between the relevant taxpayer and any person referred to in subparagraph (vi);

it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for the purpose of enabling the relevant taxpayer to obtain a tax benefit in connection with the scheme or of enabling the relevant taxpayer and another taxpayer or other taxpayers each to obtain a tax benefit in connection with the scheme (whether or not that person who entered into or carried out the scheme or any part of the scheme is the relevant taxpayer or is the other taxpayer or one of the other taxpayers).

177E Stripping of company profits

(1) Where:

- (a) as a result of a scheme that is, in relation to a company:
 - (i) a scheme by way of or in the nature of dividend stripping; or
 - (ii) a scheme having substantially the effect of a scheme by way of or in the nature of a dividend stripping; any property of the company is disposed of;
- (b) in the opinion of the Commissioner, the disposal of that property represents, in whole or in part, a distribution (whether to a shareholder or another person) of profits of the company (whether of the accounting period in which the disposal occurred or of any earlier or later accounting period);
- (c) if, immediately before the scheme was entered into, the company had paid a dividend out of profits of an amount equal to the amount determined by the Commissioner to be the amount of profits the distribution of which is, in his opinion, represented by the disposal of the property referred to in paragraph (a), an amount (in this subsection referred to as the *notional amount*) would have been included, or might

Section 177E

reasonably be expected to have been included, by reason of the payment of that dividend, in the assessable income of a taxpayer of a year of income; and

- (d) the scheme has been or is entered into after 27 May 1981, whether in Australia or outside Australia;

the following provisions have effect:

- (e) the scheme shall be taken to be a scheme to which this Part applies;

- (f) for the purposes of section 177F, the taxpayer shall be taken to have obtained a tax benefit in connection with the scheme that is referable to the notional amount not being included in the assessable income of the taxpayer of the year of income; and

- (g) the amount of that tax benefit shall be taken to be the notional amount.

- (2) Without limiting the generality of subsection (1), a reference in that subsection to the disposal of property of a company shall be read as including a reference to:

- (a) the payment of a dividend by the company;
(b) the making of a loan by the company (whether or not it is intended or likely that the loan will be repaid);
(c) a bailment of property by the company; and
(d) any transaction having the effect, directly or indirectly, of diminishing the value of any property of the company.

- (2A) This section:

- (a) applies to a non-share equity interest in the same way as it applies to a share; and
(b) applies to an equity holder in the same way as it applies to a shareholder; and
(c) applies to a non-share dividend in the same way as it applies to a dividend.

- (3) In this section, *property* includes a chose in action and also includes any estate, interest, right or power, whether at law or in equity, in or over property.

177EA Creation of franking debit or cancellation of franking credits

- (1) In this section, unless the contrary intention appears:

relevant circumstances has a meaning affected by subsection (17).

relevant taxpayer has the meaning given by subsection (3).

scheme for a disposition, in relation to membership interests or an interest in membership interests, has a meaning affected by subsection (14).

- (2) An expression used in this section that is defined in the *Income Tax Assessment Act 1997* has the same meaning as in that Act, except to the extent that its meaning is extended by subsection (16), (18) or (19), or affected by subsection (15).

Application of section

- (3) This section applies if:
- (a) there is a scheme for a disposition of membership interests, or an interest in membership interests, in a corporate tax entity; and
 - (b) either:
 - (i) a frankable distribution has been paid, or is payable or expected to be payable, to a person in respect of the membership interests; or
 - (ii) a frankable distribution has flowed indirectly, or flows indirectly or is expected to flow indirectly, to a person in respect of the interest in membership interests, as the case may be; and
 - (c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit; and
 - (d) except for this section, the person (the *relevant taxpayer*) would receive, or could reasonably be expected to receive, imputation benefits as a result of the distribution; and
 - (e) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit.

Section 177EA

Bare acquisition of membership interests or interest in membership interests

- (4) It is not to be concluded for the purposes of paragraph (3)(e) that a person entered into or carried out a scheme for a purpose mentioned in that paragraph merely because the person acquired membership interests, or an interest in membership interests, in the entity.

Commissioner to determine franking debit or deny franking credit

- (5) The Commissioner may make, in writing, either of the following determinations:
- (a) if the corporate tax entity is a party to the scheme, a determination that a franking debit or exempting debit of the entity arises in respect of each distribution made to the relevant taxpayer or that flows indirectly to the relevant taxpayer;
 - (b) a determination that no imputation benefit is to arise in respect of a distribution or a specified part of a distribution that is made, or that flows indirectly, to the relevant taxpayer.

A determination does not form part of an assessment.

Notice of determination

- (6) If the Commissioner makes a determination under subsection (5), the Commissioner must:
- (a) in respect of a determination made under paragraph (5)(a)—serve notice in writing of the determination on the corporate tax entity; or
 - (b) in respect of a determination made under paragraph (5)(b)—serve notice in writing of the determination on the relevant taxpayer.

The notice may be included in a notice of assessment.

Publication in national newspaper of determination in relation to listed public company denying imputation benefit

- (7) If the Commissioner makes a determination under paragraph (5)(b), in respect of a distribution made by a listed public company, the Commissioner is taken to have served notice in writing of the determination on the relevant taxpayer if the

Commissioner causes the notice to be published in a daily newspaper that circulates generally in each State, the Australian Capital Territory and the Northern Territory. The notice is taken to have been served on the day on which the publication takes place.

Evidence of determination

- (8) The production of:
- (a) a notice of a determination; or
 - (b) a document signed by the Commissioner, a Second Commissioner or a Deputy Commissioner purporting to be a copy of a determination;
- is conclusive evidence:
- (c) of the due making of the determination; and
 - (d) except in proceedings under Part IVC of the *Taxation Administration Act 1953* on an appeal or review relating to the determination, that the determination is correct.

Objections

- (9) If a taxpayer to whom a determination relates is dissatisfied with the determination, the taxpayer may object against it in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

Effect of determination of franking debit or exempting debit

- (10) If the Commissioner makes a determination under paragraph (5)(a):
- (a) on the day on which notice in writing of the determination is served on the entity, a franking debit or exempting debit of the corporate tax entity arises in respect of the distribution; and
 - (b) the amount of the franking debit or exempting debit is such amount as is stated in the Commissioner's determination, being an amount that:
 - (i) the Commissioner considers reasonable in the circumstances; and
 - (ii) does not exceed the amount of the franking debit or exempting debit of the entity arising under item 1 of the table in section 205-30 of the *Income Tax Assessment 1997* or item 2 of the table in section 208-120 of that Act in respect of the distribution.

Section 177EA

Effect of determination that no imputation benefit is to arise

- (11) If the Commissioner makes a determination under paragraph (5)(b), the determination has effect according to its terms.

Application of section to non-share dividends

- (12) This section:
- (a) applies to a non-share equity interest in the same way as it applies to a membership interest; and
 - (b) applies to an equity holder in the same way as it applies to a member; and
 - (c) applies to a non-share dividend in the same way as it applies to a distribution.

Meaning of interest in membership interests

- (13) A person has an interest in membership interests if:
- (a) the person has any legal or equitable interest in the membership interests; or
 - (b) the person is a partner in a partnership and:
 - (i) the assets of the partnership include, or will include, the membership interests; or
 - (ii) the partnership derives, or will derive, income indirectly through interposed companies, trusts or partnerships, from distributions made on the membership interests; or
 - (c) the person is a beneficiary of a trust (including a potential beneficiary of a discretionary trust) and:
 - (i) the membership interests form, or will form, part of the trust estate; or
 - (ii) the trust derives, or will derive, income indirectly through interposed companies, trusts or partnerships, from distributions made on the membership interests.

Meaning of scheme for a disposition

- (14) A scheme for a disposition of membership interests or an interest in membership interests includes, but is not limited to, a scheme that involves any of the following:
- (a) issuing the membership interests or creating the interest in membership interests;

- (b) entering into any contract, arrangement, transaction or dealing that changes or otherwise affects the legal or equitable ownership of the membership interests or interest in membership interests;
 - (c) creating, varying or revoking a trust in relation to the membership interests or interest in membership interests;
 - (d) creating, altering or extinguishing a right, power or liability attaching to, or otherwise relating to, the membership interests or interest in membership interests;
 - (e) substantially altering any of the risks of loss, or opportunities for profit or gain, involved in holding or owning the membership interests or having the interest in membership interests;
 - (f) the membership interests or interest in membership interests beginning to be included, or ceasing to be included, in any of the insurance funds of a life assurance company.
- (15) In determining whether a distribution flows indirectly to a person, assume that the following provisions of the *Income Tax Assessment Act 1997* had not been enacted:
- (a) section 295-385 (about income from assets set aside to meet current pension liabilities), section 295-390 (about income from other assets used to meet current pension liabilities) and 295-400 (about income of a PST attributable to current pension liabilities); or
 - (b) paragraph 320-37(1)(a) (about segregated exempt assets) or paragraph 320-37(1)(d) (about income bonds, funeral policies and scholarship plans).

When imputation benefit is received

- (16) A taxpayer to whom a distribution flows indirectly receives an **imputation benefit** as a result of the distribution if:
- (a) the taxpayer is entitled to a tax offset under Division 207 of the *Income Tax Assessment Act 1997* as a result of the distribution; or
 - (b) where the taxpayer is a corporate tax entity—a franking credit would arise in the franking account of the taxpayer as a result of the distribution.

Section 177EA

Note: Where the distribution is made directly to the taxpayer, see subsection 204-30(6) of the *Income Tax Assessment Act 1997* for a definition of *imputation benefit*.

Meaning of relevant circumstances of scheme

- (17) The *relevant circumstances* of a scheme include the following:
- (a) the extent and duration of the risks of loss, and the opportunities for profit or gain, from holding membership interests, or having interests in membership interests, in the corporate tax entity that are respectively borne by or accrue to the parties to the scheme, and whether there has been any change in those risks and opportunities for the relevant taxpayer or any other party to the scheme (for example, a change resulting from the making of any contract, the granting of any option or the entering into of any arrangement with respect to any membership interests, or interests in membership interests, in the corporate tax entity);
 - (b) whether the relevant taxpayer would, in the year of income in which the distribution is made, or if the distribution flows indirectly to the relevant taxpayer, in the year in which the distribution flows indirectly to the relevant taxpayer, derive a greater benefit from franking credits than other entities who hold membership interests, or have interests in membership interests, in the corporate tax entity;
 - (c) whether, apart from the scheme, the corporate tax entity would have retained the franking credits or exempting credits or would have used the franking credits or exempting credits to pay a franked distribution to another entity referred to in paragraph (b);
 - (d) whether, apart from the scheme, a franked distribution would have flowed indirectly to another entity referred to in paragraph (b);
 - (e) if the scheme involves the issue of a non-share equity interest to which section 215-10 of the *Income Tax Assessment Act 1997* applies—whether the corporate tax entity has issued, or is likely to issue, equity interests in the corporate tax entity:
 - (i) that are similar, from a commercial point of view, to the non-share equity interest; and
 - (ii) distributions in respect of which are frankable;
 - (f) whether any consideration paid or given by or on behalf of, or received by or on behalf of, the relevant taxpayer in

- connection with the scheme (for example, the amount of any interest on a loan) was calculated by reference to the imputation benefits to be received by the relevant taxpayer;
- (g) whether a deduction is allowable or a capital loss is incurred in connection with a distribution that is made or that flows indirectly under the scheme;
 - (ga) whether a distribution that is made or that flows indirectly under the scheme to the relevant taxpayer is sourced, directly or indirectly, from unrealised or untaxed profits;
 - (h) whether a distribution that is made or that flows indirectly under the scheme to the relevant taxpayer is equivalent to the receipt by the relevant taxpayer of interest or of an amount in the nature of, or similar to, interest;
 - (i) the period for which the relevant taxpayer held membership interests, or had an interest in membership interests, in the corporate tax entity;
 - (j) any of the matters referred to in subparagraphs 177D(b)(i) to (viii).

Meaning of greater benefit from franking credits

- (18) The following subsection lists some of the cases in which a taxpayer to whom a distribution flows indirectly receives a **greater benefit from franking credits** than an entity referred to in paragraph (17)(b). It is not an exhaustive list.
- (19) A taxpayer to whom a distribution flows indirectly receives a **greater benefit from franking credits** than an entity referred to in paragraph (17)(b) if any of the following circumstances exist in relation to that entity in the year of income in which the distribution giving rise to the benefit is made, and not in relation to the taxpayer if:
 - (a) the entity is not an Australian resident; or
 - (b) the entity would not be entitled to any tax offset under Division 207 of the *Income Tax Assessment Act 1997* because of the distribution; or
 - (c) the amount of income tax that would be payable by the entity because of the distribution is less than the tax offset to which the entity would be entitled; or

Section 177EB

- (d) the entity is a corporate tax entity at the time the distribution is made, but no franking credit arises for the entity as a result of the distribution; or
- (e) the entity is a corporate tax entity at the time the distribution is made, but cannot use franking credits received on the distribution to frank distributions to its own members because:
 - (i) it is not a franking entity; or
 - (ii) it is unable to make frankable distributions.

Note: Where the distribution is made directly to the taxpayer, see subsections 204-30(7), (8), (9) and (10) of the *Income Tax Assessment Act 1997* for a list of circumstances in which the taxpayer will be treated as deriving a greater benefit from franking credits than another entity.

177EB Cancellation of franking credits—consolidated groups

Expressions to have same meanings as in section 177EA and Income Tax Assessment Act 1997

- (1) Unless the contrary intention appears, expressions used in this section:
 - (a) if those expressions are defined in section 177EA—have the same meanings as in that section (subject to subsection (10) of this section); and
 - (b) otherwise—have the same meanings as in the *Income Tax Assessment Act 1997*.

This section and section 177EA do not limit each other

- (2) This section does not limit the operation of section 177EA, and section 177EA does not limit the operation of this section.

Application of section

- (3) This section applies if:
 - (a) there is a scheme for a disposition of membership interests in an entity (the **joining entity**); and
 - (b) as a result of the disposition, the joining entity becomes a subsidiary member of a consolidated group; and

- (c) a credit arises in the franking account of the head company of the group because of the joining entity becoming a subsidiary member of the group; and
- (d) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the credit referred to in paragraph (c) to arise in the head company's franking account.

Bare acquisition of membership interests

- (4) It is not to be concluded for the purposes of paragraph (3)(d) that a person entered into or carried out a scheme for a purpose mentioned in that paragraph merely because the person acquired membership interests in the joining entity.

Commissioner to determine no franking credit

- (5) The Commissioner may make, in writing, a determination that no credit is to arise in the head company's franking account because of the joining entity becoming a subsidiary member of the consolidated group. A determination does not form part of an assessment.

Effect of determination

- (6) A determination under subsection (5) has effect according to its terms.

Notice of determination

- (7) If the Commissioner makes a determination under subsection (5), the Commissioner must serve notice in writing of the determination on the head company. The notice may be included in a notice of assessment.

Evidence of determination

- (8) The production of:
 - (a) a notice of a determination; or

Section 177EB

- (b) a document signed by the Commissioner, a Second Commissioner or a Deputy Commissioner purporting to be a copy of a determination;
- is conclusive evidence:
- (c) of the due making of the determination; and
 - (d) except in proceedings under Part IVC of the *Taxation Administration Act 1953* on an appeal or review relating to the determination, that the determination is correct.

Objections

- (9) If a taxpayer to whom a determination relates is dissatisfied with the determination, the taxpayer may object against it in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

Relevant circumstances

- (10) The **relevant circumstances** of a scheme include the following:
 - (a) the extent and duration of the risks of loss, and the opportunities for profit or gain, from holding membership interests in the joining entity that are respectively borne by or accrue to the parties to the scheme, and whether there has been any change in those risks and opportunities for the head company or any other party to the scheme (for example, a change resulting from the making of any contract, the granting of any option or the entering into of any arrangement with respect to any membership interests in the joining entity);
 - (b) whether the head company, or a person holding membership interests in the head company, would, in the year of income in which the joining entity became a subsidiary member of the group or any later year of income, derive a greater benefit from franking credits than other persons who held membership interests in the joining entity immediately before it became a subsidiary member of the group;
 - (c) the extent (if any) to which the joining entity was able to pay a franked dividend or distribution immediately before it became a subsidiary member of the group;
 - (d) whether any consideration paid or given by or on behalf of, or received by or on behalf of, the head company in connection with the scheme (for example, the amount of any

- interest on a loan) was calculated by reference to the franking credit benefits to be received by the head company;
- (e) the period for which the head company held membership interests in the joining entity;
 - (f) any of the matters referred to in subparagraphs 177D(b)(i) to (viii).

Section to apply to exempting credits

- (11) This section applies to exempting credits arising in the exempting account of the head company of a consolidated group in the same way that it applies to credits arising in the head company's franking account.

177F Cancellation of tax benefits etc.

- (1) Where a tax benefit has been obtained, or would but for this section be obtained, by a taxpayer in connection with a scheme to which this Part applies, the Commissioner may:
 - (a) in the case of a tax benefit that is referable to an amount not being included in the assessable income of the taxpayer of a year of income—determine that the whole or a part of that amount shall be included in the assessable income of the taxpayer of that year of income; or
 - (b) in the case of a tax benefit that is referable to a deduction or a part of a deduction being allowable to the taxpayer in relation to a year of income—determine that the whole or a part of the deduction or of the part of the deduction, as the case may be, shall not be allowable to the taxpayer in relation to that year of income; or
 - (c) in the case of a tax benefit that is referable to a capital loss or a part of a capital loss being incurred by the taxpayer during a year of income—determine that the whole or a part of the capital loss or of the part of the capital loss, as the case may be, was not incurred by the taxpayer during that year of income;
 - (d) in the case of a tax benefit that is referable to a foreign income tax offset, or a part of a foreign income tax offset, being allowable to the taxpayer—determine that the whole or a part of the foreign income tax offset, or the part of the

Section 177F

foreign income tax offset, as the case may be, is not to be allowable to the taxpayer;

and, where the Commissioner makes such a determination, he shall take such action as he considers necessary to give effect to that determination.

- (2) Where the Commissioner determines under paragraph (1)(a) that an amount is to be included in the assessable income of a taxpayer of a year of income, that amount shall be deemed to be included in that assessable income by virtue of such provision of this Act as the Commissioner determines.
- (2A) Where a tax benefit that is covered by section 177CA has been obtained, or would but for this section be obtained, by a taxpayer in connection with a scheme to which this Part applies:
- (a) the Commissioner may determine that the taxpayer is subject to withholding tax under section 128B on the whole or a part of that amount; and
 - (b) if the Commissioner makes such a determination, he or she must take such action as he or she considers necessary to give effect to that determination.
- (2B) A determination under paragraph (1)(c) or subsection (2A) must be in writing.
- (2C) Notice of the determination must be given to the taxpayer and, in the case of a determination under subsection (2A), to the person who paid the amount.
- (2D) More than one determination may be included in the same notice.
- (2E) A failure to comply with subsection (2C) does not affect the validity of a determination.
- (2F) If the Commissioner makes a determination under subsection (2A), the amount that the Commissioner determines is taken to be subject to withholding tax is taken to have been subject to withholding tax at all times by virtue of such provision of section 128B as the Commissioner determines.
- (2G) If the taxpayer is dissatisfied with a determination under paragraph (1)(c) or subsection (2A), the taxpayer may object against it in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

- (3) Where the Commissioner has made a determination under subsection (1) or (2A) in respect of a taxpayer in relation to a scheme to which this Part applies, the Commissioner may, in relation to any taxpayer (in this subsection referred to as the **relevant taxpayer**):
- (a) if, in the opinion of the Commissioner:
 - (i) there has been included, or would but for this subsection be included, in the assessable income of the relevant taxpayer of a year of income an amount that would not have been included or would not be included, as the case may be, in the assessable income of the relevant taxpayer of that year of income if the scheme had not been entered into or carried out; and
 - (ii) it is fair and reasonable that that amount or a part of that amount should not be included in the assessable income of the relevant taxpayer of that year of income;determine that that amount or that part of that amount, as the case may be, should not have been included or shall not be included, as the case may be, in the assessable income of the relevant taxpayer of that year of income; or
 - (b) if, in the opinion of the Commissioner:
 - (i) an amount would have been allowed or would be allowable to the relevant taxpayer as a deduction in relation to a year of income if the scheme had not been entered into or carried out, being an amount that was not allowed or would not, but for this subsection, be allowable, as the case may be, as a deduction to the relevant taxpayer in relation to that year of income; and
 - (ii) it is fair and reasonable that that amount or a part of that amount should be allowable as a deduction to the relevant taxpayer in relation to that year of income;determine that that amount or that part, as the case may be, should have been allowed or shall be allowable, as the case may be, as a deduction to the relevant taxpayer in relation to that year of income; or
 - (c) if, in the opinion of the Commissioner:
 - (i) a capital loss would have been incurred by the relevant taxpayer during a year of income if the scheme had not been entered into or carried out, being a capital loss that was not incurred or would not, but for this subsection,

Section 177F

- be incurred, as the case may be, by the relevant taxpayer during that year of income; and
- (ii) it is fair and reasonable that the capital loss or a part of that capital loss should be incurred by the relevant taxpayer during that year of income;
- determine that the capital loss or the part, as the case may be, should be incurred by the relevant taxpayer during that year of income; or
- (d) if, in the opinion of the Commissioner:
- (i) an amount would have been allowed, or would be allowable, to the relevant taxpayer as a foreign income tax offset if the scheme had not been entered into or carried out, being an amount that was not allowed or would not, apart from this subsection, be allowable, as the case may be, as a foreign income tax offset to the relevant taxpayer; and
- (ii) it is fair and reasonable that the amount, or a part of the amount, should be allowable as a foreign income tax offset to the relevant taxpayer;
- determine that that amount or that part, as the case may be, should have been allowed or is allowable, as the case may be, as a foreign income tax offset to the relevant taxpayer;
- and the Commissioner shall take such action as he considers necessary to give effect to any such determination.
- (4) Where the Commissioner makes a determination under subsection (3) by virtue of which an amount is allowed as a deduction to a taxpayer in relation to a year of income, that amount shall be deemed to be so allowed as a deduction by virtue of such provision of this Act as the Commissioner determines.
- (5) Where, at any time, a taxpayer considers that the Commissioner ought to make a determination under subsection (3) in relation to the taxpayer in relation to a year of income, the taxpayer may post to or lodge with the Commissioner a request in writing for the making by the Commissioner of a determination under that subsection.
- (6) The Commissioner shall consider the request and serve on the taxpayer, by post or otherwise, a written notice of his decision on the request.

- (7) If the taxpayer is dissatisfied with the Commissioner's decision on the request, the taxpayer may object against it in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

177G Amendment of assessments

Nothing in section 170 prevents the amendment of an assessment at any time if the amendment is for the purpose of giving effect to subsection 177F(3).

Part VA—Tax file numbers

Division 1—Preliminary

202 Objects of this Part

The objects of this Part are, by means of the establishment of a system of tax file numbers:

- (a) to increase the effectiveness and efficiency of the matching of information contained in reports given to the Commissioner under this Act or the regulations with information disclosed in income tax returns by taxpayers; and
- (b) to prevent evasion of liability to taxation under the laws of the Commonwealth relating to income tax; and
- (c) to facilitate the administration of any legislation enacted by the Parliament under which benefits are provided by the Commonwealth to students in relation to contributions or charges payable by students in respect of the costs of courses of study provided by institutions of higher education; and
- (d) to facilitate the administration of any legislation enacted by the Parliament to impose charge equal to any shortfall in the amount spent by employers on training employees; and
- (e) to facilitate the administration of a provision of an Act, being a provision which authorises the collection of a tax file number as a condition to the giving of personal assistance within the meaning of the *Data-matching Program (Assistance and Tax) Act 1990*; and
- (f) to facilitate the administration of the *Data-matching Program (Assistance and Tax) Act 1990*; and
- (g) to facilitate the administration of any legislation enacted by the Parliament in relation to the imposition of charge on an employer's superannuation guarantee shortfall; and
- (ga) to facilitate the administration of the *Child Support (Assessment) Act 1989* and the *Child Support (Registration and Collection) Act 1988*; and
- (h) to facilitate the administration of Division 6 of Part 4A of the *Student Assistance Act 1973*; and

- (ha) to facilitate the administration of:
 - (i) Part 2B.3 of the *Social Security Act 1991*; or
 - (ii) a provision of an instrument under Chapter 2B of the *Social Security Act 1991* (as in force before the commencement of Schedule 2 to the *Youth Allowance Consolidation Act 2000*) establishing a Student Financial Supplement Scheme, being a provision relating to the recovery through the taxation system of a student's outstanding indebtedness in respect of financial supplement paid to the student in accordance with the Scheme; and
- (hb) to facilitate the administration of Part 3.18 of the *Social Security Act 1991*; and
- (hc) to facilitate the administration of Division 11A of Part IIIB of the *Veterans' Entitlements Act 1986*; and
 - (i) to facilitate:
 - (i) the administration of Part 25A of the *Superannuation Industry (Supervision) Act 1993* in relation to individuals; and
 - (ii) the administration of that Act in relation to superannuation entities (within the meaning of that Act) or regulated exempt public sector superannuation schemes (within the meaning of Part 25A of that Act); and
 - (ia) to facilitate the administration of the *Superannuation (Unclaimed Money and Lost Members) Act 1999* (including the administration of registers by State or Territory authorities (within the meaning of that Act) in accordance with section 18 of that Act); and
 - (j) to facilitate the administration of the *Small Superannuation Accounts Act 1995*; and
- (ka) to facilitate:
 - (i) the administration of Part 11 of the *Retirement Savings Accounts Act 1997* in relation to individuals; and
 - (ii) the administration of that Act in relation to RSA providers; and
- (l) to facilitate the administration of the *Superannuation Contributions Tax (Assessment and Collection) Act 1997*, the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds)*

Section 202A

Assessment and Collection Act 1997 and the Termination Payments Tax (Assessment and Collection) Act 1997; and

- (m) to facilitate the administration of the *A New Tax System (Family Assistance) (Administration) Act 1999* and section 5 of the *A New Tax System (Family Assistance) (Consequential and Related Measures) Act (No. 1) 1999*; and
- (n) to facilitate the administration of the *A New Tax System (Bonuses for Older Australians) Act 1999*; and
- (o) to facilitate the administration of section 204A of the *Social Security (Administration) Act 1999*; and
- (p) to facilitate the administration of the fuel tax law (within the meaning of section 110-5 of the *Fuel Tax Act 2006*).

202A Interpretation

In this Part, unless the contrary intention appears:

alienated personal services payment has the meaning given by section 13-10 in Schedule 1 to the *Taxation Administration Act 1953*.

applicant, in relation to an application for the issue of a tax file number, means the person specified in the application as the person by whom or on whose behalf the issue of a tax file number is sought.

approved form has the same meaning as in the *Income Tax Assessment Act 1997*.

bank means:

- (a) the Reserve Bank of Australia;
- (b) a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*; or
- (c) a person who carries on State banking within the meaning of paragraph 51(xiii) of the Constitution.

child means a person who is less than 16 years of age.

co-operative housing society means a society registered or incorporated as a co-operative housing society or similar society under a law of a State or Territory.

data processing device means any article or material from which information is capable of being reproduced with or without the aid of any other article or device.

eligible PAYG payment means:

- (a) a payment from which an amount must be withheld under Subdivision 12-B (other than section 12-55), Subdivision 12-C or Subdivision 12-D in Schedule 1 to the *Taxation Administration Act 1953*; or
- (aa) an alienated personal services payment in respect of which Division 13 in Schedule 1 to the *Taxation Administration Act 1953* requires an amount to be paid to the Commissioner; or
- (b) a non-cash benefit in respect of which an amount is payable to the Commissioner under section 14-5 in Schedule 1 to the *Taxation Administration Act 1953* because of the application of that section in relation to Subdivision 12-B, 12-C or 12-D of that Schedule;

and has a meaning affected by section 202AA.

entity means a body corporate or unincorporated association, but does not include a natural person or a partnership.

financial institution means:

- (a) a bank; or
- (b) a co-operative housing society.

government body means the Commonwealth, a State, a Territory or an authority of the Commonwealth or of a State or Territory.

interest-bearing account means any facility, other than an RSA, by which a financial institution:

- (a) does any one or more of the following:
 - (i) accepts deposits of money to the credit of a person;
 - (ii) allows withdrawals from the money deposited;
 - (iii) pays cheques or payment orders drawn on the institution by, or collects cheques or payment orders on behalf of, the person; and
- (b) pays or credits interest, or amounts in the nature of interest, on the balance standing to the credit of the person from time to time.

Section 202A

interest-bearing deposit means a deposit of money, other than into an RSA, with a financial institution, in consideration of which the financial institution pays or credits interest, or amounts in the nature of interest, to a person.

investment body means a person who is an investment body within the meaning of section 202D.

investment to which this Part applies means an investment of a kind mentioned in section 202D.

investor means a person who is an investor within the meaning of section 202D.

passport, in relation to a person who does not hold a passport, means another official travel document held by the person.

payer means:

- (a) a person who makes an eligible PAYG payment (other than an alienated personal services payment), or is likely to make such a payment; or
- (b) a person who receives an alienated personal services payment, or is likely to receive such a payment.

person includes a partnership, a company and a person in the capacity of trustee of a trust estate.

public company means a public company within the meaning of the *Corporations Act 2001*.

recipient means:

- (a) a person who receives an eligible PAYG payment (other than an alienated personal services payment), or is likely to receive such a payment; or
- (b) a person in relation to whose personal services income (within the meaning of the *Income Tax Assessment Act 1997*) a payer receives an alienated personal services payment, or is likely to receive such a payment.

securities dealer means a person who is a dealer for the purposes of the *Securities Industry Act 1980* or for the purposes of a law of a State or Territory that corresponds to that Act.

solicitor means a solicitor, barrister and solicitor or legal practitioner of the High Court or of the Supreme Court of a State or Territory.

tax file number, in relation to a person, means a number issued to the person by the Commissioner, being a number that is either:

- (a) a number issued to the person under Division 2; or
- (aa) a number issued to a person under section 44 or 48 of the *Higher Education Funding Act 1988*; or
- (b) a number notified, before the commencement of this section, to the person as the person's income tax file number.

TFN declaration means a declaration made for the purposes of section 202C.

unit trust means a trust to which a unit trust scheme relates, and includes:

- (a) a cash management trust;
- (b) a property trust;
- (c) an arrangement declared by the Minister, by notice published in the *Gazette*, to be a unit trust for the purposes of this definition;

but does not include any arrangement declared by the Minister, by notice published in the *Gazette*, not to be a unit trust for the purposes of this definition.

unit trust scheme means an arrangement made for the purpose, or having the effect, of providing, for a person who has funds available for investment, facilities for participation by the person, as a beneficiary under a trust, in any profit or income arising from the acquisition, holding, management or disposal of property under the trust.

202AA Definition of *eligible PAYG payment*

In applying the definition of *eligible PAYG payment* in section 202A:

- (a) a requirement to withhold a nil amount is treated as a requirement to withhold an amount; and
- (b) a requirement to pay a nil amount to the Commissioner is treated as a requirement to pay an amount to the Commissioner; and

Part VA Tax file numbers

Division 1 Preliminary

Section 202AA

- (c) the following provisions in Schedule 1 to the *Taxation Administration Act 1953* are to be disregarded, namely:
section 12-1, subsection 12-45(2), subsection 12-110(2) and
subsection 12-115(2).

Division 2—Issuing of tax file numbers

202B Application for tax file number

- (1) A person may apply to the Commissioner for the issue of a tax file number.
- (2) An application shall be in a form approved by the Commissioner and shall be accompanied by documentary evidence of the applicant's identity.
- (3) An application may be handed in at, or posted to, the office of a Deputy Commissioner.
- (4) An application may be handed in at an office or facility designated by the Commissioner as a receiving centre for applications of that kind.

202BA Issuing of tax file numbers

- (1) Subject to subsection (3), if, on an application for a tax file number, the Commissioner is satisfied that the applicant's identity has been established, the Commissioner shall issue a tax file number to the applicant.
- (2) If, on such an application, the Commissioner is not satisfied as to the applicant's true identity, the Commissioner may refuse the application.
- (3) If, on such an application, the Commissioner is satisfied that:
 - (a) the applicant already has a tax file number; or
 - (b) a notice under section 202BD in relation to the applicant is in force;the Commissioner shall refuse the application.
- (4) The Commissioner may, without an application being made, issue a tax file number to a person whenever it is necessary to do so in connection with the performance of a function of the Commissioner under a law of the Commonwealth relating to taxation.

Part VA Tax file numbers

Division 2 Issuing of tax file numbers

Section 202BB

- (5) The Commissioner shall issue a tax file number to a person by giving the person a written notice of the number.
- (6) The Commissioner shall refuse an application for a tax file number by giving the applicant a written notice of the refusal and of the reasons for the refusal.

202BB Current tax file number

On the issue of a tax file number to a person, any tax file number previously issued to the person and not already cancelled or withdrawn ceases to have effect.

202BC Deemed refusal by Commissioner

- (1) If the Commissioner has not decided an application for a tax file number within 28 days after the application is made, the applicant may, at any time, give to the Commissioner written notice that the applicant wishes to treat the application as having been refused.
- (2) If in the application the applicant has stated the name and address of one or more payers of the applicant, subsection (1) does not apply at a particular time if at that time a notice has been issued to each such payer under section 202BD in relation to the applicant and each such notice is in force.
- (3) For the purposes of Division 6, where an applicant gives notice under subsection (1), the Commissioner shall be taken to have refused the application for a tax file number on the day on which the notice was given.

202BD Interim notices

- (1) Where an application for a tax file number states the name and address of a payer of the applicant, the Commissioner may give to the payer a notice under this section in relation to the applicant.
- (2) The notice remains in force for the period of 28 days commencing on the day specified in the notice.
- (3) The notice shall specify:
 - (a) the applicant's name as shown in the application; and

- (b) the last day of the period for which the notice remains in force.
- (4) On giving the notice, the Commissioner shall inform the applicant that the notice has been given.
- (5) The notice may be given to take effect on the expiration of a notice previously given to the payer under this section in relation to the applicant.
- (6) Where, while an application for a tax file number is pending, the applicant notifies the Commissioner, in writing, of the name and address of a payer of the applicant (being a payer whose name and address is not stated on the application), the payer's name and address shall, at the end of the period of 7 days after the notification, be taken to have been stated on the application.

202BE Cancellation of tax file numbers

- (1) Where the Commissioner concludes that a tax file number was issued to a person under an identity that is not the person's true identity, the Commissioner may, by written notice given to the person, cancel the tax file number.
- (2) The Commissioner shall set out in the notice the reasons for the Commissioner's conclusion.

202BF Alteration of tax file numbers

The Commissioner may, at any time, by written notice given to a person who has a tax file number:

- (a) withdraw that number; and
- (b) issue to the person a new tax file number in place of the withdrawn number.

Division 3—Quotation of tax file numbers by recipients of eligible PAYG payments

202C TFN declarations by recipients of eligible PAYG payments

- (1) A person who is a recipient of a payer, or expects to become a recipient of a payer, may make a TFN declaration in relation to the payer.
- (2) To be effective, the declaration must be made in the approved form.

202CA Operation of TFN declaration

- (1) Subject to this Division, a TFN declaration commences to have effect when it is made.

Note: Under section 202CB, a TFN declaration is not effective unless the tax file number of the recipient is stated in the declaration.

- (1A) A TFN declaration ceases to have effect when the recipient makes another TFN declaration in relation to the payer.
- (1B) A TFN declaration ceases to have effect 12 months after it is made if no eligible PAYG payment is made by the payer to the recipient during that 12 month period.
- (1C) If:
 - (a) the payer makes an eligible PAYG payment to the recipient after the TFN declaration is made; and
 - (b) a period of 12 months then elapses without any further eligible PAYG payment being made by the payer to the recipient;then the TFN declaration ceases to have effect at the end of that period of 12 months.
- (2) A TFN declaration to which a determination under subsection (3) applies ceases to have effect at the end of the day fixed by the determination.
- (3) The Commissioner may determine that:
 - (a) all TFN declarations; or

(b) a specified class of TFN declarations;
shall cease to have effect at the end of the day specified in the determination.

(4) A determination shall be made by notice published in the *Gazette*.

202CB Quotation of tax file number in TFN declaration

- (1) Subject to subsections (2) and (4) and subsection 202CE(2), a TFN declaration is not effective for the purposes of this Part unless the tax file number of the recipient is stated in the declaration.
- (2) For the purposes of this Part, a recipient is taken to have stated his or her tax file number in a TFN declaration if the declaration includes a statement:
 - (a) that an application by the recipient for a tax file number is pending; or
 - (b) that the recipient has a tax file number but does not know what it is and has asked the Commissioner to inform him or her of the number.
- (3) Where:
 - (a) a TFN declaration includes such a statement; and
 - (b) the recipient who made the declaration fails to inform the payer of the recipient's tax file number within 28 days after making the declaration;subsection (2) does not apply to the declaration in respect of any time after the end of the period of 28 days.
- (4) For the purposes of this Part, a recipient is taken to have stated his or her tax file number in a TFN declaration in relation to a payer while a notice under section 202BD given to the payer in relation to the recipient is in force.
- (5) If:
 - (a) the tax file number of a recipient is withdrawn under section 202BF; and
 - (b) at the time of the withdrawal, the number is stated in a TFN declaration;the declaration is taken to state the tax file number of the recipient in spite of the withdrawal of the number.

Part VA Tax file numbers

Division 3 Quotation of tax file numbers by recipients of eligible PAYG payments

Section 202CB

- (6) Subsections (2) to (4) do not apply to a TFN declaration given to the Secretary to the Department of Social Security or to the Chief Executive Officer of the Commonwealth Services Delivery Agency, established by the *Commonwealth Services Delivery Agency Act 1997*:
- (a) by a person who is an applicant for an austudy payment, a CDEP Scheme Participant Supplement, a newstart allowance, a sickness allowance or a youth allowance under the *Social Security Act 1991*; or
 - (aaa) by a person who is not a member of a couple and is an applicant for a parenting payment under the *Social Security Act 1991*; or
 - (b) by a person who is a recipient for the purposes of this Part because the person receives, or expects to receive, a payment referred to in paragraph (a).

Persons receiving benefits under Veterans' Entitlements Act

- (7) Subsections (2) to (4) do not apply to a TFN declaration given to the Secretary to the Department of Veterans' Affairs:
- (a) by a person who is an applicant for a pension or allowance under the *Veterans' Entitlements Act 1986*; or
 - (b) by a person who is a recipient for the purposes of this Part because the person receives, or expects to receive, such a pension or allowance.

Persons receiving benefits under Military Rehabilitation and Compensation Act

- (8) Subsections (2) to (4) do not apply to a TFN declaration given to the Military Rehabilitation and Compensation Commission:
- (a) by a person who is an applicant for compensation or an allowance under the *Military Rehabilitation and Compensation Act 2004*; or
 - (b) by a person who is a recipient for the purposes of this Part because the person receives, or expects to receive, such compensation or allowance.

202CC Making a replacement TFN declaration in place of an ineffective declaration

Nothing in this Division prevents a recipient making a new TFN declaration in place of a TFN declaration that is ineffective under subsection 202CB(1).

202CD Sending of TFN declaration to Commissioner

- (1) Where a recipient gives a payer a TFN declaration, the payer shall:
- (a) countersign the original of the declaration;
 - (b) within 14 days after the declaration is made, send the original to the office of a Deputy Commissioner; and
 - (c) retain the copy of the declaration in accordance with subsection (6).

Penalty: 10 penalty units.

- (4) If:
- (a) a TFN declaration, when given to a payer, does not quote the recipient's tax file number; and
 - (b) before the payer sends the declaration to the Deputy Commissioner, the recipient informs the payer of the recipient's tax file number;
- the payer shall write the number on the declaration and on the copy.

Penalty: 10 penalty units.

- (5) Where a tax file number has been written on a declaration under subsection (4), the declaration shall be regarded as stating that number as the tax file number of the recipient who made the declaration.

- (5A) A payer who fails to comply with subsection (1) or (4) is liable to pay to the Commissioner a penalty of 10 penalty units.

Note 1: See section 4AA of the *Crimes Act 1914* for the current value of a penalty unit.

Note 2: Division 298 in Schedule 1 to the *Taxation Administration Act 1953* contains machinery provisions relating to civil penalties.

Section 202CE

- (6) The payer shall retain the copy of a TFN declaration until the second 1 July after the day on which the declaration ceases to have effect.

202CE Effect of incorrect quotation of tax file number

- (1) If the Commissioner is satisfied:
- (a) that the tax file number stated in a TFN declaration:
 - (i) has been cancelled or withdrawn since the declaration was given; or
 - (ii) is otherwise wrong; and
 - (b) that the recipient has a tax file number;
- the Commissioner may give to the payer concerned written notice of the incorrect statement and the recipient's tax file number.
- (2) If a notice is given under subsection (1), the TFN declaration shall be regarded, for the purposes of this Part, as having always stated the recipient's tax file number.
- (3) If:
- (a) the Commissioner is satisfied that the tax file number stated in a TFN declaration:
 - (i) has been cancelled since the declaration was given; or
 - (ii) is for any other reason not the recipient's tax file number; and
 - (b) the Commissioner is not satisfied that the recipient has a tax file number;
- the Commissioner may, by written notice given to the payer, inform the payer accordingly.
- (4) A notice under subsection (3) takes effect on the day specified in the notice, being a day not earlier than the day on which a copy of the notice is given to the recipient under subsection (5).
- (5) The Commissioner shall give a copy of any notice under subsection (3) to the recipient concerned, together with a written statement of the reasons for the decision to give the notice.
- (6) On and from the day on which a notice under subsection (3) takes effect, the TFN declaration concerned shall be taken not to state the tax file number of the recipient concerned.

- (7) Subsection (6) does not apply to a TFN declaration given to the Secretary to the Department of Social Security or to the Chief Executive Officer of the Commonwealth Services Delivery Agency, established by the *Commonwealth Services Delivery Agency Act 1997*:
- (a) by a person who is an applicant for an austudy payment, a CDEP Scheme Participant Supplement, a newstart allowance, a sickness allowance or a youth allowance under the *Social Security Act 1991*; or
 - (aaa) by a person who is not a member of a couple and is an applicant for a parenting payment under the *Social Security Act 1991*; or
 - (b) by a person who is a recipient for the purposes of this Part because the person receives, or expects to receive, a payment referred to in paragraph (a).

Persons receiving benefits under Veterans' Entitlements Act

- (8) Subsection (6) does not apply to a TFN declaration given to the Secretary to the Department of Veterans' Affairs:
- (a) by a person who is an applicant for a pension or allowance under the *Veterans' Entitlements Act 1986*; or
 - (b) by a person who is a recipient for the purposes of this Part because the person receives, or expects to receive, such a pension or allowance.
- (9) Subsection (6) does not apply to a TFN declaration given to the Military Rehabilitation and Compensation Commission:
- (a) by a person who is an applicant for compensation or an allowance under the *Military Rehabilitation and Compensation Act 2004*; or
 - (b) by a person who is a recipient for the purposes of this Part because the person receives, or expects to receive, such compensation or allowance.

202CF Payer must notify Commissioner if no TFN declaration by recipient

- (1) If, after the commencement of this section, a person (the *payer*) commences a relationship with another person under which, or as a result of which, the payer will make (or will be likely to make)

Part VA Tax file numbers

Division 3 Quotation of tax file numbers by recipients of eligible PAYG payments

Section 202CF

eligible PAYG payments to a person (the *recipient*), whether or not the recipient is a party to the relationship, the payer must give notice to the Commissioner in the approved form, within 14 days after the commencement of the relationship, unless a TFN declaration made by the recipient to the payer is in effect at the end of that 14 day period.

- (2) If, at the commencement of this section, a person (the *payer*) has a relationship with another person under which, or as a result of which, the payer will make (or will be likely to make) eligible PAYG payments to a person (the *recipient*), whether or not the recipient is a party to the relationship, the payer must give notice to the Commissioner in the approved form, not later than 31 October 2000, unless a TFN declaration made by the recipient to the payer is in effect on 31 October 2000.

- (3) A payer who fails to comply with subsection (1) or (2) is liable to pay to the Commissioner a penalty of 10 penalty units.

Note 1: See section 4AA of the *Crimes Act 1914* for the current value of a penalty unit.

Note 2: Division 298 in Schedule 1 to the *Taxation Administration Act 1953* contains machinery provisions relating to civil penalties.

Division 4—Quotation of tax file numbers in connection with certain investments

202D Explanation of terms: investment, investor, investment body

(1A) This section:

- (a) applies to a non-share equity interest in the same way as it applies to a share; and
- (b) applies to an equity holder in the same way as it applies to a shareholder.

(1) Investments of the kinds mentioned in column 1 of the following table are investments to which this Part applies, whether or not the investments come into existence before the commencement of this section.

Table

Item No.	Column 1 Investment	Column 2 Investor	Column 3 Investment body
1	Interest-bearing account with a financial institution	The person in whose name the account is held	The financial institution
2	Interest-bearing deposit (other than a deposit to the credit of an account) with a financial institution	The person in whose name the deposit is made	The financial institution
3	Loan of money to a government body or to a body corporate (other than a deposit to the credit of an account referred to in item 1, a deposit to which item 2 applies or a loan made in the ordinary course of the business of providing business or consumer finance by a	The person in whose name the money is lent	The government body or body corporate

Part VA Tax file numbers

Division 4 Quotation of tax file numbers in connection with certain investments

Section 202D

Item No.	Column 1 Investment	Column 2 Investor	Column 3 Investment body
4	person who carries on that business) Deposit of money with a solicitor for the purpose of: (a) being invested by the solicitor; or (b) being lent under an agreement to be arranged by or on behalf of the solicitor	The person for whose benefit the money is to be invested or lent	The solicitor
5	Units in a unit trust	The person in whose name the units are held	The manager of the unit trust
6	Shares in a public company	The shareholder	The company
7	An investment-related betting chance	The betting investor	The betting investment body

(2) In relation to an investment of a kind mentioned in column 1 of an item in the table in subsection (1):

(a) the investor is the person specified in column 2 of the item; and

(b) the investment body is the person specified in column 3 of the item.

(3) Where:

(a) by virtue of subsection (2), a body corporate other than an entrepot nominee company is the investor in relation to an investment; and

(b) another person is entitled to receive from the body corporate all or part of the income from the investment;

the person's right to receive the income or part of the income is an investment to which this Part applies.

- (3A) In the case of an investment that is a relevant Part VA investment for the purposes of section 221YHZLA, subsection (3) does not apply to a person's right to receive income if:
- (a) the body corporate concerned has received a payment of the kind referred to in paragraph 221YHZLA(2)(a); and
 - (b) the circumstances referred to in subparagraph 221YHZLA(2)(c)(i) or (ii) in relation to an applicant exist in relation to the body corporate.
- (4) In relation to an investment referred to in subsection (3):
- (a) the person entitled to receive income is the investor; and
 - (b) the body corporate is the investment body.
- (5) Subsection (4) does not affect a person's status or obligations as an investor by virtue of subsection (2).
- (6) In determining whether a person in the capacity of trustee of a trust estate is an investor in relation to an investment, it is irrelevant that the name of the trust estate, the name of any actual or potential beneficiary or any other indication of trust is shown on any documentation in connection with the investment.
- (7) Subsection (6) is enacted for the guidance and information of investors and investment bodies and does not, by implication, affect the meaning of other provisions of this Act dealing with trustees and trust estates.
- (8) If subparagraph 26AJ(1)(a)(ii) and paragraphs 26AJ(1)(b), (c), (d), (e), (f) and (g) apply in relation to the payment or crediting of an amount to a person, being the taxpayer referred to in subsection 26AJ(1), then:
- (a) for the purposes of this section:
 - (i) the betting chance referred to in paragraph 26AJ(1)(c) is an investment-related betting chance; and
 - (ii) the person is the betting investor in relation to the investment-related betting chance; and
 - (iii) the investment body referred to in paragraph 26AJ(1)(c) is the betting investment body in relation to the investment-related betting chance; and

Section 202DA

- (b) for the purposes of this Part, and for the purposes of Subdivision 12-E in Schedule 1 to the *Taxation Administration Act 1953*:
 - (i) the betting chance referred to in paragraph 26AJ(1)(c) is taken to be an investment; and
 - (ii) the amount paid or credited is taken to be income in respect of the investment.
- (9) For the purposes of subsection (3), an entrepot nominee company is a body corporate that is:
 - (a) controlled solely by a securities dealer or by 2 or more persons each of whom is a securities dealer; and
 - (b) operated for the sole purpose of facilitating settlement of security transactions.

202DA Phasing-in period for Division

The phasing-in period for this Division is the period of 12 months commencing on 1 July 1990.

202DB Quotation of tax file numbers in connection with investments

- (1) A person who, at any time after the beginning of the phasing-in period for this Division, is an investor in relation to an investment to which this Part applies may quote the person's tax file number to the investment body in connection with the investment.
- (2) Where:
 - (a) a person, at any time after the beginning of the phasing-in period for this Division, holds an investment on behalf of another person; and
 - (b) the first-mentioned person does not have a tax file number in his or her capacity of trustee of a trust estate in relation to the investment;the first-mentioned person may quote his or her tax file number to the investment body in connection with the investment and, for the purposes of this Part, that person is to be taken to have quoted the investor's tax file number in connection with the investment.

202DC Method of quoting tax file number

- (1) A person quotes a tax file number to an investment body by informing the body of the number in a manner approved by the Commissioner.
- (2) The investment body may be so informed by the person or by another person acting for that person.
- (3) If, after the beginning of the phasing-in period for this Division, a person becomes an investor as a result of a transaction carried out through a securities dealer, the person shall be taken to have quoted the person's tax file number to the investment body concerned if the dealer is informed of the number.

202DD Investor excused from quoting tax file number in certain circumstances

Where:

- (a) at a particular time a person becomes an investor in relation to an investment to which this Part applies by virtue of acquiring shares in a public company; and
 - (b) at that time, the person has quoted, or is taken to have quoted, a tax file number in connection with an existing investment consisting of a shareholding in that company; and
 - (c) the company has not, since the quotation of the number in connection with the existing investment, informed the person that the company has lost the person's tax file number;
- the person is to be taken to have quoted a tax file number in connection with the first-mentioned investment.

202DDB Quotation of tax file number in connection with indirectly held investment

- (1) If, apart from this section:
 - (a) either of the following subparagraphs applies:
 - (i) both of the following conditions are satisfied:
 - (A) a body corporate (in this section called the *interposed entity*) is the investor in relation to an investment (in this section called the *secondary investment*) with an investment body

Section 202DDB

(in this section called the *secondary investment body*);

- (B) another person (in this section called the *primary investor*) is entitled to receive from the interposed entity all or part of the income from the secondary investment (which right to receive the income or part of the income is in this section called *primary investment*);
- (ii) both of the following conditions are satisfied:
 - (A) a person (in this section also called the *primary investor*) is the investor in relation to an investment (in this section also called the *primary investment*) covered by item 4 in the table in subsection 202D(1), being a deposit of money with a solicitor (in this section also called the *interposed entity*);
 - (B) as a result of carrying out the purpose for which that investment was made, the interposed entity is the investor in relation to another investment (in this section also called the *secondary investment*) with an investment body (in this section also called the *secondary investment body*); and

(b) the conditions set out in the regulations are satisfied; the following provisions have effect for the purposes of this Part and Subdivision 12-E in Schedule 1 to the *Taxation Administration Act 1953*:

- (c) the primary investor may quote his or her tax file number under section 202DB to the secondary investment body in connection with the secondary investment as if he or she were the investor in relation to the secondary investment;
- (d) if the primary investor quotes his or her tax file number as mentioned in paragraph (c)—the interposed entity is taken to have quoted his or her tax file number to the secondary investment body in connection with the secondary investment;
- (e) the interposed entity is not entitled to actually quote his or her tax file number to the secondary investment body in connection with the secondary investment;

(f) the interposed entity is taken not to be an investment body in relation to the primary investment.

(2) If there are 2 or more primary investors in relation to a primary investment, all the primary investors are taken to have quoted their tax file numbers as mentioned in paragraph (1)(c) if, and only if:

- (a) all of those primary investors are persons who, for the purposes of this Part, are taken, by section 202EE or 202EF, or both, to have quoted their tax file numbers under this Division in connection with the primary investment; or
- (b) if:
 - (i) paragraph (a) does not apply; and
 - (ii) all of those primary investors are covered by any or all of the following categories:
 - (A) persons who, for the purpose of this Part, are taken, under section 202EE or 202EF, or both, to have quoted their tax file numbers under this Division in connection with the primary investment;
 - (B) persons to whom section 202EB applies;
 - (C) entities mentioned in paragraph 202EC(1)(a); and
 - (iii) all of the following conditions are satisfied in relation to at least one of those primary investors:
 - (A) the primary investor is covered by sub-paragraph (ii)(B) or (C);
 - (B) the primary investor gives to the secondary investment body the information mentioned in subsection 202EB(1) or 202EC(1) as if the primary investor were the investor in relation to the secondary investment;
 - (C) as a result of the giving of that information, the primary investor would be taken, under section 202EB or 202EC, to have quoted his or her tax file number under this Division in connection with the secondary investment; or
- (c) at least one of those primary investors:
 - (i) has a tax file number; and
 - (ii) has quoted that number under section 202DB to the secondary investment body in connection with the

Section 202DE

secondary investment as if he or she were the investor in relation to the secondary investment.

202DE Securities dealer to inform the investment body of tax file number

Where:

- (a) after the beginning of the phasing-in period for this Division, a person becomes an investor as a result of a transaction carried out through a securities dealer; and
- (b) the person informs the dealer of the person's tax file number; the dealer shall inform the investment body concerned of the person's tax file number.

202DF Effect of incorrect quotation of tax file number

- (1) If the Commissioner is satisfied:
 - (a) that the tax file number quoted to an investment body in relation to an investment:
 - (i) has been cancelled or withdrawn since it was quoted; or
 - (ii) is otherwise wrong; and
 - (b) that the investor has a tax file number;the Commissioner may give to the investment body concerned notice of the incorrect statement and the investor's tax file number.
- (2) If a notice is given under subsection (1), the investor shall be regarded, for the purposes of this Part, as having always stated the investor's tax file number in connection with the investment.
- (3) If:
 - (a) the Commissioner is satisfied that the tax file number quoted to an investment body in relation to an investment:
 - (i) has been cancelled since it was quoted; or
 - (ii) is for any other reason not the investor's tax file number; and
 - (b) the Commissioner is not satisfied that the investor has a tax file number;the Commissioner may, by written notice given to the investment body concerned, inform the investment body accordingly.

- (4) A notice under subsection (3) takes effect on the day specified in the notice, being a day not earlier than the day on which a copy of the notice is given to the investor under subsection (5).
- (5) The Commissioner shall give a copy of any notice under subsection (3) to the investor concerned, together with a written statement of the reasons for the decision to give the notice.
- (6) On and from the day on which a notice under subsection (3) takes effect, the investor concerned shall be taken not to have quoted the investor's tax file number in connection with the investment.

202DG Investments held jointly

- (1) Where 2 persons are jointly entitled to the property or rights that constitute an investment to which this Part applies, neither person shall be taken to have quoted the person's tax file number in connection with the investment unless both persons have quoted their tax file numbers under this Division in connection with the investment.
 - (2) Where more than 2 persons are jointly entitled to the property or rights that constitute an investment to which this Part applies, all of the persons are to be taken to have quoted their tax file numbers in connection with the investment if and only if:
 - (a) where one of those persons has a tax file number and is not an exempt person in relation to the investment—that person has quoted that number, and at least one of the other persons is, for the purposes of this Part, to be taken to have quoted his or her tax file number, under this Division in connection with the investment; or
 - (b) where 2 or more of those persons have tax file numbers and are not exempt persons in relation to the investment—at least 2 of those persons have quoted their own tax file numbers under this Division in connection with the investment; or
 - (c) in any other case—at least 2 of those persons are, for the purposes of this Part, to be taken to have quoted their tax file numbers under this Division in connection with the investment.
 - (2A) A reference in subsection (2) to an exempt person in relation to an investment is a reference to a person who, for the purposes of this Part, is to be taken to have quoted his or her tax file number under
-

Section 202DH

this Division in connection with the investment although the person has not actually done so.

- (3) This section does not apply in relation to persons who are jointly entitled to property or rights merely because they are partners in a partnership.
- (4) This section does not apply in relation to investments covered by section 202DDB.

202DH Tax file number quoted for superannuation or surcharge purposes taken to be quoted for purposes of the taxation of eligible termination payments

- (1) If a person (the *first person*) who is a beneficiary of an eligible superannuation entity or of a regulated exempt public sector superannuation scheme has quoted his or her tax file number to the trustee of the entity or scheme in connection with the operation or possible future operation of the *Superannuation Industry (Supervision) Act 1993*, the *Superannuation Contributions Tax (Assessment and Collection) Act 1997*, the *Superannuation (Unclaimed Money and Lost Members) Act 1999*, the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997* or the *Termination Payments Tax (Assessment and Collection) Act 1997*, the first person is taken, so long as he or she continues to be such a beneficiary, to have made a TFN declaration in relation to the trustee that has effect under Division 3..
- (2) In this section and in section 202DHA, *eligible superannuation entity* and *regulated exempt public sector superannuation scheme* have the same meanings as in Part 25A of the *Superannuation Industry (Supervision) Act 1993*.

202DHA Tax file number quoted for Division 3 purposes taken to have been quoted for superannuation purposes

If:

- (a) a person has on or after 1 July 2007 made a TFN declaration in relation to a payer; and

- (b) the person is a beneficiary of an eligible superannuation entity or of a regulated exempt public sector superannuation scheme or is an RSA holder; and
 - (c) the payer makes a contribution to the person's eligible superannuation entity or regulated exempt public sector superannuation scheme or RSA for the benefit of the person;
- the person is taken to have authorised the payer to inform the trustee of the superannuation entity or scheme or the RSA provider of the person's tax file number.

202DI Tax file number quoted for RSA purposes taken to be quoted for purposes of the taxation of superannuation benefits

If a person (the *first person*) who is the holder of an RSA has quoted his or her tax file number to the provider of the RSA in connection with the operation or possible future operation of the *Retirement Savings Accounts Act 1997*, the first person is taken, so long as he or she continues to be the holder of the RSA, to have made a TFN declaration in relation to the provider of the RSA that has effect under Division 3.

202DJ Tax file number quoted for purposes of taxation of superannuation benefits taken to be quoted for surcharge purposes

- (1) If a person who is:
 - (a) a beneficiary of an eligible superannuation entity or of a regulated exempt public sector superannuation scheme; or
 - (b) a member of a constitutionally protected superannuation fund; or
 - (c) the holder of an RSA;

has made a TFN declaration in relation to the trustee of the entity, scheme or fund, or the RSA provider, that states his or her tax file number, and has effect under Division 3 (except a declaration that includes a statement mentioned in subsection 202CB(2)), the person is taken, so long as he or she continues to be such a beneficiary, member or holder, to have quoted that tax file number to the trustee of the entity, scheme or fund or to the RSA provider, as the case may be, in connection with the operation or possible future operation of the *Superannuation Contributions Tax (Assessment and Collection) Act 1997*, the *Superannuation*

Section 202DJ

Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997 and the Termination Payments Tax (Assessment and Collection) Act 1997.

(2) In this section:

constitutionally protected superannuation fund has the same meaning as *constitutionally protected fund* has in the *Income Tax Assessment Act 1997*.

eligible superannuation entity and *regulated exempt public sector superannuation scheme* have the same meanings as in Part 25A of the *Superannuation Industry (Supervision) Act 1993*.

holder, RSA and *RSA provider* have the same meanings as in the *Retirement Savings Accounts Act 1997*.

Division 4A—Quotation of tax file numbers in connection with farm management deposits

202DK Interpretation

Expressions used in this Division that are also used in Schedule 2G have the same meanings as in that Schedule.

202DL Quotation of tax file number

A depositor of a farm management deposit *quotes* the owner's tax file number to the financial institution in connection with the deposit by:

- (a) stating the number in the form mentioned in subsection 393-30(3) of Schedule 2G in relation to the deposit; or
- (b) informing the financial institution of the number in any other manner approved by the Commissioner in connection with the deposit.

202DM Effect of incorrect quotation of tax file number

Commissioner may notify financial institution of correct tax file number

- (1) If the Commissioner is satisfied:
 - (a) that the tax file number quoted to a financial institution in connection with a farm management deposit:
 - (i) has been cancelled or withdrawn since it was quoted; or
 - (ii) is otherwise wrong; and
 - (b) that the owner has a tax file number;the Commissioner may give the financial institution notice in writing of the owner's correct tax file number.

Part VA Tax file numbers

Division 4A Quotation of tax file numbers in connection with farm management deposits

Section 202DM

Commissioner may notify financial institution if owner does not have a tax file number etc.

- (3) If:
- (a) the Commissioner is satisfied that the tax file number quoted to a financial institution in connection with a farm management deposit:
 - (i) has been cancelled since it was quoted; or
 - (ii) is for any other reason not the owner's tax file number; and
 - (b) the Commissioner is not satisfied that the owner has a tax file number;

the Commissioner may give the financial institution notice in writing accordingly.

Commissioner to give owner copy of notice

- (4) If a notice is given under subsection (3), the Commissioner must give the depositor a copy of the notice, together with a written statement of the reasons for the decision to give the notice.

Notice takes effect when given to owner

- (5) The notice takes effect on the day specified in the notice, being a day not earlier than the day on which the copy of the notice is given to the depositor.

Tax file number deemed not quoted

- (6) On and from the day on which the notice takes effect, the depositor is taken not to have quoted the owner's tax file number in connection with the deposit.

Division 5—Exemptions

202EA Persons receiving certain pensions etc.—employment

- (1) Nothing in this Part shall be taken to provide for a person who is a recipient because the person receives, or expects to receive, a pension or benefit referred to in subsection (5) to make a TFN declaration, or to quote his or her tax file number, in connection with the payment of that pension, benefit or allowance.
- (2) For the purposes of this Part, a person who is being paid a pension or benefit referred to in subsection (5) shall be taken to have quoted his or her tax file number in a TFN declaration given to a payer of the person if a statement is made in the declaration to the effect that the person is being paid such a pension or benefit.
- (3) A person who, as a person who is being paid a pension or benefit referred to in subsection (5), is taken, because of this section, to have quoted his or her tax file number in a TFN declaration shall continue to be taken to have, because of this section, quoted the number in the declaration until the Commissioner gives a written notice to the person to the effect that the person is no longer entitled to exemption under this section.
- (4) The Commissioner may not give a notice under subsection (3) until the person has ceased to be paid any pension or benefit referred to in subsection (5).
- (5) This section applies in relation to the following:
 - (a) an age pension under Part 2.2 of the *Social Security Act 1991*;
 - (b) a disability support pension under Part 2.3 of that Act;
 - (c) a wife pension under Part 2.4 of that Act;
 - (d) a carer payment under Part 2.5 of that Act;
 - (f) a widow B pension under Part 2.8 of that Act;
 - (fa) a parenting payment that is a pension PP (single) under Part 2.10 of that Act;
 - (g) a special benefit under Part 2.15 of that Act;
 - (h) a special needs pension under Part 2.16 of that Act;

Section 202EB

- (i) a pension under Part III of the *Veterans' Entitlements Act 1986*;
- (ia) income support supplement under Part IIIA of the *Veterans' Entitlements Act 1986*;
- (j) Defence Force Income Support Allowance under Part VIIAB of the *Veterans' Entitlements Act 1986*.

202EB Persons receiving certain pensions etc.—investments

- (1) For the purposes of this Part, a person to whom this section applies shall be taken to have quoted his or her tax file number under Division 4 in connection with the investment if the investment body concerned is given the following information by the person in a manner approved by the Commissioner:
 - (a) the person's full name;
 - (b) the nature of the pension, benefit or allowance by virtue of the payment of which the person is a person to whom this section applies.
- (3) A person who, as a person to whom this section applies, is taken, because of this section, to have quoted his or her tax file number in connection with an investment shall continue to be taken to have, because of this section, quoted the number in connection with the investment until the Commissioner gives a written notice to the person to the effect that the person is no longer entitled to exemption under this section.
- (4) The Commissioner may not give a notice under subsection (3) until the person has ceased to be a person to whom this section applies.
- (5) A person to whom this section applies is a person who is being paid:
 - (a) one of the following:
 - (i) an age pension under Part 2.2 of the *Social Security Act 1991*;
 - (ii) a disability support pension under Part 2.3 of that Act;
 - (iii) a wife pension under Part 2.4 of that Act;
 - (iv) a carer payment under Part 2.5 of that Act;
 - (vi) a widow B pension under Part 2.8 of that Act;
 - (via) a parenting payment that is a pension PP (single) under Part 2.10 of that Act;

- (vii) a special benefit under Part 2.15 of that Act;
- (viii) a special needs pension under Part 2.16 of that Act; or
- (c) a pension under Part III of the *Veterans' Entitlements Act 1986*; or
- (d) income support supplement under Part IIIA of the *Veterans' Entitlements Act 1986*.

202EC Entities not required to lodge income tax returns

- (1) For the purposes of this Part, where:
 - (a) an entity that is not required to furnish to the Commissioner a return under section 161 in respect of a year of income is, at any time during that year, an investor in relation to an investment to which this Part applies; and
 - (b) the entity does not have a tax file number;the entity shall be taken to have quoted its tax file number in connection with the investment if the investment body concerned is given the following information by the eligible representative in a manner approved by the Commissioner:
 - (c) the name and address of the entity;
 - (d) the reason why the entity is not obliged to furnish to the Commissioner a return under section 161 in respect of the year of income.
- (3) An entity that, as an entity that is not required to furnish to the Commissioner a return under section 161 in respect of a year of income, is to be taken, because of this section, to have quoted its tax file number in connection with an investment shall continue to be taken to have, because of this section, quoted the number in connection with the investment until 2 months after the end of the first year of income, following the time at which the entity is to be taken to have quoted the number, in respect of which the entity is required so to furnish a return.
- (4) Where an entity in respect of which information has been given to an investment body under subsection (1) in connection with an investment becomes obliged under section 161 to furnish a return in respect of a year of income, the person who is the public officer of the entity for the purposes of this Act is guilty of an offence if:
 - (a) the entity is, at the end of the year of income, still an investor in relation to the investment; and

Section 202EC

- (b) the investment body is not, within 2 months after the end of the year of income, informed of the entity's tax file number or informed that the entity is obliged to furnish the return.

Penalty: \$1,000.

- (5) For the purposes of this section, a person is an eligible representative of an entity if the person is:
 - (a) where the entity is a body corporate—a person who is any one or more of the following:
 - (i) the public officer of the body corporate for the purposes of this Act;
 - (ii) an officer of the body corporate within the meaning of section 8Y of the *Taxation Administration Act 1953*;
 - (iii) a receiver of property of the body corporate, whether appointed by a court or otherwise and whether or not also a manager;
 - (iv) a liquidator of the body corporate appointed by a court;
 - (v) in the case of a foreign company within the meaning of the *Corporations Act 2001*—a local agent of the company within the meaning of that Act;
 - (vi) an employee of the body corporate in relation to whom there is in force a written authorisation to act as an eligible representative of the body corporate, being an authorisation by a person who, when the authorisation was given, was an eligible representative of the body corporate by virtue of one or more of the preceding subparagraphs; or
 - (b) where the entity is an unincorporated association—a person who is any one or more of the following:
 - (i) the public officer of the unincorporated association for the purposes of this Act;
 - (ii) a director, secretary, office-holder, liquidator, receiver or trustee of the association;
 - (iii) an employee or member of the unincorporated association in relation to whom there is in force a written authorisation to act as an eligible representative of the unincorporated association, being an authorisation by a person who, when the authorisation was given, was an eligible representative of the

unincorporated association by virtue of either or both of the preceding subparagraphs.

202EE Non-residents

- (1) For the purposes of this Part, where:
- (a) a non-resident is an investor in relation to an investment to which this Part applies; and
 - (b) at a particular time, the investment body pays an amount to the non-resident by way of income derived from the investment;
- the non-resident is taken to have quoted the non-resident's tax file number in connection with the investment at that time if:
- (c) the investment body is required to withhold an amount under Subdivision 12-F or 12-H in Schedule 1 to the *Taxation Administration Act 1953* from the payment; or
 - (d) the investment body would have been required to withhold such an amount but for the operation of paragraph 128B(3)(a), (b), (ga) or (jb) or subparagraph 128B(3)(h)(iv) of this Act or subsection 802-15(1) of the *Income Tax Assessment Act 1997*.
- (2) If:
- (a) a person who was a non-resident and an investor in relation to an investment to which this Part applies becomes a resident of Australia at a particular time; and
 - (b) the person is, at that time, still an investor in relation to the investment; and
 - (c) the investment body concerned is not, within one month after that time, informed of the person's tax file number or informed that the person has become such a resident;
- the person is guilty of an offence.
- Penalty: 10 penalty units.
- (3) Nothing in this section affects the person's liability to pay withholding tax.

202EF Territory residents etc.

- (1) For the purposes of this Part, a recipient is taken to have quoted the recipient's tax file number in a TFN declaration given to the payer
-

Section 202EG

concerned under section 202C if all eligible PAYG payments by the payer to the recipient would be exempt from income tax because of Division 1A of Part III.

- (2) For the purposes of this Part, an investor in relation to an investment to which this Part applies shall be taken to have quoted the investor's tax file number under Division 4 in connection with the investment if income derived from the investment would be exempt from income tax because of Division 1A of Part III.
- (3) Subsection (1) or (2) continues to have effect until the end of one month after the payments or income would no longer be exempt from income tax because of Division 1A of Part III.
- (4) Where:
 - (a) a person has been taken, because of this section, to have quoted the person's tax file number in connection with payments, or with an investment; and
 - (b) the payments, or income derived from the investment, ceases to be exempt from income tax because of Division 1A of Part III;

the person is guilty of an offence if, within one month of the income ceasing to be exempt from income tax, the payer concerned, or the investment body concerned, is not informed of the person's tax file number or informed that the income is no longer exempt from income tax.

Penalty: 10 penalty units.

202EG Manner of completing declarations

Where a person is unable to make a declaration under this Division, the declaration may be made by another person on behalf of the first-mentioned person.

202EH Declarations under this Division to be retained in certain circumstances

- (1) The Commissioner may direct an investment body to retain declarations, or declarations of a particular kind, made under this Division for such time as is specified in the direction.

- (2) A direction mentioned in subsection (1) must be given to the investment body in writing or by notice published in the *Gazette*.
- (3) An investment body that is retaining a declaration in accordance with such a direction must, if required to do so by the Commissioner:
 - (a) forward the declaration to the office of a Deputy Commissioner in accordance with the Commissioner's directions; or
 - (b) give to the Commissioner such information contained in the declaration as the Commissioner specifies.

Division 6—Review of decisions

202F Review of decisions

- (1) Applications may be made to the Tribunal for review of the following decisions of the Commissioner:
 - (a) a decision refusing an application for the issue of a tax file number under section 202BA (including a decision that is to be taken to have been made by virtue of section 202BC);
 - (b) a decision to cancel a tax file number under section 202BE;
 - (c) a decision to give a notice under subsection 202CE(3);
 - (d) a decision to give a notice under subsection 202DF(3);
 - (da) a decision to give a notice under subsection 202DM(3);
 - (e) a decision to give a notice under subsection 202EB(3);
 - (f) a decision under subsection 202G(4) not to exempt a person from compliance with section 202G or to vary or revoke a notice given under that subsection;
 - (fa) a decision to give a notice under subsection 190-15(1) or (1A) of the *Higher Education Support Act 2003*;
 - (fb) a decision to give a notice under subsection 190-20(1) or (1A) of the *Higher Education Support Act 2003*;
 - (g) a decision stated by the regulations to be a reviewable decision for the purposes of this section.
- (2) Where an application has been made to the Tribunal for review of a decision referred to in paragraph (1)(a), the orders that may be made under subsection 41(2) of the *Administrative Appeals Tribunal Act 1975* include an order that the Commissioner issue a tax file number to the applicant pending the determination of the application for review.
- (3) A tax file number issued in accordance with an order referred to in subsection (2) ceases to have effect when the application is finally disposed of.
- (4) When a tax file number ceases to have effect under subsection (3), this Part (other than this section) applies as if the number had been cancelled.

202FA Statements to accompany notification of decisions

- (1) Where a decision of a kind referred to in section 202F is made and notice in writing of the decision is given to a person whose interests are affected by the decision, that notice shall include a statement to the effect that, if the person is dissatisfied with the decision, application may, subject to the *Administrative Appeals Tribunal Act 1975*, be made to the Tribunal for review of the decision and, except where subsection 28(4) of that Act applies, also include a statement to the effect that the person may request a statement under section 28 of that Act.
- (2) A failure to comply with subsection (1) does not affect the validity of the decision.

Division 7—Manner of providing information

202G Transmission of information in accordance with specifications

- (1) The Commissioner may, by notice published in the *Gazette*, set out specifications for transmission to the Commissioner of information to which this section applies.
- (2) A notice under subsection (1) has effect on and from the day specified in the notice.
- (3) Where the whole or part of the information to which this section applies that a person is obliged to give to the Commissioner is kept by or on behalf of the person by means of a data processing device, the person shall, when giving any of that information to the Commissioner, give it in a manner and form that is in accordance with the specifications set out in the notice under subsection (1), as amended from time to time.
- (4) A person is exempt from compliance with subsection (3) if, on an application by the person, the Commissioner has, by written notice to the person, exempted the person from compliance with this section.
- (5) A notice under subsection (4) has effect for the period specified in the notice.
- (6) Refusal by the Commissioner of an application under subsection (4) shall be by notice in writing to the applicant.
- (7) In deciding whether to exempt a person, the Commissioner shall consider:
 - (a) the amount of information concerned;
 - (b) any difficulties in giving the information in the manner required by this section;
 - (c) the purposes of this Part; and
 - (d) any other matters that the Commissioner thinks are relevant.
- (8) A person is exempt from compliance with subsection (3) if the person is included in a class of persons specified by the Commissioner by notice published in the *Gazette*.

- (9) This section applies to information that a person is or will be obliged to give to the Commissioner, whether by means of a report, form, certificate or otherwise:
- (a) under this Part;
 - (b) under regulations made for the purposes of this Part; or
 - (c) under this Act, being information in respect of which this Act provides for the inclusion of tax file numbers.